



REPUBLIC OF ZAMBIA

REPORT

OF THE

**PUBLIC ACCOUNTS COMMITTEE ON THE PUBLIC PROCUREMENT BILL, N.A.B.
NO. 8 OF 2020**

FOR THE

FIFTH SESSION OF THE TWELFTH NATIONAL ASSEMBLY

Printed by the National Assembly of Zambia

REPORT

OF THE

**PUBLIC ACCOUNTS COMMITTEE ON THE PUBLIC PROCUREMENT BILL, N.A.B.
NO. 8 OF 2020**

FOR THE

FIFTH SESSION OF THE TWELFTH NATIONAL ASSEMBLY

TABLE OF CONTENTS

| Item | Page |
|--|-------------|
| 1.0 Composition of the Committee | 1 |
| 2.0 Functions of the Committee | 1 |
| 3.0 Meetings of the Committee | 1 |
| 4.0 Procedure adopted by the Committee | 1 |
| 5.0 Background | 1 |
| 6.0 Objects of the Bill | 2 |
| 7.0 Salient Provisions of the Bill | 2 |
| PART I | |
| Preliminary Provisions | 2 |
| PART II | |
| The Zambia Public Procurement Authority | 2 |
| PART III | |
| General Principles of Public Procurement | 2 |
| PART IV | |
| Procuring Entities | 3 |
| PART V | |
| Method of Procurement | 3 |
| PART VI | |
| Procurement Process | 3 |
| PART VII | |
| Stores Management and Distribution | 4 |
| PART VIII | |
| Compliance Monitoring and Enforcement | 4 |
| PART IX | |
| Bidders and Suppliers | 4 |

PART X

| | |
|---------|---|
| Appeals | 4 |
|---------|---|

PART XI

| | |
|---------------------------------|---|
| General Provisions | 4 |
| Concerns Raised By Stakeholders | 5 |

PART I PRELIMINARY PROVISIONS

| | |
|---------------------------|---|
| Clause 2 – Interpretation | 5 |
|---------------------------|---|

PART II – THE ZAMBIA PUBLIC PROCUREMENT AUTHORITY

| | |
|---|---|
| Clause 6 - Functions of Authority | 5 |
| Clause 7 – Constitution of Board | 6 |
| Clause 9 – Director-General | 6 |
| Clause 11 – Emoluments and other conditions of service of Director-General, Secretary and other staff | 6 |

PART III GENERAL PRINCIPLES OF PUBLIC PROCUREMENT

| | |
|---|---|
| Clause 12–Procurement Pricing | 7 |
| Clause 14–Standard Procurement Documents | 7 |
| Clause 16–Use of Information and Communication Technologies | 7 |
| Clause 17 – Form of Communication and Advertisements | 7 |
| Clause 21 – Procurement records | 7 |
| Clause 22 – Procurement approvals | 8 |

PART IV PROCURING ENTITIES

| | |
|---|---|
| Clause 26 – Duties and responsibilities of Controlling Officer or Chief Executive Officer | 8 |
| Clause 27 – Establishment and composition of Procurement Committee | 8 |
| Clause 29 – Tenure of office of Procurement Committee | 8 |
| Clause 34 – Procurement authorisation and levels of authority | 8 |

PART V METHOD OF PROCUREMENT

| | |
|--|---|
| Clause 37 - Methods of procurement | 8 |
| Clause 39 - National and international bidding | 9 |

| | |
|--|----|
| Clause 40 – Open selection | 9 |
| Clause 41 – National and international selection | 9 |
| Clause 42 – Limited bidding | 9 |
| Clause 48 – Electronic reverse auction | 9 |
| Clause 49 – Procedure for electronic reverse auction | 10 |

**PART VI
PROCUREMENT PROCESS**

| | |
|--|----|
| Clause 68 – Negotiations | 10 |
| Clause 71 – Notification of best evaluated bidder | 10 |
| Clause 72 – Award of contract | 10 |
| Clause 76 – Contract management | 10 |
| Clause 77 – Amendment or variation of contract | 10 |
| Clause 78 – Defects liability certificate and payments | 11 |

**PART VII
STORES MANAGEMENT AND DISTRIBUTION**

| | |
|--|----|
| Clause 81 – Stores management system | 11 |
| Clause 82- Management of purchased goods | 12 |

**PART IX
BIDDERS AND SUPPLIERS**

| | |
|--|----|
| Clause 93 – Subcontracting policy | 12 |
| Clause 97 –Permanent bar of bidder or supplier | 12 |

**PART X
APPEALS**

| | |
|---|----|
| Clause 100 – Appeal of decision by procuring entity | 12 |
| 8.0 Submission from the Minister of Finance | 12 |
| 9.0 Committee’s Observations and Recommendations | 15 |
| 10.0 Conclusion | 17 |
| Appendix I – List of National Assembly Officials | 19 |
| Appendix II – List of Witnesses | 20 |

REPORT OF THE PUBLIC ACCOUNTS COMMITTEE ON THE PUBLIC PROCUREMENT BILL, N.A.B NO. 8 OF 2020, FOR THE FIFTH SESSION OF THE TWELFTH NATIONAL ASSEMBLY.

1.0 MEMBERSHIP OF THE COMMITTEE

The Committee consisted of: Mr H Kunda, MP (Chairperson); Ms B M Tambatamba, MP (Vice Chairperson); Mr M Mbulakulima, MP; Mr C Mweetwa, MP; Mr K Simbao, MP; Mr M C Munkonge, MP; Mr A K Mukosa, MP; Ms D Mwape, MP; Mr T J Kasonso, MP; and Mr V Lumayi, MP.

The membership of the Committee changed following the demise of Mr M C Munkonge, MP, who was replaced by Mr A C Mumba, MP.

The Honourable Mr Speaker
National Assembly
Parliament Buildings
LUSAKA

Sir,

The Committee has the honour to present its Report on the Public Procurement Bill, N.A.B No. 8 of 2020, referred to it on Wednesday, 16th September, 2020.

2.0 FUNCTIONS OF THE COMMITTEE

In addition to the duties conferred upon it under Standing Order 153 (3), or by Order of the House, the Committee is mandated to consider any Bills that may be referred to it by the House, in line with Standing Order 102 (1).

3.0 MEETINGS OF THE COMMITTEE

The Committee held eight meetings to consider the Public Procurement Bill, N.A.B No. 8 of 2020.

4.0 PROCEDURE ADOPTED BY THE COMMITTEE

The Committee requested written submissions from various stakeholders. The Committee thereafter interacted with the stakeholders, who were requested to orally brief the Committee on the contents of their memoranda and clarify issues that arose from the presentations. The witnesses who appeared before the Committee are listed at Appendix II of this Report.

5.0 BACKGROUND

The Public Procurement Bill, N.A.B No. 8 of 2020 seeks to repeal and replace the *Public Procurement Act, No. 12 of 2008* and to revise the law relating to procurement in order to enhance transparency, efficiency and effectiveness in public procurement. The Bill further seeks to enhance accountability and integrity in public procurement and regulate and control practices relating to public procurement. In addition, the Bill seeks to promote the participation of citizens in public procurement.

6.0 OBJECTS OF THE PUBLIC PROCUREMENT BILL, N.A.B NO. 8 OF 2020

The objects of the Bill are to:

- (a) revise the law relating to procurement so as to enhance transparency, efficiency, effectiveness, economy, value for money, competition and accountability in public procurement;
- (b) regulate and control practices relating to public procurement in order to promote the integrity of, fairness and public confidence in, the procurement process;
- (c) promote the participation of citizens in public procurement;
- (d) continue the existence of the Zambia Public Procurement Authority;
- (e) repeal and replace the *Public Procurement Act, No.12 of 2008*; and
- (f) provide for matters connected with, or incidental to, the foregoing.

7.0 SALIENT PROVISIONS OF THE BILL

PART I PRELIMINARY PROVISIONS

This part provided for the short title and commencement, interpretation, application and the approval required for international procurement agreements.

PART II THE ZAMBIA PUBLIC PROCUREMENT AUTHORITY

This part provided for the continuation of the Zambia Public Procurement Authority and its functions; the constitution of the Board and its functions; the appointment of the Director-General, Secretary and other staff. It also provided for the emoluments and other conditions of service of the Director-General, Secretary and other staff.

PART III GENERAL PRINCIPLES OF PUBLIC PROCUREMENT

This part provided for procurement pricing by mandating a procuring entity to procure standard goods, services and works in accordance with the price index issued by the Authority. It further provided for prohibition of discrimination from participation in public procurement on the basis of nationality, race, religion, gender or any other criterion not related to the person's eligibility.

This part also made it mandatory for a procuring entity to use standard procurement documents issued by the Authority in procurement proceedings. The part also provided for restrictions on office holders of a procuring entity from participating as a bidder in procurement by a procuring entity by which the office holder is employed, among others.

In addition, this part provided for the use of information and communication technologies; form of communication and advertisements; inappropriate influence on evaluations and other matters; corrupt, coercive, obstructive, collusive or fraudulent practice and conflict of interest; confidentiality; procurement records; procurement approvals; and stakeholder feedback.

PART IV PROCURING ENTITIES

This part provided for the composition and functions of procuring entities; duties and responsibilities of Controlling Officer or Chief Executive Officer; establishment, composition, functions and tenure of office of Procurement Committee. It also provided for the manner of proceedings of a Procurement Committee. The part also empowered a Procurement Committee to establish subcommittees with specific functions.

The part further provided for the establishment and functions of a Procurement Unit; the functions of user departments; procurement authorisation and levels of authority; procurement of common use items; and use of procurement agent or service provider.

PART V METHOD OF PROCUREMENT

This part provided for methods of procurement as open bidding, national and international bidding; open selection, national and international selection and limited bidding. Others were limited selection, simplified bidding, simplified selection, direct bidding and direct selection.

The part also provided for electronic reverse auction and sets out its procedure and empowered the Minister to prescribe other procedures relating to this procurement method.

Other methods provided for were force account and the circumstances under which it may be justified; purchases from other procuring entities; procurement of infrastructure for private financing and award of concessions.

In addition, the part provided for community participation in procurement by authorising the Authority to adapt procurement procedures, specifications and contract packaging to ensure project sustainability or to achieve specific social objections, where project components required local community and non-governmental organisations' participation, necessary labour and appropriate technologies, and local know how and materials.

PART VI PROCUREMENT PROCESS

This part provided for the choice of procurement procedure; pre-qualification; commencement of procurement proceedings; procurement planning; determination of procurement method; statement of procurement requirements. Other components provided for under this part were solicitation documents; selection of bidders; invitation to bid; bid security or bid securing declaration; and receipt of bids.

This part also provided for opening of bids; evaluation; post qualification; negotiations; termination or cancellation of procurement proceedings; decision to award contract; notification of best evaluated bidder; award of contract; standard contract; and prohibition from assigning contract.

In addition, this part provided for the notification of unsuccessful bidder; contract management; amendment or variation of contract; defects liability certificate and payments; deviations; and the circumstances when the Authority may accredit an alternative procurement system.

**PART VII
STORES MANAGEMENT AND DISTRIBUTION**

This part provided for permission for a procuring entity, subject to the *Public Finance Management Act, No.1 of 2018*, to use stores management and control system in order to meet the objectives of sound supply chain management. The part also provided for the management of purchased goods.

**PART VIII
COMPLIANCE MONITORING AND ENFORCEMENT**

This part provided for supply of information by a public entity; investigations and inspections; appointment and power of inspectors; report of investigation or inspection; and powers of the Authority in investigation or inspection.

**PART IX
BIDDERS AND SUPPLIERS**

This part provided for eligibility and qualification of bidders; preference and reservation for schemes; participation by public body or company in procurement; subcontracting policy; supplier database or list; suspension of bidder or supplier; grounds for suspension of bidder or supplier and permanent bar of bidder or supplier.

This part also provided for rejection of a bid, proposal, offer or quotation; and appeal against a decision of the Authority to suspend the bidder or supplier by submitting the matter to arbitration.

**PART X
APPEALS**

This part provided for appeal of decision by a procuring entity; and determination of dispute by arbitration.

**PART XI
GENERAL PROVISIONS**

This part provided for a framework agreement and the conditions under which a procuring entity may enter into a framework agreement through open tender. This part also empowered the Authority to promulgate a code of conduct to regulate office holders, bidders and suppliers involved in public procurement of goods, works and services. It also sets out the conduct of a person participating in public procurement of goods, works or services.

Other matters provided for under this part were general offences; limitation of liability of Controlling Officer or Chief Executive Officer; general penalty; offences by principal officers of bodies corporate and unincorporated bodies; and compensation. This part further provided for the transfer of functions of procuring entity to other body; circulars and publications; regulations

and sought to repeal the *Public Procurement Act, No. 12 of 2008* and provided for some savings and transitional provisions.

7.0 CONCERNS OF STAKEHOLDERS

All the stakeholders who appeared before the Committee supported the Bill. However, they raised concerns as set out below.

PART I PRELIMINARY PROVISIONS

Clause 2 – Interpretation

- i. Some stakeholders were of the view that the term *Price Reasonableness Analysis* as provided in the Bill was unclear. It was, therefore, recommended that the definition be adjusted by removing the word “fair” and replacing it with the word “reasonable”, so that it read as follows: “*Price Reasonableness Analysis*” means a review of the prices proposed by a supplier in order to ascertain whether the prices offered in the bids are reasonable to a procuring entity and supplier.
- ii. Some stakeholders were concerned that definitions of *collusive, national bidding and international bidding* were not included in the Bill even when they were provided for in the *Public Procurement Act, No. 12 of 2008* and were still being used in the Bill. Stakeholders proposed that these words be defined.
- iii. Other stakeholders submitted that in order to provide clarity on the provisions permitting direct bidding, there was need to include the definition of the word “*emergency*”. It was, therefore, recommended that the definition should include circumstances which were deemed to be urgent, unforeseeable, life threatening and not caused by the delaying conduct of the institutions.
- iv. Some stakeholders had noted that the term ‘review Board’ provided for under Clause 14 (3) (h), had not been defined. They were of the strong view that given the importance of the review Board, it was important that the term be defined under interpretation Clause.

PART II THE ZAMBIA PUBLIC PROCUREMENT AUTHORITY

Clause 6 - Functions of Authority

- i. Some stakeholders submitted that the existing complaints handling process where ZPPA appointed its members of staff to hear appeals submitted by a supplier did not guarantee a fair hearing. It was, therefore, recommended that the Bill should provide for an independent public procurement appeals tribunal.
- ii. Stakeholders submitted that Clause 6(3)(c), which provided that the Authority may, in the performance of its functions, access information, documents, records and reports of a

procuring entity in respect of a public procurement process, should be recast to read as follows:

(c) access, *subject to other provisions of this Act*, information, documents, records and reports of a procuring entity in respect of a public procurement process.” This was because provisions such as Clause 3(5) prohibited the access of information, documents from the Defence Force and the Zambia Security Intelligence Service, except with the written consent of the President.

Clause 7 – Constitution of Board

Most stakeholders expressed concern at the provision that the Minister shall appoint the Chairperson and the Vice-Chairperson from among the members of the Board. They contended that the Board risked interference from the Minister or the Government in its execution of duties. In this regard, it was recommended that the Bill should provide for the Board to elect its own chairperson and vice chairperson from among the Board members. It was further recommended that the tenure of the Board should be clearly provided for, so as to ensure effectiveness in the execution of its duties.

Clause 9 – Director-General

- i. Stakeholders expressed concern that Clause 9 was not precise on the appointment process of the Director-General and that the qualifications relevant for one to be appointed to the office of Director-General were also not provided for. They proposed that the appointment process should be clearly stipulated under Clause 9. Further, the position of Director-General should be held by someone with procurement and supply qualifications, with appropriate levels of seniority, integrity and experience in decision making. In addition, the office holder should have working knowledge and experience in public procurement. Further, the autonomy of the office of the Director-General should be guaranteed, in order for the office holder to perform his or her mandate diligently.
- ii. Stakeholders submitted that the arrangement where the President appointed the Director-General had the potential to create conflict in the governance of the ZPPA. They contended that since Clause 8(1) provided that the Board was the governing body of the Authority, the Board was responsible for the governance of the ZPPA. The Board should therefore, be able to exercise oversight over management, control and administration of assets and operations of the Authority.

Clause 11 – Emoluments and Other Conditions of Service of Director-General, Secretary and Other Staff

Under Clause 11(1) the Bill provided that the Emoluments Commission shall, on the recommendation of the President, determine the emoluments of the Director-General. Further, under Clause 11 (2) the President shall determine the terms and conditions of service, other than emoluments, of the Director-General.

It was proposed that given the heavy burdens of responsibilities that weigh on the Presidency, the President should be allowed to focus on Constitutional Office bearers. The President should be

spared from the direct concerns of management of parastatal bodies which should be handled by ministers, permanent secretaries and boards of directors on his behalf.

PART III GENERAL PRINCIPLES OF PUBLIC PROCUREMENT

Clause 12–Procurement Pricing

Stakeholders commended the inclusion of procurement pricing in the Bill. In acknowledging the provision, one stakeholder particularly proposed that the Bill should provide for a working definition of standard goods, services and works in order to guide procuring entities in determining standard goods, services and works and ensure adherence to the provision.

Clause 14–Standard Procurement Documents

Clause 14 (5) (a) provided that information contained in the standard procurement documents shall be confidential. Some stakeholders wondered how this would be tenable when Clause 4 required that these documents be published. Stakeholders recommended that the Bill must be clear at what stages the documents must be confidential.

Clause 16–Use of Information and Communication Technologies

Clause 16(1) provided that a procuring entity shall use the electronic government procurement system or any other electronic procurement system that the Minister may, by statutory instrument, prescribe.

A concern was raised that the electronic government procurement (eGP) or any prescribed electronic procurement system did not have a provision for electronic payment or an interface to the Government electronic payment gateway to enable electronic transactions and electronic payments. Further, the implementation and operationalisation of the digital signatures on the eGP would not be effected in the absence of the Electronic Government Bill, 2020 and Electronic and Communication Bill, 2020.

Clause 17 – Form of Communication and Advertisements

Clause 17 (1) provided that a communication between parties to a procurement proceeding shall be in writing or in form of a data message that provided a record of the content of the information that was accessible and usable for subsequent reference.

Stakeholders noted that an official email was part of the data message but were concerned that the modes of advertisements or sending out invitation to bid under Clause 17 (3) (a) to (e) seemed to exclude electronic mail. Stakeholders proposed that official email be considered as part of the modes of communication and advertising an invitation to tender under Clause 17 (3).

Clause 21 – Procurement Records

Clause 21(1) provided that a procuring entity shall keep records of each procurement for at least ten years after the resulting contract is completed or, where a contract was not awarded, after the procurement proceedings was terminated. A stakeholder submitted that the Clause should further compel the procurement entities to deposit the procurement records with the ZPPA e-repository as well as other private or public repositories to increase the safety of records for future reference.

Clause 22 – Procurement Approvals

Clause 22(3) provided that a procuring entity shall maintain specimen signatures of persons authorised to make approvals within the procurement process. However, some stakeholders proposed that the Clause should further provide for protection of the owners of the specimen signatures from abuse by the procuring entity.

PART IV PROCURING ENTITIES

Clause 26 – Duties and Responsibilities of Controlling Officer or Chief Executive Officer

Under Clause 26 (2) (j)- stakeholders noted that the period of seven days given for the Procurement Committee to submit minutes to the Authority was too short. They proposed that a period of thirty days be provided.

Clause 27 – Establishment and Composition of Procurement Committee

Clause 27 (1) provided for the establishment and composition of the Procurement Committee. However, a stakeholder observed that the composition did not include the internal audit office which was currently attending procurement meetings based on the Government Circular. It was, therefore, proposed that the Internal Audit Office be included in the composition of the Procurement Committee.

Clause 29 – Tenure of Office of Procurement Committee

Clause 29 provided that a member of the Procurement Committee shall hold the office for a period of three years and may be reappointed for another term. There was concern that the long-term appointment could be a recipe for abuse due to familiarity among members. It was, therefore, proposed that such a situation should be avoided to prevent abuse of office.

Clause 34 – Procurement Authorisation and Levels of Authority

Stakeholders noted the various procurement authorisation and levels of authority provided under this Clause. Stakeholders stated that if the national or international bidding documents should be reviewed and authorised by the Procurement Committee, there was likely to be inefficiency as most Members of the Procurement Committee did not have time to read such bulky documents. It was, therefore, proposed that the Bill should provide for a Technical Committee responsible for the review of solicitation documents for national and international bidding prior to issuance. Such a Committee may be appointed by the Procurement Committee.

PART V METHOD OF PROCUREMENT

Clause 37 - Methods of Procurement

With regard to Clause 37(5) (n) on “procurement method”, stakeholders wondered how the Bill would regulate Public Private Partnerships (PPPs) which were not subject to the proposed piece of legislation. They, therefore, proposed a deletion of this provision.

Clause 39 - National and International Bidding

While noting the provisions in Clauses 39 (6) and 41 (6), it was not clear as to what extent the foreign contractor should partner with citizen suppliers at the bidding stage and who was responsible for ensuring that a foreign bidder partnered with a citizen supplier or citizen bidder.

Stakeholders were of the view that the Bill should provide clear guidelines as regards the extent to which a foreign contractor should partner with citizen suppliers and specify who was responsible for ensuring that a foreign bidder partnered with a citizen supplier or citizen bidder.

Clause 40 – Open Selection

Under Clause 40, some stakeholders proposed the inclusion of a subsection to prescribe the selection methods to be used in the selection of consultants, such as quality and cost based selection, quality based selection, fixed budget selection, least cost selection, single source selection and selection based on consultants' qualifications.

Clause 41 – National and international selection

Stakeholders submitted that the requirement under Clause 41(5) to publish bid notices for international tenders in any regional or international media was not only difficult for most procuring entities but also costly. They proposed that publication through the internet, on the websites of the procuring entity and that of the Zambia Public Procurement Authority should be adequate. It was contended that experience had shown that international bidders relied on the national media such as newspapers and websites.

Clause 42 and 43– Limited Bidding and Limited Selection

Clause 42 (b) provided for “urgent need” as one of the reasons for the use of limited bidding. However, stakeholders were concerned that the provision was prone to abuse by a procuring entity. It was, therefore, proposed that the Bill should provide for a clear working definition of “urgent need” under Clause 2.

Clause 48 – Electronic Reverse Auction

The objective of electronic reverse auction was to enable a procuring entity to seek competitive pricing by inviting prequalified suppliers to participate in a real-time dynamic online procurement proceeding. While welcoming the provision under Clause 48, stakeholders were of the view that this would be an added strain on the limited budgetary allocations that procuring entities were operating within. This was because procuring entities would be required to spend on infrastructure and expertise to implement it.

Further, Clause 48 (2) provided that a procuring entity shall only qualify to use the reverse auction method if it had a procurement portal and an appropriate secure software with electronic procurement capabilities and functionalities approved by the Authority.

Stakeholders submitted that a procurement entity should not be given an opportunity to create a silo procurement portal. They proposed that in a situation where the procurement entity had been authorised to use an appropriate electronic procurement portal, the same should be interfaced with the eGP.

Clause 49 – Procedure for Electronic Reverse Auction

Stakeholders submitted that the procedures outlined under this Clause be deleted and instead be provided for in the regulations as the case was with other methods.

PART VI PROCUREMENT PROCESS

Clause 68 – Negotiations

Some stakeholders proposed that under Section 68 (4), the Bill should include a paragraph which would allow for negotiations where the bidder's price exceeded the market price as maybe deduced from subsequent Price Reasonableness Analysis conducted by the procuring entity.

It was noted that this would be applicable in cases where the prevailing market prices were lower than the estimated cost at the time the budget was drafted.

Clause 71 – Notification of best evaluated bidder

With regard to notification of best evaluated bidder, under Clause 71(1), some stakeholders contended that the period of two days in which the procuring entity was expected to prepare a notice was too short. They, therefore, proposed that seven to fourteen days be provided.

Clause 72 – Award of Contract

Some stakeholders expressed concern that the inclusion of the Treasury in the approval requirement for the award of contract under Clause 72(2) (e) would lengthen the procurement process and subsequently lead to business inefficiency. They contended that this was evident in the *Public Procurement Act, No.12 of 2008*, under Section 52(2), which had proven to be a lengthy process for the procuring entities.

It was, therefore, proposed that its inclusion be considered for International Procurement Agreements only where Zambia was a State party as prescribed in the Preliminary Provisions under Section 4(1).

Clause 76 – Contract management

Some stakeholders submitted that the Bill put more emphasis on contract management issues relating to performance and quality deliverables. While appreciating the emphasis on issues relating to performance and quality deliverables, which were very necessary, there was concern that the Bill was silent on some aspects such as project management capacity and non-adherence to the regulations, especially by procuring entities. An example of non-adherence was the failure to pay for goods and services acquired in a timely manner. It was, therefore, suggested that this should be provided for in order to maintain integrity and public confidence in public procurement.

Clause 77 – Amendment or Variation of Contract

- i. Some stakeholders argued that variation could sometimes result in price reduction and wondered whether approval would still be needed in such an instance. In this regard, they proposed that there should be a statement that 'as long as the procurement entity confirmed

that the additional funds were available within its budget' and that Treasury authority should only be sought where supplementary funding was required.

- ii. With regard to cancellation of a contract, some stakeholders contended that it would be expensive to cancel a contract that resulted in the variation exceeding 25 percent. They, therefore, proposed that instead of cancelling, a provision should be made to allow the packaging of additional work as a new procurement. They further contended that this inclusion did not take into account factors that may lead to contract variations such as drastic movements in the economic environment such as depreciation of the local currency and unforeseen events such as a pandemic that may trigger the increment in the prices of goods and services. This provision would, therefore, be punitive to the contractor where the variation was beyond their control. They proposed that the Bill should include an exception to this provision due to extenuating circumstances.
- iii. Clause 77(4) - Other stakeholders observed that Clause 77(4) provided that contract variation and amendment should not exceed 25 percent of the original contract price or the contract shall be cancelled and the procurement re-tendered. However, the stakeholders were of the view that this prescription may prove onerous as factors like force majeure could trigger incremental price differentials of goods and services.

It was, therefore, proposed that the Bill should include an exceptional clause to this provision to support extenuating circumstances and support the continued execution of a contract.

Clause 78 – Defects Liability Certificate and Payments

Clause 78(1) prohibited the processing of final payment of a contract sum where a defects liability certificate had not been issued.

Stakeholders submitted that the defects liability period might not be applicable to some contracts. They proposed that the provision should be qualified so as to restrict its application to contracts that had a defects liability period.

PART VII STORES MANAGEMENT AND DISTRIBUTION

Clause 81 – Stores Management System

- i. Some stakeholders noted that while the Bill referred to the *Public Finance Management Act, No. 1 of 2018*, in relation to stores management, it did not provide for classification of any lack of compliance that would result in waste of public funds, as financial irregularities. They were of the view that in the current form of the Clause, it was not possible to tell at what point a procurement process should be deemed irregular or wasteful. It was, therefore, recommended that the Bill should provide a mechanism that would be used to determine an irregular or wasteful expenditure in the procurement process.

- ii. Other stakeholders submitted that the Bill should be clear as to who was in charge of stores between Finance Department and Procurement Unit. Stakeholders proposed that stores should be handled by the Procurement Unit.

Clause 82- Management of Purchased Goods

Some stakeholders noted that Clause 82 (2) stated that the Head of the Stores Unit shall report to the Controlling Officer or Chief Executive Officer. However, they proposed that the Head of Stores should report to the Head of Procurement and Supplies. This was to ensure effective and sound supply chain management by having the respective functions such as stores and procurement reporting to the Head of Procurement and Supplies.

PART IX BIDDERS AND SUPPLIERS

Clause 93 – Subcontracting Policy

Stakeholders commended the inclusion of the subcontracting policy in Clause 93(1). They noted that the policy was restricted to foreign bidders only and therefore, proposed that the policy should be applicable to both foreign and local bidders depending on the scope of work.

Clause 97 –Permanent Bar of Bidder or Supplier

Clause 97(1) provided that the Authority may, on its own motion or on recommendation of a law enforcement agency with investigative powers, permanently prohibit a bidder or supplier from participating in public procurement on stipulated grounds.

Stakeholders proposed that it should be made mandatory for law enforcement agencies to render reports to ZPPA whenever they prosecuted a bidder or supplier for offences related to Clause 97.

PART X APPEALS

Clause 100 – Appeal of Decision by Procuring Entity

The provisions under this Clause were noted. However, it was observed that the Bill did not specify what should happen in the event that the Procurement Authority did not communicate its decision on an appeal within the stipulated ten working days. It was proposed that this should be provided for under this Clause.

8.0 SUBMISSION FROM THE MINISTER OF FINANCE

The Hon Minister of Finance submitted that the Public Procurement Bill, N.A.B. 8 of 2020, specifically aimed to achieve the following:

- (i) Enhance the independence and professionalism of the ZPPA Board;
- (ii) provide for price benchmarking through the publication of the quarterly market price index;
- (iii) introduce provisions for declaration of interest by office holders;
- (iv) restrict contract variations to no more than 25 percent of the original contract value;

- (v) provide for greater citizens involvement in public procurement by restricting national bidding to citizens and requiring international bidding to be done in collaboration with citizens;
- (vi) recognise preferential procurement for special interest groups;
- (vii) enhance the sanction regime for infringement of the Act; and
- (viii) introduce mandatory usage of electronic tendering processes and procedures.

8.1 MAIN PROVISIONS IN THE BILL

Below are some of the provisions discussed by the Hon Minister of Finance:

a. *Clause 93: Enforcing Government Policy on Subcontracting*

The Hon Minister of Finance informed the Committee that enforcing the subcontracting requirement for foreign bidders had been a challenge to the Government. It was therefore, submitted that the Bill provided this Clause which empowered ZPPA to enforce Government's policy on subcontracting. This included a provision requiring foreign bidders or suppliers to subcontract a percentage of the total value of procurements exceeding thresholds to be prescribed in regulations.

b. *Amendment to Clauses 105, 107 and 108: Offences and sanction for breach of the Public Procurement Act to enhance punitive sanctions against public procurement offenders*

The Hon Minister of Finance submitted that in order to preserve public resources meant for national development, the Bill provided for enhanced sanctions in instances where there was abrogation of the procurement process by bidders or any other person. It provided for sanctions in the form of a penalty as imposed by the courts and disqualification from public procurement for five years. The abrogation of the procurement process included failure to declare conflicts of interest and other inappropriate influence on evaluations, including corrupt, coercive, obstructive and collusive practices.

The Hon Minister of Finance further submitted that, Clause 105 specifically, provided for penalties for a number of vices that contravened this act. This included certification of works that were substandard or incomplete or non-existent. These acts constituted an offence of corruption and shall be prosecuted in accordance with the *Anti-Corruption Commission Act, No.3 of 2012*.

8.2 THE MINISTER OF FINANCE'S RESPONSES TO SOME OF THE STAKEHOLDERS' CONCERNS

- i. Some stakeholders noted that Clause 9(1) provided that the President shall appoint a Director General while Clause 7(1) provided that the Minister shall appoint the Board. Stakeholders submitted that this was irregular.

In his response, the Hon Minister of Finance submitted that there was nothing irregular about this as it was a fairly common practice. The Hon Minister stated that this was the exact arrangement at the Zambia Revenue Authority and the Bank of Zambia.

- ii. Some stakeholders noted that Clause 9(4) of the Bill provided for the Director General to attend meetings of the Board and participate in its meetings but should not vote on any

matter. Stakeholders contended that there was lack of clarity on whether or not the Director General was entitled to Board conditions

In his response, the Hon Minister of Finance clarified that the Director General was an ex officio of the Board and was therefore, not a full member. The Hon Minister explained that one of the functions of the Director General on the board was to serve the Board.

- iii. On why the Bill had not provided for the qualifications of the Director General of the Zambia Public Procurement Authority under Clause 9, the Hon Minister of Finance noted the observation. The Hon Minister submitted that the Ministry was willing to propose an amendment in order to provide for the relevant qualifications and experience of the office holder.
- iv. Stakeholders also noted that the requirement to publish bid notices for international tenders in any regional or international media under Clause 41(5) was not only difficult for most procuring entities but would also increase both the administrative and procurement related costs.

In addressing the concern, the Hon Minister of Finance submitted that it was necessary to advertise in international media in order to reach out to foreign bidders and suppliers

- v. Stakeholders observed that the provisions under Clause 46 regarding direct bidding lacked clarity and were prone to abuse by procuring entities. They contended that the words used such as emergency needed to be clearly defined so that circumstances which were deemed to be urgent, unforeseeable, life threatening and not caused by the dilatory conduct of the institutions, were explained.

In response, the Hon Minister of Finance submitted that some of these terms such as emergency and the types of emergencies would be defined in the regulations.

- vi. Other stakeholders were concerned that Clause 77(1) (2) and (3), which provided that amendment or variation to a contract shall not be effected without the approval of the Treasury and the legal advice of the Attorney-General seemed to apply to all contracts. They observed that if this was the case, the provision might be too onerous both on the part of the procuring entity and other parties involved as some of these contracts related to very small contract price amounts and amendments might be minor.

In response, the Hon Minister of Finance explained that there was an understanding that contract variation would not be a routine activity. However, the Hon Minister pointed out that authorisation to vary contracts was necessary so that bidders and suppliers did not abuse the provision if left open. The Minister further submitted that contract variation had financial implications and hence, the need for the relevant authorities to be involved at all times.

9.0 COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

The Committee's observations and recommendations are set out below.

- i. The Committee notes that Clause 3 (2) and (3) of the Bill provides for procurements that can be exempted from the strict application of the provisions of the Bill once enacted into law. Despite not being part of those procurements provided for under this Clause, the Committee is of the view that due to the nature of the mandate of the Central Bank, some of the procurements relating to its operations may require that they be exempted as well.

In light of the above, the Committee recommends that the Bill should include procurements relating to operations of the Central Bank among those procurements to be exempted from the strict application of the provisions of the Bill. This will preserve the confidentiality and security associated with the operations of the Bank of Zambia.

- ii. The Committee notes that ZPPA is a regulator in public procurement. However, it is concerned that the Bill does not address the administrative gap in the Ministries, Provinces and Spending Agencies that results from the lack of a specific office to superintend over heads of procurements in Government. In this regard, the Committee recommends that the Bill should provide for a specific office to be called Office of the Procurement General which is analogous to the Office of the Accountant General and should be at the level of Permanent Secretary. The Procurement General would, among other things, oversee the public procurement function in the Government.
- iii. The Committee observes that Clause 7 (1) provides for the constitution of the Board of the Zambia Public Procurement Authority (ZPPA) whose members are appointed by the Minister. Further, Clause 7 (2) provides that the Minister shall appoint the Chairperson and the Vice Chairperson from among the members under subsection (1). While the Committee agrees with the provision in Clause 7 (1), it does not agree with the provision in Clause 7 (2). The Committee therefore, recommends that the appointment of the Chairperson and the Vice Chairperson should be left to the Board members themselves to ensure that the Board operates without the perceived interference from the Minister.
- iv. The Committee observes that Clause 9 (1) provides for the appointment of the Director-General by the President who shall also determine the terms and conditions of service of the Director-General as provided for under Clause 11(2). Further, Clause 9 (2) provides that the Director-General is subject to the general or specific direction of the Board.

The Committee agrees with the stakeholders' concern that this arrangement has the potential to create conflict in the governance of ZPPA. The Committee is of the view that since Clause 8(1) provides that the Board is the governing body of ZPPA and the Director-General is subject to the general or specific direction of the Board, the Board should be allowed to appoint the Director-General. In this regard, the Committee recommends that the Bill should provide for the appointment of the Director-General by the Board and not the President. This will allow the Board to exercise oversight on the operations of ZPPA without being in conflict with any other appointing authority.

- v. The Committee observes that the qualifications for the position of the Director-General have not been provided for under Clause 9. The Committee is of the view that such a key position should not be left without qualifications being clearly stipulated. The Committee

is of the view that the precedent that has been set in the *Public Finance Management Act, No.1 of 2018* where the qualifications of the Accountant General are provided for should be applied in the Public Procurement Bill, 2020. The Committee recommends that the Bill should clearly provide for the qualifications of the Director-General of ZPPA.

- vi. Clause 12 makes it mandatory for procuring entities to procure standard goods, services and works in accordance with the price index issued by the Authority. The Committee notes that this is a very progressive Clause aimed at preventing the loss of Government money through overpricing of goods, services and works. However, the Committee is concerned that the Bill is silent on what should happen if particular services or goods to be procured were costing much more than the prices in the Quarterly Market Price Index. The Committee recommends that the Bill should address this issue by providing that an application should be made to ZPPA for the procurement to proceed outside the Quarterly Market Price.
- vii. The Committee observes that under Clause 27 (1), that the composition of the Procurement Committee does not provide for representation from the Internal Audit Office. However, the Committee was informed that the existing practice was that officers from Internal Audit Office attended procurement meetings based on a Government Circular. While noting this submission, the Committee recommends that the Bill should formalise the arrangement into law by providing for representation of the Internal Audit Office on the Procurement Committee. This is necessary for purposes of checks and balances.
- viii. The Committee observes that under Clause 46, one of the reasons for engaging in Direct Bidding is the existence of an emergency. The Committee welcomes the provision but is concerned that the Bill does not define what constitutes an emergency. The Committee contends that if left undefined, the Clause would be abused by procuring entities. The Committee, therefore, recommends that the word “*emergency*” should be clearly defined.
- ix. The Committee has noted, under Clause 91 (1) (b), that while the Bill provides that a procuring entity shall reserve or set aside certain procurement requirements for a target group, by restricting bidding to the target group, the Committee is of the strong view that this does not guarantee any benefit to a definitive Zambian. In this regard, the Committee recommends that the target group referred to under this Clause must be definitive Zambians.
- x. Clause 100(1) provides that a bidder or supplier who is aggrieved with a decision made by a procuring entity under this Act may appeal against the decision to the Authority. The Committee welcomes this important provision. However, it is concerned that the arrangement where ZPPA appoints its members of staff to hear appeals submitted by the suppliers does not guarantee a fair hearing. This is because there may be a conflict of interest arising from some of the functions of the Authority such as those relating to approvals of procurement actions. The Committee recommends that the Bill should provide for an independent appellate body that is detached from ZPPA and the procuring entity since these bodies are actively involved in the procurement decision making.

10 CONCLUSION

The Committee commends the Executive for initiating the *Public Procurement Bill, N.A.B 8 of 2020*. While the Bill contains progressive provisions that will ensure transparency and accountability in public procurement, the Committee is of the strong view that there are a number of provisions which need to be fine tuned, as contained in this Report and in line with stakeholders submissions. The Committee fully supports the Bill and is hopeful that its recommendations will be considered in order to enhance the effectiveness of the law in relation to public procurement.

The Committee wishes to express its gratitude to all stakeholders who appeared before it and tendered both oral and written submissions. The Committee also appreciates the services rendered by the Office of the Clerk of the National Assembly and the permanent witnesses from the Ministry of Justice.

We have the Honour to be, Sir, the Public Accounts Committee mandated to consider the Public Procurement Bill, N.A.B No. 8 of 2020 for the Fifth Session of the Twelfth National Assembly.

Mr H Kunda, MP;
(Chairperson)

Ms B M Tambatamba, MP;
(Vice Chairperson)

Mr M Mbulakulima, MP;
(Member)

Mr C Mweetwa, MP;
(Member)

Mr K Simbao, MP;
(Member)

Mr A C Mumba, MP;
(Member)

Mr A K Mukosa, MP;
(Member)

Ms D Mwape, MP;
(Member)

Mr T J Kasonso, MP; and
(Member)
Mr V Lumayi, MP.
(Member)

October, 2020
LUSAKA

APPENDIX I

NATIONAL ASSEMBLY OFFICERS

Ms C Musonda, Principal Clerk of Committees

Mr H Mulenga, Deputy Principal Clerk of Committees (FC)

Mrs C K Mumba, Senior Committee Clerk (FC)

Ms A M Banda, Committee Clerk

Mr M Chuba, Committee Clerk

Ms I Mwiya, Typist

Mr M Kantumoya, Parliamentary Messenger

APPENDIX II

THE WITNESSES

Ministry of Justice

Mrs Mwenya Bwalya, Chief Parliamentary Counsel
Mrs Nachimata Nchito, Parliamentary Counsel
Mrs Mary Nkhoma, Parliamentary Counsel

Ministry of Finance

Hon Bwalya Ngandu, Minister
Mr Mukuli Chikuba, Permanent Secretary - (EMF)
Mr Mulele M Mulele, Director
Mr Akapelwa Imwiko, Assistant Director
Mr Musokotwane Sichizuwe, Assistant Director
Mr Mainza Mweemba, Principal Economist
Mr Kabaso Kabwe, Principal Economist
Ms Bertha Chola, Senior Economist
Mr Chabu Kapambwe, Senior Economist
Mr Chilesa Kandeta, Public Relations Officer

Zambia Institute of Purchasing and Supply

Mr Chibwe D Mwelwa, President
Mr Daniel Kabamba, Council Secretary
Mr Gift Mwanza, Member
Ms Beatrice Mbewe, Member

Action Aid Zambia

Mrs Nalucha Nganga Ziba, Country Director
Mr Musonda Kabinga, Head of Programmes
Mr Richard Kampamba, Economic Justice Officer

Zambia Public Procurement Authority

Mr Christopher Chichoni, Director General
Ms Mwaka Ndhlovu, Board Secretary
Ms Ethel Nunkwe, Manager Electronic Government Procurement
Mr Gilbert Mbewe, Manager Contracts

Ministry of Local Government

Mr Ngoza Munthali, Director Planning and Information
Mr Nkumbu Siame, Director Housing and infrastructure
Mr Muyambango Nkwemu, Chief Planner
Mr Patrick Chabuka, Senior Procurement Officer

The Copperbelt University

Dr Chanda Shikaputo, Dean – School of Business

Dr Progress Choongo, Head of Department-Operations and Supply Chain Management

Dr Mwansa Chabala, Operations and Supply Chain Management

Mr Brian Chishimba, Procurement Manager

Mrs Annie L Siame, Operations and Supply Chain Management

Mr Shame Sikombe, Operations and Supply Chain Management

Ministry of Commerce, Trade and Industries

Mr Mushuma Mulenga, Permanent Secretary

Mr Sunday Chikoti, Director Industry

Mr Nsangwa Ngwira, Director Domestic Trade

Mr Paul Lupunga, Director Planning and Information

Mr Brian Moonga, Chief Planner

Mr Mike Chivumo, Parliamentary Liaison Officer

Engineering Institution of Zambia

Eng Linus K Chanda, Registrar and Chief Executive Officer

Mr Rex Kahlangu, Technical Officer and Quality Manager

Industrial Development Co-operation

Mrs Pamela Musepa, Chief Corporate Services Officer

Mr Tonny Simbaya, Manager Procurement and Supplies

Mr James Kankondo, Senior Legal Counsel

Ms Sombo Kaweza, Senior Analyst, Research and Strategy

Zambia Information and Communications Technology Authority

Eng Patrick Mutimushi, Director General

Mr Thomas Malama-Director Legal

Mr Paul Manda, Head of Supply Chain and Acquisitions

Ms Kalonde Mungomba, Manager Strategy

Mrs Mary Katai, Legal Officer

Smart Zambia Institute

Mr Milner Makuni, Director eGovernment

Mr Chibala Makasa, Assistant Director – Policy

Ms Betty Bwalya, Senior Procurement Officer

Ms Carol Chipango, Senior Policy Officer

Anti-Corruption Commission

Mrs Rosemary Nkonde-Khuzwayo, Acting Director General

Mrs Malama Mushingi-Siamoondo, Senior Legal and Prosecutions Officer

Mr Bornwell Kapapa, Senior Procurement Officer

Office of the Auditor General

Dr Dick C Sichembe, Auditor General

Mr Francis Mbewe, Deputy Auditor General-Audits

Mrs Clara Mazimba, Deputy Auditor General- Corporate Services Division

Mr Davy Siame, Director Planning

Ms Beatrice Mbewe, Head Procurement

Mr Chishimba Mwewa, Executive Assistant to the Auditor General

The Bank of Zambia

Dr Francis Chipimo, Deputy Governor-Operations

Ms Rekha C Mhango, Deputy Governor-Administration

Mr Evans Luneta, Director-Procurement and Maintenance Services

Ms Helen Banda, Deputy General Counsel

Mr Edward Simwanza, Assistant Director-Procurement

Mr Chungu Kapembwa, Executive Assistant to the Deputy Governor Operations

Ms Kombe Soteli, Executive Assistant to the Deputy Governor

Ms Prudence Sikamba, Senior Economist Executive Governor

Ministry of Health

Ms Kakulubelwa Mulalelo, Permanent Secretary

Mr Evans Malikana, Deputy Director

Mr Wilson Lungu, Head Procurement and Supplies Unit

Mr Daniel Kalunga, Director of Finance

Mr Raphael Mwanza, Director Physical Planning and Medical Technologies

Mr George Chibwe, Director Internal Audit