

L.N. 68 of 2015**FINANCIAL ADMINISTRATION AND AUDIT ACT
(CAP. 174)****Public Procurement (Amendment) Regulations, 2015**

BY VIRTUE of the powers conferred by article 4 of the Financial Administration and Audit Act, the Minister for Finance has made the following regulations:-

Citation and commencement.

S.L. 174.04

1. (1) The title of these regulations is the Public Procurement (Amendment) Regulations, 2015, and these regulations shall be read and construed as one with the Public Procurement Regulations, hereinafter referred to as the "principal regulations".

(2) These regulations shall come into force on such date as the Minister responsible for finance may, by notice in the Gazette, establish, and different dates may be so established for different provisions or different purposes of these regulations.

Amends regulation 2 of the principal regulations.

2. Regulation 2 of the principal regulations shall be amended as follows:

(a) immediately after the definition "affiliated undertaking" there shall be added the following new definition:

" "black listed person" means any person, whether legal or natural, with whom a contracting authority and any body governed by public law shall be prohibited from carrying out any procurement whether directly or as a sub-contractor or as a member of a consortium and, or joint venture;"

(b) immediately after the definition "central government authorities" there shall be added the following new definition:

" "Commercial Sanctions Tribunal" means the tribunal established in regulation 6H;" and

(c) immediately after the definition "Director" there shall be added the following new definition:

" "Director of Employment and Industrial Relations" shall have the same meaning as specified in the Employment and Industrial Relations Act;"

Amends regulation 6 of the principal regulations.

3. Sub-regulation (2) of regulation 6 of the principal regulations shall be amended as follows:

(a) in paragraph (m) thereof for the words "of this award." there shall be substituted the words "of this award;"; and

(b) immediately after paragraph (m) thereof, there shall be added the following new paragraph:

"(n) to draw up and maintain a list of persons who have been blacklisted."

4. Immediately after regulation 6 of the principal regulations, there shall be added the following new regulations:

Adds new regulations to the principal regulations.

"Black-listing.

6A. (1) The Director of Employment and Industrial Relations shall request the Commercial Sanctions Tribunal to black list a person, whether natural or legal, from participating in procedures for the award of public contracts if such person:

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(a) has been declared guilty by any Court or Tribunal of an offence in terms of the Employment and Industrial Relations Act or any subsidiary legislation made under that Act; or

(b) has failed to provide his employees with a written contract of service; or

(c) has failed to provide his employees with a detailed pay slip containing all relevant details including amount paid, normal hours worked, overtime hours, hours worked on Sundays and public holidays, hours availed of a leave or sick leave, a breakdown of bonuses and allowances as well as deductions made; or

(d) has failed to deposit wages or salaries by direct payment in the employee's bank account; or

(e) has failed to provide the relevant bank statements of wages and salaries' deposit and copies of the detailed payslips, which are to be made available as and when required by the Director of Industrial and Employment Relations; or

(f) has subcontracted a public contract to another person employing the same employees of the principal contractor to carry out the same or similar duties for the execution of the said public contract.

(2) In the case mentioned in sub-regulation (1)(a), the black listing shall extend to the legal person, on whose behalf the person has been found guilty of an offence.

Role and investigations of the Director of Employment and Industrial Relations.

6B. It shall be the function of the Director of Employment and Industrial Relations to ensure that the conditions mentioned in regulation 6A are observed by all persons.

Black listing procedure.

6C. (1) The Director of Employment and Industrial Relations shall proceed for the black listing of a person before the Commercial Sanctions Tribunal by means of an application.

(2) If the black listing is based on the grounds mentioned in regulation 6A(1)(a), the Director of Employment and Industrial Relations shall request the black listing of both the natural person and the legal person on whose behalf the former was found guilty of an offence.

(3) The application shall contain a statement of the facts and the grounds of the cause for black listing. It shall also contain a detailed report on the findings of the investigations carried out by the Director of Employment and Industrial Relations or a copy of the decision given by the Court.

(4) The application and all the documents supporting the application shall be served on the defendant by registered mail, who shall have twenty days to file a reply. The reply shall be accompanied by a deposit of four hundred euro (€400) payable to the Secretary of the Commercial Sanctions Tribunal and shall contain all documentation in support of the reply.

Procedure
before the
Commercial
Sanctions
Tribunal.

(5) The defendant shall cause a copy of the reply to be served on the Director of Employment and Industrial Relations.

(6) The written pleadings shall be deemed to be closed upon the expiration of the time referred to in sub-regulation (4).

6D. (1) After the expiry of the time allowed for the written pleadings, the Secretary of the Commercial Sanctions Tribunal shall immediately notify the Director of Employment and Industrial Relations and the defendant of the date on which the first hearing will be held. The first sitting shall be appointed within fifteen days from the date the written pleadings have been closed.

(2) The parties shall appear before the Commercial Sanctions Tribunal either in person or by agent on the day and at the time fixed for the hearing, make their submissions and produce such evidence as the Commercial Sanctions Tribunal may allow:

Provided that the Commercial Sanctions Tribunal may postpone the hearing of the case if it is satisfied that any one of the parties or any witness was prevented from appearing before it owing to illness or absence from Malta.

(3) Upon the request of one of the parties, the Commercial Sanctions Tribunal shall have the power to summon witnesses and to administer the oath to any person appearing before it. Should a witness duly notified by a summons signed by the Chairman of the Commercial Sanctions Tribunal fail to enter an appearance before the Commercial Sanctions Tribunal, such person shall be guilty of an offence and liable, on conviction, to a fine (*multa*) of not less than five hundred euro (€500) and not more than five thousand euro (€5,000).

(4) The service of all summons, orders or other acts of the Commercial Sanctions Tribunal shall be carried out by registered mail at least five days before the date of the sitting.

(5) All evidence tendered by witnesses that are produced before the Commercial Sanctions Tribunal shall be transcribed and put in writing in the records of the proceedings.

(6) When the hearing is concluded, the Commercial Sanctions Tribunal, if it does not deliver decision on the same day, shall reserve decision for the earliest possible date to be fixed for the purpose, but not later than four months from the date when the written pleadings mentioned in regulation 6C are deemed to be closed:

Provided that, for serious and justified reasons expressed in writing by means of an order notified to all the parties, the Commercial Sanctions Tribunal may postpone the judgment to a later period.

(7) After evaluating all the evidence and after considering all submissions put forward by the parties, the Commercial Sanctions Tribunal shall decide whether to accede or reject to the request made by the Director of Employment and Industrial Relations for the black listing of the defendant:

Provided that the Commercial Sanctions Tribunal may, after considering measures taken by the defendant to remedy the situation and after taking into account the gravity and particular circumstances of the offence or misconduct, decide to deliver a warning to the defendant, instead of black listing the defendant.

(8) If the Commercial Sanctions Tribunal decides for the black listing of the defendant, the black listing period shall be as follows:

(a) in case of an offence under regulation 6A(1)(a), the period of black listing shall be between of two years;

(b) in the case of a misconduct under regulation 6A(1)(b) to (f), the period of black listing shall be between six months and one year:

Provided that where the defendant is a recidivist in contravention of regulation 6A(1)(a), the black listing period shall be between two and three years. In the case where the defendant is a recidivist in contravention of regulation 6A(1)(b) to (f), the black listing period shall be between one and three years.

(9) In its decision the Commercial Sanctions Tribunal shall recommend as to whether any deposit, or part thereof, submitted by defendant should be refunded.

Appeal from
the decision of
the
Commercial
Sanctions
Tribunal.

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6E. (1) Any person who feels aggrieved by a decision taken by the Commercial Sanctions Tribunal may appeal to the Court of Appeal (Superior Jurisdiction) as constituted in accordance with article 41(1) of the Code of Organization and Civil Procedure by means of an application filed in the registry of that court within twenty days from when the decision was read in public.

(2) A copy of the appeal application shall be served on the other party, who may file a written reply within twenty days from the date of service.

(3) The Court of Appeal shall set down the cause for hearing at an early date, in no case later than three months from the date on which the appeal is brought before it, and shall cause notice of such date to be given to the parties to the suit who, on their part, shall assume the responsibility to visit the court registry and be aware of the latest information regarding the appointment for the hearing of the case.

(4) After appointing the application for hearing, and after listening to the oral submissions made by all parties, the Court shall decide the application on its merits, within the shortest time possible but not any later than four months from the day when the appeal had been filed and the parties have been duly notified.

(5) The Court, for serious and necessary reasons, may by virtue of a decree extend for a reasonable time the judicial terms mentioned under this regulation.

Effects of black listing.

6F. (1) The effects of black listing shall commence on the lapse of two months from the day when the decision of the black listing has become final.

(2) All existing contracts signed by contracting authorities and bodies governed by public law with persons who have been black listed in terms of these regulations shall be terminated *ipso jure* without any compensation for actual and future losses from the date on which the decision regarding the black listing becomes final.

(3) A contracting authority included in Schedules 1, 2 and 3 or a body governed by public law shall be prohibited from carrying out any procurement with a blacklisted person. Any contract duly signed with persons included in the blacklist shall be deemed to be null and void.

(4) Any person who enters into a contract (whether in his own name or on behalf of others) in contravention of any of the provisions of this regulation, and any person who induces any other person to enter into or appear on any such contract as aforesaid or the making thereof, or who aids or abets any of the aforesaid acts, shall be guilty of an offence and shall be liable on conviction to a fine (*multa*) not exceeding two thousand euro (€2,000).

Creation of a black list.

6G. (1) The Director of Contracts shall keep and maintain an updated list of all black listed persons.

(2) Whosoever, for commercial reasons, with intent of submitting a tender, needs to verify whether a person is black listed, may, upon payment of fifty euro (€50) and with the explicit consent in writing of the person concerned, forward a request in writing to the Department of Contracts to confirm or otherwise whether the person indicated is blacklisted. The Department of Contracts shall, within three working days, reply to such a request.

Commercial
Sanctions
Tribunal.

6H. (1) There shall be established a Commercial Sanctions Tribunal which shall have the function to hear and determine issues relating to the black listing of persons and determine the period during which a person shall be black listed.

(2) The decision of the Commercial Sanctions Tribunal shall be rendered in writing, be signed by all members of the Commercial Sanctions Tribunal and be dated.

(3) The Commercial Sanctions Tribunal shall indicate the reasons upon which such decision was taken, and the decision shall be read in public.

(4) The Commercial Sanctions Tribunal shall be composed of a Chairman and two members who shall be appointed by the Prime Minister on the advice of the Minister for Finance, for a period of three years.

(5) The members of the Commercial Sanctions Tribunal may be individually removed from office on the ground of proved inability to perform the functions of that office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.

(6) The Commercial Sanctions Tribunal shall be assisted by a Secretary.

(7) The Chairman or other member of the Commercial Sanctions Tribunal shall be disqualified from hearing a review in such circumstances as would disqualifying a judge in a civil suit, and in any such case the Chairman or member shall be substituted by another person appointed for the purpose by the Prime Minister on the advice of the Minister for Finance.

(8) A person shall be disqualified from being appointed or continuing to be a member of the Commercial Sanctions Tribunal if he is a member of the House of Representatives, a member of a Local Council or if he has a financial or other interest as is likely to prejudice the discharge of his functions as a member of the same Commercial Sanctions Tribunal.

(9) The members of the Commercial Sanctions Tribunal shall receive such remuneration as the Prime Minister may determine and this shall be paid from the Consolidated Fund.

(10) The members of the Commercial Sanctions Tribunal shall not be held personally liable for any act or omission done in good faith in the course of the exercise of their functions as members of the said Commercial Sanctions Tribunal.

(11) The sessions of the Commercial Sanctions Tribunal shall be held in public and all parties involved shall have the right to attend and to be accompanied by any person, professional or otherwise, who they consider suitable to defend their interests.

(12) The Commercial Sanctions Tribunal shall be empowered to call witnesses, to administer oaths and to engage any government official or non-governmental expert to assist it as it deems fit.

(13) The Chairman, in agreement with the members of the Commercial Sanctions Tribunal, shall have the power to determine the procedure for the hearing and shall ensure that during the public hearing all interested parties are given the opportunity to make their case.

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(14) Unless there is an appeal, the decision of the Commercial Sanctions Tribunal shall constitute an executive title and may be enforced in terms of article 273 of the Code of Organization and Civil Procedure.

(15) Decisions of the Commercial Sanctions Tribunal shall preferably be taken on the basis of unanimity. However, majority decisions shall be final and binding. The Chairman and the other two members shall have one vote each.

(16) Decisions of the Commercial Sanctions Tribunal shall be delivered by the Chairman to the Director of Contracts on the same date in which the decision is delivered.

(17) The Commercial Sanctions Tribunal shall, by not later than six months after the end of the financial year, make and submit to the Minister for Finance a report dealing with the performance of the Tribunal during the financial year being reported upon. The report shall, in particular, provide details regarding its decisions."

5. Sub-regulation (5) of regulation 50 of the principal regulations shall be deleted.

Amends
regulation 50 of
the principal
regulations.

