TITLE: THE EVALUATION OF THE LAW REGARDING TENDERS: A CASE

STUDY OF ZESCO

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THE UNIVERSITY OF ZAMBIA

LUSAKA

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DECLARATION

I, **VERONICA QUITA**, do hereby declare that this dissertation represents my own original work and it has not been submitted for a degree at the University of Zambia or any other University.

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II
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ABSTRACT

This research paper is an evaluation of the law regarding tenders in the Zambian legal system. Tenders are currently regulated by the Public Procurement Act of 2008 which, among its other provisions, gives the remedy of arbitration for dissatisfied bidders, thus effectively precluding them from bringing tender issues to litigation. As a result, case law involving tenders tends to focus on other issues such as contractual obligations rather than going to the heart of the disputed tender itself. Therefore, bidders are not always adequately protected. This research undertook to answer the question of how tenders may be more effectively regulated in Zambia. This was done by evaluating the current tender regime in Zambia and by using ZESCO as a case study to see how these rules are practically applied and carried out. The research methodology used was descriptive desk research with some primary research involving the interview of a member of the procurement department at ZESCO. The research found that although under the Public Procurement Act there was a near comprehensive regulatory tender regime, the practical application of the rules and the exercise of regulatory functions by the Zambia Public Procurement Authority left much to be desired. It found that bidders, disgruntled with the tender process, had limited avenues for rectification of the problems they faced. In addition, it appeared that due to appointment practices at the Authority, a situation arose where it was effectively Government policing Government. Thus, the research paper made several recommendations such as the Director-General of the Authority being appointed independent of Government and bidders being able to bring their cases to court to be adjudicated. This research paper concluded that the law on tenders be re-evaluated to ensure transparency and effectiveness of the Authority as a regulatory body and also to provide the courts as a form of dispute resolution.

The research shall incorporate ZESCO as the case study to better demonstrate the regulation of the tender regime in Zambia. This paper shall discuss how tenders are made and regulated
and shall describe the challenges that face bidders in the public procurement process. In addition, this research paper shall give recommendations on how the governing Act and the Courts can better regulate and oversee tenders in the current public procurement regime.
LIST OF CASES


3. Entores Ltd v Miles Far East Corporation [1955] 2 All ER 493, CA

4. Gibson v Manchester City Council [1979] 1 All ER 972

5. Harvey v Facey [1893] AC 552


7. Worldcap (HK) Limited v The Attorney-General 2009/HPC/0614
LIST OF STATUTES

1. Public Procurement, Act No.12 of 2008

2. Public Procurement Regulations, Statutory Instrument No.63 of 2011

3. Zambia National Tender Board Act, Cap 394
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CHAPTER ONE

INTRODUCTION

The law regarding tenders states that where there is a call for the submission of tenders this is not usually an offer made out to the person making the tender. If anything, it is an invitation to treat. The usual position is that the person making the tender is an offeror and acceptance of such tender may be said to constitute the acceptance of the offer, thus creating a valid, binding contract.

This is not always the case. Sometimes, the acceptance of the tender may simply create a series of contracts, the obligations each of which must be fulfilled. Whether or not a call for the submission of tenders is a call for offers to be made is determined by the manner in which the words of the advertisement are couched.

STATEMENT OF THE PROBLEM

The problem here is that a situation arises where the wording of the advertisement calling for tenders is determinant of whether or not a situation of offer and acceptance will ensue, and thus whether or not contractual obligations will follow. This is because in the Zambian context, individuals or companies that submit tenders are effectively precluded from bringing tender litigation. The avenues of tender dispute resolution are limited to appealing to the regulatory body (the Zambia Public Procurement Authority) and if still dissatisfied, taking the matter to arbitration. As such, case law is limited to issues of contract law or other ancillary issues, rather than the crux of the disputed tender itself.
Often, the preparation and submission of a tender will be to the financial detriment of the person placing it. In addition, it may also result in the loss of their time which, depending on the wording of the invitation for tenders, may or may not be recouped depending on their position as determined by contract law. Thus, it is necessary to have effective protection for bidders in the governing statute for tenders and also under case law.

PURPOSE OF THE STUDY

1. To ascertain what constitutes a valid tender and the steps leading to this. This shall be done by looking at the elements of contract law that are applicable to tenders and which give rise to their existence.

2. To examine the law on tenders with specific regard to the procedures followed in the Zambian jurisdiction. This will be done by recourse to the Public Procurement Act 2008, which will shed light on how the statute regulates the tender process.

3. To use the Zambia Electricity Supply Corporation Limited (ZESCO) as a case study to demonstrate the tender process. This will give a practical view on how the procedure is carried out in Zambia and how companies follow and incorporate the provisions of the statute.

4. To recommend how statute and the Courts can better protect those who not only submit a tender but also those who perform certain acts in view of their tender submission being accepted.

SIGNIFICANCE OF THE STUDY

The study will evaluate the law regarding tenders in the Zambian jurisdiction. It will have specific regard to the tender process at ZESCO.
The study will show how the law regarding tenders operates and how the tender process may be better governed so as to have a fair and beneficial effect on all the parties concerned.

METHODOLOGY

The research methodology shall be desk research, descriptive in nature, employing the use of ZESCO as a case study. This shall be done with recourse to statute and decided cases in Zambia. There shall also be primary research involving a member of the procurement department at ZESCO.

LAW RELATING TO TENDERS

Halsbury states that when an advertisement has been made calling for the submission of tenders for goods or services, it is not normally considered to be an offer made out to the person who submits the highest, most favourable tender.\(^1\) Rather, it is the actual tender that is said to constitute an offer which if accepted will lead to the formation of a valid, binding contract.\(^2\)

This is because the call for the submission of tenders is more like an invitation to treat. This advertisement is a call for offers which the party advertising for tenders may or may not accept. Acceptance is at the discretion of the party seeking the tenders and more often than not there is no obligation on their part to accept the offers extended to them. Usually if a party makes the highest tender bid, which may or may not be subject to certain procedures prescribed in the advertisement or call, they will have their offer accepted. However, this is not a foregone conclusion and any detriment they may have suffered before

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the time of acceptance of their tender, financial, time-related or otherwise, falls squarely on
their shoulders.

Chitty explains this in more detail\(^3\). He states that a call for the submission of tenders
is not, prima facie, an offer. This is so even if it results in considerable expense resting with
the person making the tender. In such instances, it is the person making the tender who is
simultaneously making the offer. He goes further to explain that "the effect of acceptance" of
such a tender is determined by interpretation of the acceptance and tender in question\(^4\). This
is very much case specific in that the interpretation is based on the particular facts in issue.
He goes on to give the following example:

Where a tender is submitted, e.g. for the erection of a building, a binding contract will
normally arise from acceptance of the tender, unless it is expressly stipulated that
there is to be no contract until certain formalities have been complied with.

Thus, it would appear that the party calling for tenders is able to protect itself against
certain eventualities, for our purposes detriment arising from the imposition or implication of
a contract. However, yet again there is no mention of what precautions the party submitting
the tender may take as provided by law. Indeed it would seem that all they could do is just not
submit a tender if they do not want to risk wasting their time, money or both. And therein
lays the problem.

A similar point is made in Cheshire and Fifoot's Law of Contract.\(^5\) They reiterate the
principle that the submission of the tender is the offer. Furthermore, whether or not there is a
binding contract, arising as a result of acceptance of the tender, is dependent on the
following:

\(^3\) Hugh G. Beale, ed., *Chitty on Contracts* (London: Sweet & Maxwell, 2004), 51
\(^4\) Hugh G. Beale, *Chitty on Contracts*, 60
\(^5\) Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (London: LexisNexis Butterworths,
2001)
...the language of the original invitation to tender...there are at least two possible cases. First, the corporation may have stated that it will definitely require a specified quantity of goods, no more no less...Here acceptance of the tender is an acceptance in the legal sense, and it creates an obligation...Secondly, if the corporation advertises that it may require articles of a specified description up to a maximum amount, as for instance, where it invites tenders for the supply during the coming year of coal not exceeding 1000 tons altogether, deliveries to be made if and when demanded, the effect of the so-called "acceptance" is very different.

As noted there is a difference in the two instances of the effect of acceptance of the tender.

In the first case, acceptance serves to create a binding contract as there is nothing more that the person creating the tender need do. All they have to do is make their tender offer which may or may not be accepted by the party that extended the invitation to tender, usually on the basis of whether it is the highest or most favourable tender submission. In this case, the invitation to tender is specific, requiring and not calling for further negotiation to determine contractual obligations between the parties.

In the second case, acceptance of the tender submission does not serve to create a valid, binding contract. This is because the invitation to tender is not specific. The time-frame during which the coal is to be delivered is not specific; it merely gives a year as the window in which deliveries may be made. There are no specific intervals of delivery discussed. In addition, the amount of coal is not specifically given; it just should not exceed 1000 tons. Whether or not this should be more or less than 1 ton or some lesser figure is not stated. In addition, it states that deliveries are to be made if and when demanded. This renders it too uncertain for the parties to have intended that contractual obligations should arise from acceptance of the tender. It calls for something more; a negotiation between the parties to set out what their expectations and obligations are to be under the contract of which the tender is the subject.

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6 Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*
notice to this effect was endorsed on the final draft. The final draft agreement was called a 'Wholesale Distributors Agreement'. The name of the plaintiff was inserted twice in the final draft agreement by the plaintiff's advocates. The final draft was not signed by either of the parties. The agreement was not registered with the Lands and Deeds Registrar. A dispute arose between the parties as to the dishonouring of certain cheques given by the defendant to the plaintiff. The plaintiff issued a writ claiming possession of the premises and loss of profits and the defendant counter-claimed for an order for specific performance of the agreement and damages\textsuperscript{10}.

Jean Mwamba Mpashi and Mobil (Oil) Zambia Limited both support the point made in Chitty and Cheshire and Fifoot that whether or not there is a binding contract is dependent on the facts present in each case. These cases stand for the proposition that it is necessary that all the circumstances of a case are considered in determining whether or not there is a valid, binding contract. This must of necessity comprise the documents used by the parties; the intention of the parties; and their conduct. Therefore, if this approach is to be followed, it is not enough that a tender has been made and accepted. What must be considered is the wording in the invitation for tenders and the subsequent submission of a tender; the intentions that the parties had when submitting and/or exchanging these documents; and their ensuing behaviour and interactions.

The intended effect of acceptance of the tender in creating enforceable obligations is further governed by the law of contract. A case to illustrate this point is Entores Ltd v Miles Far East Corporation\textsuperscript{11}. An English company in London was in communication with a Dutch company in Amsterdam (acting as agent for an American principal) by Telex, each company having in its office a teleprinter machine by means of which, a message typed by one

\textsuperscript{10} Mobil Oil (Zambia) Limited v Loto Petroleum Distributors Limited

\textsuperscript{11} Entores Ltd v Miles Far East Corporation [1955] 2 All ER 493, CA
company’s clerk was simultaneously and automatically typed out on paper by the other’s machine. The English company received an offer of goods from the Dutch company by Telex and made a counter-offer which the Dutch company accepted by Telex. The English company applied for leave to serve notice of the writ in an action for damages for breach of the contract on the American principal out of the jurisdiction. It was held that a contract was created at the place where the English company received the acceptance (London). As such, the contract was made within the jurisdiction and leave to serve notice outside of the jurisdiction could rightly be given. This case stands for the proposition that a contract is complete when the offeror has received acceptance. Furthermore, it expounds the principle that the formation of the contract is at the place where the acceptance is received. Thus, with regards to tenders, bearing in mind Cheshire and Fifoot’s warning that contract formation turns on the wording of the invitation for tenders among other things; the contract is complete when the person submitting the tender receives acceptance, and it is at this place that the contract is formed.

In *Gibson v Manchester City Council* a city council adopted a policy of selling council houses to its tenants. The respondent who was renting a council house applied on a printed form supplied by the council for details of the price of the house and mortgage terms available from the council. On 10 February 1971 the city treasurer wrote to the respondent that the council ‘may be prepared to sell the house to you at the purchase price of £2,725 less 20% = £2,180 (freehold)’. The letter then gave details of the mortgage likely to be made available to the respondent and went on: ‘If you would like to make formal application to buy your council house please complete the enclosed application form and return it to me as soon as possible.’ The application form was headed ‘Application to buy a council house’ and

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12 Entores Ltd v Miles Far East Corporation [1955]
13 Gibson v Manchester City Council [1979] 1 All ER 972
concluded with a statement ‘I ... now wish to purchase my council house. The above answers [i.e. the answers in the application form] are correct and I agree that they shall be the basis of the arrangements regarding the purchase...’. The respondent completed the application form except for the purchase price and returned it to the council on 5 March. On 18 March the respondent wrote to the council: ‘I would be obliged if you will carry on with the purchase as per my application already in your possession.’ Before contracts were prepared and exchanged there was a change in control following local government elections in May 1971 and on 7 July the council resolved to discontinue the scheme for the sale of council houses forthwith and to proceed only with those sales where there had been an exchange of contracts. On 27 July the council wrote to the respondent to advise him that the council was unable to proceed further with his application to purchase. The respondent brought an action alleging that there was a binding contract for the sale of the house constituted by an offer contained in the city treasurer’s letter of 10 February 1971 and his acceptance of it by the return of the application form on 5 March and his letter of 18 March, and claiming specific performance of the contract\(^\text{14}\). It was held that there was no binding contract between the parties because the statements contained in the city treasurer’s letter of 10 February were not actually an offer. Rather they contained an invitation to treat. As such, the respondent had no entitlement to the remedy of specific performance. This cases stands for the principle that it is necessary to look at the correspondence of the parties as a whole and their conduct to see if there has been an agreement. This would include regard to the documents used; the parties’ intentions; and the conduct of the parties in determining whether there is a valid, binding, enforceable contract.

\(^\text{14}\) Gibson v Manchester City Council [1979]
In Harvey v Facey\textsuperscript{15} the plaintiffs sent a telegraph asking for the lowest cash price for “Bumper Hall Pen”. The defendants answered this query saying that their lowest price was “£900”. The plaintiffs responded to this saying “We agree to buy...£900 asked by you”. The Privy Council held that the defendants’ initial response was not an offer and therefore the plaintiff’s second telegraph could not be said to constitute an acceptance. This shows that an answer to an enquiry is not an offer to sell. It also shows that where there is a response to a tender, this is not enough to constitute acceptance of said tender.

In The Rating Valuation Consortium,\textsuperscript{16} Lusaka City Council had advertised for the submission of tender bids. The second appellant was successful and took certain measures as required by the Council including the formation of the Rating Valuation Consortium. Subsequent to this, the appellants were told that the contract could not be continued because of irregularities in the tender procedure and the lack of approval by the Local Government Minister as required by statute. The appellants maintained that there was a binding contract because the respondents had allowed them to take certain measures in pursuance of the agreement. The respondents argued that there was no contract owing to the fact that the agreement was subject to the Minister’s approval and to certain tender procedures which were not followed in the award of the tender. The appellants brought an action for specific performance of the contract or the payment of damages for breach of contract and the payment of 5% of the contract sum. The Supreme Court held, \textit{inter alia}, that the learned trial judge was correct when he held that the two fundamental ingredients of a legally binding contract (offer and acceptance) were not present in this agreement and as such there was no legally binding contract. In addition, if a contract is rendered illegal and unenforceable or void by a statute, the court will not enforce such a contract. Thus, as the contract in dispute

\textsuperscript{15} Harvey v Facey [1893] AC 552

was in contravention of statutory provisions the court did not enforce it. However, the appellants were successful in part because they were awarded damages on a *quantum meruit* basis. Thus in this case where a successful bidder suffered a detriment by fulfilling his part of the tender agreement, the court ordered that he be compensated in part for his loss.

However, this is not always the case. In *Worldcap (HK) Limited v The Attorney-General*\(^\text{17}\) the plaintiff claimed damages for breach of a contract. The purported contract was borne out of a selective tender for the supply and delivery of bullet proof vests made by the defendant for the Zambia Police Service- Ministry of Home Affairs. The plaintiff argued that there was a contract between themselves and the defendant which was constituted by the notification of award that they received from the defendant. In addition, the defendant requested the plaintiff to urgently deliver to them a consignment of bullet proof vests which the plaintiff did in fact produce but was unable to deliver as the defendant did not provide them with the funding to do so. The Court held that from looking at the conduct of the parties, the interpretation and effect of the tender documents and the subsequent correspondence between the parties, there was no contract between them and the plaintiff’s claim was dismissed. The effect of this decision was that the plaintiff had manufactured the bullet proof vests at their own risk despite there being in the bidding document a clause which expressly stated that the notification of award constituted the formation of the contract. Thus, the plaintiff was left without recompense.

**The position of regulating tenders under statute**

Tenders form a part of the public procurement regime in Zambia. This regime is regulated by the Public Procurement Act 2008.\(^\text{18}\) The Act regulates the entire tender process

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\(^{17}\) *Worldcap (HK) Limited v The Attorney-General* 2009/11PC/0614

\(^{18}\) Public Procurement, Act No.12 of 2008
from beginning to end and even after into contract management. It also provides for the composition, function and remit of the regulatory authority of the public procurement regime, the Zambia Public Procurement Authority.

Recourse will be had to the provisions of the Act in the next chapter in detail to better understand how tenders and the whole procurement process are regulated. At present it is necessary to note that one reason why the cases abovementioned focus on matters such as contract formation as a result of tenders rather than the tender itself, is that the Act provides for relief for dissatisfied bidders. The forms this relief may take are applying to the Zambia Public Procurement Authority for review of a procuring entity’s decision\(^\text{19}\) and if the bidder is still unhappy with the decision made, resorting to arbitration to resolve the dispute\(^\text{20}\). Thus, bidders do not have an opportunity to have the issue of tenders specifically dealt with in court and to have decisions overturned, set aside or varied on appeal. This would explain the scarcity of direct case law on the matter.

**CONCLUSION**

As can be seen, the case law in relation to tenders is very complex. There are a number of factors that are important in determining tenders and whether or not their acceptance may constitute the formation of valid, binding, enforceable contracts.

As discussed, a tender may be understood as an invitation for offers to be made for the procurement of goods, works or services. However, whether acceptance of such an offer has the effect of creating a contract is not a matter of simple offer and acceptance contract law.

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\(^{19}\) Public Procurement, Act No.12 of 2008, s.70

\(^{20}\) Public Procurement, Act No.12 of 2008, s.71
Firstly, an advertisement for the submission of tenders is not usually an offer to sell to or contract with the person making the highest or most favourable tender bid. It may be viewed more in the light of an invitation to treat.

Secondly, it may be understood that the offer in tender situations comes from the person that submits the actual tender.

Acceptance of the tender is not enough in all situations to constitute the formation of a contract. It is necessary to look at the whole of the circumstances surrounding the complete course of the dealings in question, in particular, the wording of the invitation calling for the submission of tenders. Depending on that wording, and also the intentions and conduct of the parties, something more may be required to support the argument that a contract has arisen.

In light of this, it is clear that the person submitting a tender is usually at a disadvantage in such situations. It will be necessary in the next chapter to examine how statute governs the tender process to gain a better understanding of how this process is regulated in the Zambian legal context.
CHAPTER TWO

THE TENDER PROCESS IN ZAMBIA

INTRODUCTION

The tender process in Zambia is regulated by the Public Procurement Act, 2008.\(^1\) This Act replaced and repealed the Zambia National Tender Board Act.\(^2\) The Public Procurement Act continues the Zambia National Tender Board but re-names it the Zambia Public Procurement Authority.\(^3\) The Public Procurement Act is supported by the Public Procurement Regulations, 2011.\(^4\) These regulations are subsidiary legislation used to explain the principal act. They also go into more detail for certain of its provisions.

The Public Procurement Act gives the procedures that must be followed in the tender process; sets out the functions and composition of the tender watchdog, the Zambia Public Procurement Authority; gives the different forms the bidding of tenders may take; and the Act outlines the remedies of making a complaint to the Zambia Public Procurement Agency and of arbitration for displeased bidders.

The Act applies to any procurement carried out by a procuring entity (such as the Government or a parastatal body) in which funds belonging to the public are utilised.\(^5\) There is a modification of the application of the procurement rules in the public interest where the procurement in question is in relation to defence, national security or international relations.\(^6\)

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\(^1\) Public Procurement, Act No.12 of 2008
\(^2\) Zambia National Tender Board Act, Cap 394
\(^3\) Public Procurement, Act No.12 of 2008, s.5(1)
\(^4\) Public Procurement Regulations, Statutory Instrument No.63 of 2011
\(^5\) Public Procurement, Act No.12 of 2008, s.3(1)
\(^6\) Public Procurement, Act No.12 of 2008, s.3(2)
The Public Procurement Act shall be referred to as ‘the Act’, the Public Procurement Regulations shall be referred to as ‘the Regulations’ and the Zambia Public Procurement Authority shall be referred to as ‘the Authority’ in this research.

The Act provides for the existence of the Zambia Public Procurement Authority. The Authority is the continuation and result of the re-naming of the Zambia National Tender Board7. The Authority is a legal entity in much the same way that a company is. This means that it may sue and be sued.8

The Authority has many powers and functions that are listed in the Act9. The Authority is

an independent regulatory body with responsibility for policy, regulation, standard setting, compliance and performance monitoring, professional development and information management and dissemination in the field of public procurement.10

Thus, the Authority is the body that implements and regulates the area of public procurement, instituting the rules that are provided for by the Act. This means that the Act regulates the tender process of which the Authority is the watchdog.

THE TENDER PROCESS

There are a number of steps, governed by the Act, which a procuring entity must follow in the tender process. A procuring entity is ‘a Government agency, parastatal body or any other body or unit established and mandated by Government to carry out procurement

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7 Public Procurement, Act No.12 of 2008, s.5(1)
8 Public Procurement, Act No.12 of 2008, s.5(2)
9 Public Procurement, Act No.12 of 2008, s.6
10 Public Procurement, Act No.12 of 2008, s.6(1)
using public funds\textsuperscript{11}.\textsuperscript{11} Thus, any public body involved in the tender process in the public sphere must follow the regulations as laid down in the Act. The steps are as follows;

**(i) Highlight procurement requirements**

Firstly, a procuring entity should determine what their procurement requirements are. Procurement is the “acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise or any combination thereof.”\textsuperscript{12}\textsuperscript{12} Thus, the entity should determine what need they are looking to fulfil through the use of tenders and this will inform and direct the rest of the procurement/tender process such as the procurement method and the method of selection of the tender bids.

The Act stipulates that all procurement requirements a procuring entity may have should be documented before any procurement proceedings are begun.\textsuperscript{13}\textsuperscript{13} These are to be contained in the solicitation document sent to bidders to notify them of the entities requirements.\textsuperscript{14} A solicitation document is defined in the Act as

...a bidding document, a request for proposals, request for quotation and, where applicable, a prequalification document or document of any kind issued by a procuring entity, inviting bidders to participate in procurement proceedings.

In addition, the procurement requirements are to be used later on in the tender process in evaluation to assess a bidder’s suitability to fulfil the entity’s needs\textsuperscript{15}\textsuperscript{15} and shall also be embodied in the contract to describe what has been procured.\textsuperscript{16}\textsuperscript{16}

\textsuperscript{11} Public Procurement, Act No.12 of 2008, s.2

\textsuperscript{12} Public Procurement, Act No.12 of 2008, s.2

\textsuperscript{13} Public Procurement, Act No.12 of 2008, s.41(1)

\textsuperscript{14} Public Procurement, Act No.12 of 2008, s.44(2)(a)

\textsuperscript{15} Public Procurement, Act No.12 of 2008, s.44(2)(b)

\textsuperscript{16} Public Procurement, Act No.12 of 2008, s.41(2)(c)
As such, the determination by a procurement entity of their requirements is an integral part of the tender process. Not only does it inform them of their need but also governs further stages in the process. It is also a point of reference in the evaluation of competing bidders to determine who the tender should be awarded to.

Furthermore, the Act provides that any procurement proceeding may only start where availability of funding has been confirmed\(^\text{17}\) and where there has been approval to proceed.\(^\text{18}\) This must be done by the appropriate officer with authority to do so e.g. a Controlling Officer.

This requirement is important because it stops procuring entities starting the tender process in situations where they may find they are unable to honour their obligations as a result of insufficient funds or assumed approval/permission not being forthcoming. This can be to the detriment of parties that submit tender bids as they may incur costs that they will not be able to recoup if it is later revealed that, although initially successful in their bid, a procuring entity did not actually have the authority to enter into any agreement made. To this effect it should be borne in mind that, as discussed in Chapter One, in *The Rating Valuation Consortium*\(^\text{19}\) the Supreme Court held that if a contract is rendered illegal or void by a statute then the Court will not enforce such a contract. Thus, if a contract is entered into between a procuring entity and a successful bidder where these steps have not been taken, said contract is void\(^\text{20}\) and will not be enforced by the Courts.

\(^\text{17}\) Public Procurement, Act No.12 of 2008, s.41(2)(a)
\(^\text{18}\) Public Procurement, Act No.12 of 2008, s.41(2)(b)
\(^\text{20}\) Public Procurement, Act No.12 of 2008, s.54(3)
(ii) Decide method of bidding

Secondly, the procuring entity should determine the method by which they are going to receive tender bids or submissions. This is determined by their procurement requirements. The procurement method that an entity wishes to use shall be chosen in compliance with Part IV of the Act\textsuperscript{21}. The entity is to take into account several factors listed\textsuperscript{22}, such as the value and nature of the procurement, the number of suppliers and urgency of the procurement requirement, and whether local or foreign participation is necessary. In addition, the entity is barred from splitting up their procurement requirements with the purpose of favouring one method over the other\textsuperscript{23}. This is so in instances where the requirements can be procured in one contract.

This provision ensures that procuring entities pick the method most appropriate to their procurement needs, thus precluding them from choosing a method which enables them to favour one bidder or class of bidders over another. This ensures fairness and equality in the tender process.

The Public Procurement Act provides for several methods of procurement. These methods of procurement may also be thought of as the different ways of inviting and submitting tenders. These are open bidding\textsuperscript{24}, national and international bidding\textsuperscript{25}, limited bidding\textsuperscript{26}, simplified bidding\textsuperscript{27} and direct bidding\textsuperscript{28}.

Open bidding refers to a “procurement method for goods, works and non-consulting services which is open to participation on equal terms by all eligible bidders through

\textsuperscript{21} Public Procurement, Act No.12 of 2008, s.43(2)
\textsuperscript{22} Public Procurement, Act No.12 of 2008, s.43(2)(a)-(d)
\textsuperscript{23} Public Procurement, Act No.12 of 2008, s.43(3)
\textsuperscript{24} Public Procurement, Act No.12 of 2008, s.25
\textsuperscript{25} Public Procurement, Act No.12 of 2008, s.26
\textsuperscript{26} Public Procurement, Act No.12 of 2008, s.29
\textsuperscript{27} Public Procurement, Act No.12 of 2008, s.31
\textsuperscript{28} Public Procurement, Act No.12 of 2008, s.32
advertisement of the opportunity.\footnote{29} This effectively means that anyone with the ability to satisfy the procurement requirements that an entity advertises, may respond and submit their tender bid for consideration. Generally, this method of procurement does not preclude any class of suitable bidder.

Open bidding may take two forms i.e. open national bidding and open international bidding. Open bidding is the main method of procurement and therefore of obtaining tender bids/submissions and as such the Act requires procurement entities to use this as the primary method of public procurement except in circumstances as outlined in the Act.\footnote{30}

An example of such a circumstance is where it would make more practical sense to construct infrastructure using a Government agency’s own manpower and equipment as provided for in s.33.\footnote{31} This is called the use of force account.\footnote{32} Force account may be used if the amount of work needing to be done cannot be determined in advance\footnote{33}; where the “works are small and scattered or in remote locations” for which outside firms would probably not give reasonable bid prices\footnote{34}; where it is necessary to carry out the works without disrupting works that may be going on\footnote{35}; in situations where there may be interruptions to the works, the risks are better borne by a procuring entity rather than a bidder\footnote{36}; and where the works needed are urgent\footnote{37}. In such a case, the procuring entity may use their own resources rather than employing another method of procurement to engage outside bidders. The strict rules regarding force account are to ensure that procuring entities (often Government bodies or bodies with common public interests) are discouraged from sharing profitable projects

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\footnote{29}{Public Procurement, Act No.12 of 2008, s.2}
\footnote{30}{Public Procurement, Act No.12 of 2008, s.25(2)}
\footnote{31}{Public Procurement, Act No.12 of 2008, s.33}
\footnote{32}{Public Procurement, Act No.12 of 2008, s.33(1)}
\footnote{33}{Public Procurement, Act No.12 of 2008, s.33(2)(a)}
\footnote{34}{Public Procurement, Act No.12 of 2008, s.33(2)(b)}
\footnote{35}{Public Procurement, Act No.12 of 2008, s.33(2)(c)}
\footnote{36}{Public Procurement, Act No.12 of 2008, s.33(2)(d)}
\footnote{37}{Public Procurement, Act No.12 of 2008, s.33(2)(e)}
amongst themselves. This in turn promotes private sector participation in the procurement sphere and enhances competition by ensuring that tenders are not arbitrarily limited to a small section of society.

The first form of open bidding is open national bidding. National bidding refers to "bidding which is limited to citizen and local bidders." Open national bidding is mandated as the bidding method to be used by procurement entities for all procurement. Open national bidding is available only to citizens and local bidders. A citizen bidder refers to a "citizen-empowered company, a citizen-influenced company or citizen-owned company." While a local bidder refers to a bidder "who is licensed to undertake business activities in Zambia, but who is not a citizen supplier." Thus, open national bidding in its simplest sense, means the call for tender submissions from citizen and/or local bidders/suppliers. This means that it precludes the submission of tenders from bidders or suppliers in foreign territories.

International bidding is "bidding which is open to all bidders, including citizens, local and foreign bidders." Open national bidding is the primary method of procurement and as such open international bidding shall be used only in certain circumstances. The Act gives three instances where this may be so. Firstly, where the value of the procurement is above a prescribed threshold. This threshold is over K5 billion for goods and non-consulting services and over K50 billion for works. The threshold is not applicable to consulting

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38 Public Procurement, Act No.12 of 2008, s.2
39 Public Procurement, Act No.12 of 2008, s.26(1)
40 Public Procurement, Act No.12 of 2008, s.26(3)
41 Public Procurement, Act No.12 of 2008, s.2
42 Public Procurement, Act No.12 of 2008, s.2
43 Public Procurement, Act No.12 of 2008, s.2
44 Public Procurement, Act No.12 of 2008, s.26(2)(a)
services. This threshold is given in the second schedule of the Public Procurement Regulations (‘the Regulations’) pursuant to regulation 8.\(^{45}\)

Secondly, open international bidding may be used where what is intended to be procured is not obtainable from at least three sources in Zambia under competitive prices and other conditions.\(^{46}\) Thirdly, this method of bidding may be used where international involvement is necessary as a result of an agreement entered into by the Zambian government.\(^{47}\)

It should be noted that the use of open international bidding does not exclude Zambian bidders or suppliers from submitting tender bids in favour of international or foreign bidders\(^{48}\). Rather it opens up the bidding process to bidders abroad as well as those that are to be found locally.

The international bidding process is not to disadvantage international bidders. The Act provides that where this method of procurement is used, advertisement of the bid notice shall be in regional and international media (as the case may be) as well as in the national media.\(^{49}\) In addition, there shall be an extended time-frame for the submission of bids or any pre-qualification applications so as to give foreign bidders an opportunity to make their necessary submissions.\(^{50}\) These provisions are in the interests of allowing all eligible bidders an equal opportunity and chance in the procurement/tender process.

\(^{45}\) Public Procurement Regulations, Statutory Instrument No.63 of 2011, r.8
\(^{46}\) Public Procurement, Act No.12 of 2008, s.26(2)(b)
\(^{47}\) Public Procurement, Act No.12 of 2008, s.26(2)(c)
\(^{48}\) Public Procurement, Act No.12 of 2008, s.26(4)
\(^{49}\) Public Procurement, Act No.12 of 2008, s.26(5)(a)
\(^{50}\) Public Procurement, Act No.12 of 2008, s.26(5)(b)
It should be noted that although the Act allows for foreign bidders, they must partner with a citizen or local supplier.\textsuperscript{51} This ensures as much local participation in the procurement process as possible and also benefits the Zambian economy as local bidders or suppliers are encouraged to partake in the tender process were eligible.

The next method of procurement is limited bidding. Limited bidding is “where bids are obtained by direct invitation to a shortlist of bidders without open advertisement.”\textsuperscript{52} This means that when a procuring entity has determined their procurement requirements, they draw up a shortlist of suitable bidders or suppliers and send a direct invitation to these candidates to submit a tender bid. Limited bidding is to be used where the circumstances are not favourable to the utilisation of the open bidding method of procurement.

The purpose of this method is to “obtain competition and value for money to the extent possible.”\textsuperscript{53} Thus, in circumstances where there is a limited amount of bidders that are capable of providing the goods, works or services that a procuring entity are looking for, the entity is at liberty to draw up a shortlist of potential suppliers that they may send the bid notice to\textsuperscript{54}. For example, if there are only five companies that provide the sort of equipment the procuring entity is seeking, the entity may send the invitation to those five companies rather than resorting to open bidding.

Another instance where limited bidding may be used as a method of procurement is where “there is an urgent need for the consulting services and engaging in open bidding would therefore be impractical.”\textsuperscript{55} Thus, where the nature of the services needed by the

\textsuperscript{51} Public Procurement, Act No.12 of 2008, s.26(6)
\textsuperscript{52} Public Procurement, Act No.12 of 2008, s.2
\textsuperscript{53} Public Procurement, Act No.12 of 2008, s.2
\textsuperscript{54} Public Procurement, Act No.12 of 2008, s.29(2)(a)
\textsuperscript{55} Public Procurement, Act No.12 of 2008, s.29(2)(b)
procuring entity require haste, limited bidding may be employed instead of open bidding in the interests of time efficiency.

Simplified bidding is where quotations from a number of bidders are compared.\textsuperscript{56} The purpose of this method of procurement is “to obtain competition and value for money to the extent possible, while maintaining economy and efficiency, where the circumstances do not justify the use of open bidding.”\textsuperscript{57}

This method of procurement may be used where the estimated value of the procurement does not exceed the prescribed threshold.\textsuperscript{58} This may be for goods, works or services (consulting or non-consulting). The prescribed thresholds for procurement using the simplified method of bidding are given in the second schedule of the Regulations pursuant to regulation 8.\textsuperscript{59} For goods and non-consulting services the prescribed threshold is up to K500 million; for the procurement of works it is up to K500 million; and for consulting services it is up to K300 million.

The third method of procurement a procuring entity may use is direct bidding. Direct bidding is “where a bid is obtained directly from a single bidder, without competition.”\textsuperscript{60} Under this method of procurement, a tender submission is invited from a sole bidder or supplier as opposed to it being advertised openly.

\textsuperscript{56} Public Procurement, Act No.12 of 2008, s.2
\textsuperscript{57} Public Procurement, Act No.12 of 2008, s.31(1)
\textsuperscript{58} Public Procurement, Act No.12 of 2008, s.31(2)
\textsuperscript{59} Public Procurement Regulations, Statutory Instrument No.63 of 2011, r.8
\textsuperscript{60} Public Procurement, Act No.12 of 2008, s.2
The purpose of this method of procurement or of inviting the submission of tenders is to ensure that there is “timely and efficient procurement, where the circumstances or value do not justify or permit the use of competition.”

It may be used in prescribed instances that are provided for in the Act. These are where what the procuring entity wishes to procure is only available from one source; where there is an urgent need for the procurement; where there is need for additional procurement from the same source in the interests of “compatibility, standardisation or continuity”; where there is already in existence a contract for the subject of the procurement and more is needed where there would be no advantage if it is open to competition; and where the estimated value of the procurement does not exceed the prescribed threshold. The prescribed threshold is provided for in the second schedule of the Regulations pursuant to regulation 8. For the procurement of goods, works or services (consulting or non-consulting) the threshold is up to K10 million or in appropriate circumstances (discussed above) requiring the use of direct bidding as a method of procurement.

The method of selection of the tender bids is determined by the method of procurement that the procuring entity utilised. There is open selection, national and international selection, and limited selection.

The Public Procurement Act defines open selection as “the procurement method for consulting services which is open to applications for short listing on equal terms by all

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61 Public Procurement, Act No.12 of 2008, s.32(1)  
62 Public Procurement, Act No.12 of 2008, s.32(2)  
63 Public Procurement, Act No.12 of 2008, s.32(2)(a)  
64 Public Procurement, Act No.12 of 2008, s.32(2)(b)  
65 Public Procurement, Act No.12 of 2008, s.32(2)(c)  
66 Public Procurement, Act No.12 of 2008, s.32(2)(d)  
67 Public Procurement, Act No.12 of 2008, s.32(2)(e)  
68 Public Procurement Regulations, Statutory Instrument No.63 of 2011, r.8
bidders through advertisement of the opportunity.” This means that all bidders that submit a tender in response to the advertisement placed by the procuring entity shall have their bids shortlisted, if deemed suitable, and assessed on equal terms with the other bidders. Open selection is the primary method of selection in procurement and the Act provides that it shall be used by procuring entities for all consulting services. The Act states that open national selection shall be used in all procurement. Open international selection shall be used in the three instances as given in the Act and as discussed above. As under the provisions concerning international bidding, a foreign bidder is expected to partner with a local or citizen bidder.

Limited selection is defined as “a procurement method for consulting services where bids are obtained by direct invitation to a shortlist of bidders, without open advertisement.” This means that the procuring entity sends an invitation for the submission of tenders to a select group of candidates rather than placing an invitation in the national or international media. The successful bidder is selected from those who respond to the invitation for tenders. This method of selection may be used where the consulting services are obtainable from a select group of suppliers or where the consulting services are urgently required by the procuring entity. Thus, limited selection is used where the practical needs of the procuring entity cannot be served efficiently and in a timely manner by the use of open selection.

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69 Public Procurement, Act No.12 of 2008, s.2
70 Public Procurement, Act No.12 of 2008, s.27(2)
71 Public Procurement, Act No.12 of 2008, s.28(1)
72 Public Procurement, Act No.12 of 2008, s.28(2)
73 Public Procurement, Act No.12 of 2008, s.28(6)
74 Public Procurement, Act No.12 of 2008, s.2
75 Public Procurement, Act No.12 of 2008, s.30(2)(a)
76 Public Procurement, Act No.12 of 2008, s.30(2)(b)
(iii) Invitation of bids

The procuring entity must then invite bids. The invitation of bids is the invitation for the submission of tenders. A procuring entity is to keep a record of all bidders it sends the solicitation documents to.\textsuperscript{77} This provision also gives guidelines on how procuring entities should best set bidding deadlines\textsuperscript{78} such as allowing enough time for bidders to receive solicitation documents and to compile and submit bids. This ensures that all eligible bidders are given an equal opportunity to submit tender bids by removing the chance that they will be summarily excluded from the procurement process due to arbitrary time constraints.

The Act also provides that an entity may require bidders to submit bid securities.\textsuperscript{79} Bid securities are discussed in more detail in the Regulations.\textsuperscript{80} The Regulations provide that bid securities are required where the estimated value of the procurement exceeds K500 million.\textsuperscript{81} This requirement is to “deter irresponsible bids and to encourage bidders to fulfil the conditions of their bids.”\textsuperscript{82} This provision protects procuring entities from frivolous bids and is in the public interest as these entities are using public funds which are not to be wasted.

It should be noted that s.47 stipulates that procuring entities should require their bidders to “submit sealed, written bids, unless otherwise provided for in this Act.”\textsuperscript{83} This ensures that all bids are kept private and that no one bidder gains an advantage over the other by favourably adjusting their tender submission after being made aware of another candidates offer.

\textsuperscript{77} Public Procurement, Act No.12 of 2008, s.47(1)
\textsuperscript{78} Public Procurement, Act No.12 of 2008, s.47(4)
\textsuperscript{79} Public Procurement, Act No.12 of 2008, s.47(5)
\textsuperscript{80} Public Procurement Regulations, Statutory Instrument No.63 of 2011, r.55
\textsuperscript{81} Public Procurement Regulations, Statutory Instrument No.63 of 2011, r.55(1)
\textsuperscript{82} Public Procurement Regulations, Statutory Instrument No.63 of 2011, r.55(1)
\textsuperscript{83} Public Procurement, Act No.12 of 2008, s.47(7)
S.48 makes provision for the receipt of bids\textsuperscript{84} and s.49 stipulates that "all open bidding, limited bidding and open selection processes shall include a public bid opening..."\textsuperscript{85} This is to ensure compliance with the regulations stipulated in this Act and to maintain a transparent, fair and competitive bidding process.

There are certain criteria which all bidders must meet so as to be deemed eligible to take part in public procurement. Firstly, the bidder must have the legal capacity to contract.\textsuperscript{86} This refers to their age, mental health and other such matters regulated by the general contract law.

Secondly, the bidder must be solvent. This means that they should not be in receivership or bankrupt; that their affairs should not be administered by the court or a judicial officer; and the bidder should not have their business activities suspended nor should they be the subject of legal proceedings for any of the aforementioned state of affairs.\textsuperscript{87}

Thirdly, the bidder should have paid its taxes and social security contributions.\textsuperscript{88}

Fourthly, the bidder or its directors or officers should not have been convicted of any criminal offence related to professional conduct or the making of false statements of misrepresentations as to their qualifications to enter into contracts. This provision is concerned with the five years preceding the beginning of the procurement process. In addition the bidder should not have been suspended pursuant to s.65 of the Act.\textsuperscript{89}

\footnotesize{\textsuperscript{84} Public Procurement, Act No.12 of 2008 \\
\textsuperscript{85} Public Procurement, Act No.12 of 2008 \\
\textsuperscript{86} Public Procurement, Act No.12 of 2008, s.61(1)(a) \\
\textsuperscript{87} Public Procurement, Act No.12 of 2008, s.61(1)(b) \\
\textsuperscript{88} Public Procurement, Act No.12 of 2008, s.61(1)(c) \\
\textsuperscript{89} Public Procurement, Act No.12 of 2008, s.61(1)(d)
Finally, the bidder should not have a conflict of interest with regard to the subject-matter of the procurement requirement.\textsuperscript{90} This means

This section also gives the grounds on which the procuring entity may require that the bidders be local or citizen bidders.\textsuperscript{91}

The solicitation document is to state the eligibility requirements of potential bidders and should state any documentary evidence that is required as proof.\textsuperscript{92} The review of the eligibility of bidders should be conducted as part of the preliminary examination of bids except in cases where this has been done as part of the pre-qualification proceedings.\textsuperscript{93}

(iv) Evaluation of bids

The next step in the tender process is for the bids that have been submitted to be evaluated. This is the process by which the best tender bid is chosen. Bids are to be evaluated in a manner “determined by the type, value and complexity of procurement requirement...”\textsuperscript{94} In evaluating bids the procuring entity should ensure that they are not in violation of the Act’s general procurement rules which stipulate that bidders should not suffer discrimination.\textsuperscript{95}

The solicitation document should state the methodology and criteria that a procuring entity will use in the evaluating of bids and in deciding the best evaluated bidder.\textsuperscript{96} The procuring entity may only use the methodology and criteria as stated in the solicitation document.\textsuperscript{97} This ensures fairness to the bidders as the criteria on which they are to be

\textsuperscript{90} Public Procurement, Act No.12 of 2008, s.61(1)(e)
\textsuperscript{91} Public Procurement, Act No.12 of 2008, s.61(2)
\textsuperscript{92} Public Procurement, Act No.12 of 2008, s.61(3)
\textsuperscript{93} Public Procurement, Act No.12 of 2008, s.61(4)
\textsuperscript{94} Public Procurement, Act No.12 of 2008, s.50(1)
\textsuperscript{95} Public Procurement, Act No.12 of 2008, s.37
\textsuperscript{96} Public Procurement, Act No.12 of 2008, s.50(2)
\textsuperscript{97} Public Procurement, Act No.12 of 2008, s.50(3)
evaluated is known to them from the very start and enables them to know how best to respond to the invitation for bids, or whether not to respond at all.

When the procuring entity has completed its evaluation they must submit an evaluation report to the appropriate approvals authority.98

(v) Decision to award the contract

The evaluation stage of the procurement process is followed by the taking of the decision to award the contract. The decision to award the procurement contract is to be recommended to the best evaluated bidder as determined by the evaluation process.99 However, this is not taken by the procuring entity but rather the appropriate approvals authority.100 This means that the approvals authority decides who to award the contract to, based on the recommendation by the procuring entity. The recommendation is for the best evaluated bidder as determined by the preceding stage in the procurement process. It should be noted that this decision to award a contract by the approvals authority does not itself constitute a contract.101

(vi) Publication of the best evaluated bidder

The next stage in the process is the publication of who the best evaluated bidder is. Within seven days of the contract being awarded, the procuring entity must prepare a notice indicating the best evaluated bidder and the value of the contract and must send this notice to all bidders who submitted bids in response to the invitation.102 No award of

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98 Public Procurement, Act No.12 of 2008, s.506
99 Public Procurement, Act No.12 of 2008, s.52(1)
100 Public Procurement, Act No.12 of 2008, s.52(2)
101 Public Procurement, Act No.12 of 2008, s.52(3)
102 Public Procurement, Act No.12 of 2008, s.53(1)
a contract is to be made for ten working days following the completion of these requirements.\textsuperscript{103}

(vii) Award of the contract

S.54 makes provision for the award of the contract and s.55 makes provision for the contract itself.\textsuperscript{104} The award of the contract may either be by a written contract document or a letter of bid acceptance which shall be confirmed by the written contract.\textsuperscript{105} The award of the contract may not be made until there has been an award decision by the appropriate approvals authority; until there has been notice of the best evaluated bidder; until there has been confirmation that the procurement is not undergoing administrative review; until there has been confirmation that here is funding for the procurement; and until there has been the receipt of any other approvals required.\textsuperscript{106} Any contract that is awarded contrary to these provisions is rendered void.\textsuperscript{107} The type of contract that is issued is to be determined by statutory instrument.\textsuperscript{108}

(viii) Informing the unsuccessful bidder

After a procuring entity has commenced the contract with the successful bidder, they must inform the other bidders that they have been unsuccessful and the reasons for their decision.\textsuperscript{109} This is to allow for greater participation in the procurement process at future date. It also ensures that the general procurement process is kept as transparent and accountable as possible.

\textsuperscript{103} Public Procurement, Act No.12 of 2008, s.53(2)
\textsuperscript{104} Public Procurement, Act No.12 of 2008
\textsuperscript{105} Public Procurement, Act No.12 of 2008, s.54(1)
\textsuperscript{106} Public Procurement, Act No.12 of 2008, s.54(2)
\textsuperscript{107} Public Procurement, Act No.12 of 2008, s.54(3)
\textsuperscript{108} Public Procurement, Act No.12 of 2008, s.55
\textsuperscript{109} Public Procurement, Act No.12 of 2008, s.56
CONCLUSION

As has been seen the Public Procurement Act 2008 regulates the whole of the tender process, from beginning to end and even beyond into dispute resolution. However, just like any other piece of legislation it is open to interpretation and liable to be flouted by the very institutions which it is tasked to regulate. This shall be seen in the next chapter where ZESCO will be used as the case study.
CHAPTER THREE

INTRODUCTION

This Chapter will focus on the Zambia Electricity Supply Corporation (ZESCO) as the case study to more effectively demonstrate the tender (procurement) process in Zambia.

An interview\(^1\) was conducted with a senior procurement officer at ZESCO and a series of questions were posed to understand and highlight how procurement is carried out at the parastatal body, in line with the provisions and regulations of the Public Procurement Act.\(^2\)

INTERVIEW EVALUATION

Procurement at ZESCO is conducted using the Public Procurement Act No.12 of 2008 including the Public Procurement Regulations, 2011. The regulations explain the principal Act and go into more detail on its provisions, such as stating the prescribed thresholds mentioned in the principal Act, numerically. These prescribe how the whole process is to be conducted from identification of a need to final supply. These direct the institution when conducting its public procurement and enable those tasked with that duty to know what they can and cannot do within the remit of the Act. The procurement department is responsible for public procurement at ZESCO. This department is managed by the Senior Manager. The Senior Manager is supported by two managers; one responsible for local procurement and the other for foreign procurement.

The items procured at ZESCO include transformers; line hardware; various cables, poles and insulators; IT equipment and services; motor vehicles; construction works; and so forth. These items are procured using the open, limited, direct and simplified bidding

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\(^1\) Matthew Ndhlovu, interview by Veronica Oputa, April 6, 2012
\(^2\) Public Procurement, Act No.12 of 2008
methods of procurement. The choice of procurement method is based on the items that are part of ZESCO’s procurement requirements and their availability and accessibility. This means that an item that is in wide supply may be procured using open bidding, calling for all potential suppliers to submit tenders to be evaluated. An item that is not widely available or that is needed urgently may be procured using direct bidding where ZESCO will send an invitation to tender directly to one particular supplier.

ZESCO as a parastatal body is always in the role of procuring entity and never that of bidder or supplier. ZESCO’s procurement requirements are based on the User requirements of the institution which are contained in the annual budget approved by the Board.

Open bidding tenders are advertised in the printing media\(^3\), mostly the Times of Zambia, Zambia Daily Mail and the Post newspaper. The government gazette is the main publication for tenders. The other methods of bidding such as direct and simplified bidding do not require advertisement as the invitation for tenders is extended directly to potential suppliers.

The evaluation stage of the tender process\(^4\) is conducted by an Evaluation Committee which is appointed by the Managing Director. The Committee comprises staff from the Users Department, Technical Experts, Finance Department and the Procurement Department. The evaluation at ZESCO is usually conducted in three stages which comprise the following:

i. Stage 1- This is the preliminary stage which focuses on verifying whether a bidder has the correct document that would provide assurance that they are a registered entity for the purposes of procurement. These documents would include a power of attorney, a bid form, manufacturer’s authorisation, and so forth. Any bid that has a defect at this stage is considered non-responsive and is not considered for the next stage of the evaluation process.

\(^{3}\) Public Procurement, Act No.12 of 2008, s.26(5)(a)

\(^{4}\) Public Procurement, Act No.12 of 2008, s.50
ii. Stage 2- This is the technical stage which focuses on verifying whether specifications have been met without deviations or deficiencies. Any bid that has a defect at this stage is considered non-responsive and is not considered for the next stage of the evaluation process.

iii. Stage 3- This is the commercial stage which determines the commercial responsiveness of the bidder in terms of the delivery period they provide, their payment terms and the price of the procurement. At this stage only the bid that is best evaluated on all the stages is recommended for award to the appropriate authority based on the threshold prescribed by the Zambia Public Procurement Authority.

When a tender is successful, the winning bidder and losing bidder(s) are informed in writing. If there are no objections from the losing bidder(s), a contract is drawn up and the project is monitored until final delivery and payment. Furthermore, the unsuccessful bidder(s) is informed of the reasons which led to their bid being non-responsive as part of enhancing competition for future requirements. The aim is to ensure that bidders are made aware of measures that they can take in the future to be successful in the procurement process with the institution.

If there are any objections, the losing bidder(s) will appeal to the Zambia Public Procurement Authority which may institute an investigation into the decision to award the successful bidder. If the losing bidder is successful in their appeal to the Authority, the Authority will state whatever measures the procuring entity may have to take to correct their erroneous decision.

The procurement process is regulated by the Public Procurement Act which repeals and replaces the Zambia National Tender Board Act. It is a continuation of the Zambia National

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5 Public Procurement, Act No.12 of 2008, ss.52- 56
Tender Board Act and contains similarities with the same. However, there are practical differences experienced by ZESCO between the two Acts. The main differences are that, firstly, bidders have an opportunity to challenge the tender process. If they are unhappy with a contract award decision by the institution they may appeal to the Authority. If they are further unhappy with the decision of the Authority, they may take the matter to arbitration to have the dispute resolved. Secondly, bidders have a right to know why they were not selected. This makes sure that contract award decisions are based on merit rather than favour or some other arbitrary criteria because the institution has to support its decision with reasons. It also means that bidders can take steps that will help towards enabling them to be successful in tender submission in the future. Thirdly, the Public Procurement Act outlines everyone’s roles in the whole cycle of the procurement process where as the old Act did not do so as comprehensively. This means that all major players know exactly what it is that they need to be doing, thus making sure that no part of the tender process goes unchecked.

When asked about the effectiveness of tender regulation in Zambia, the ZESCO procurement officer felt that the regulation would be more effective if the regulator was capable of monitoring its implementation. Currently there seems to be a gap between what the Act stipulates should be done and the duties of the Authority, and what the Authority is actually doing to ensure that institutions are adhering to the Act’s provisions. This has resulted in the rise in the flouting of the regulations by different institutions.

The officer recommended that the penalties should be clearly outlined for flouting the tender laws and the institutions responsible must apply them to ensure compliance.

CONCLUSION

The tender process at ZESCO is completely governed by the Public Procurement Act. Thus, in theory, every member of the procurement department is aware of their duties and the remits of their power under the Act. In addition, as tender regulation is the same across the
board due to adherence to provisions in the Act rather than down to an individual's own mode of practice or successive Senior Managers implementing their own way of carrying out the procurement process, there is uniformity in the system ensuring a smooth and ordered procurement process. This further ensures that bidders are protected from any arbitrary actions of the institution as their tender process is governed by the Act.

In line with the Act they have a procurement committee that is tasked with fulfilling their procurement requirements and inviting the submission of tenders. The arrangement of the procurement department into Senior Manager supported by two managers (for domestic and foreign procurement) is both positive and functional. This is because there is an individual in charge of domestic procurement and an individual in charge of foreign procurement. Thus, areas of expertise are developed to ensure that the individual in charge of each area of procurement knows the process inside out and can ensure the smooth and effective running of his part of the procurement process. This in turn leads to greater efficiency in the ZESCO tender process and reduces mistakes as individuals know their roles and duties intimately.

In addition, ZESCO have an evaluation committee which evaluates the bids that have been submitted in order to recommend the best evaluated bidder to the appropriate approvals authority for the award of the tender contract. According to provisions in the Act, a procuring entity is allowed to choose their own evaluation methodology based on various aspects of their procurement requirement.\(^6\) ZESCO has developed a 3 stage process to thoroughly assess the suitability of each bidder. This makes sure that each bidder has an equal opportunity of having their tender bid assessed and accepted according to an evaluation process that has been used with success for some years in the institution.

\(^6\) Public Procurement, Act No. 12 of 2008, s.50(1)
ZESCO has seen the practical differences between the Zambia National Tender Board Act and the Public Procurement Act. However, as was highlighted from the interview, more can actually be done to ensure that tender regulation in Zambia is more effectively carried out. This will be examined in more detail in the next chapter.
CHAPTER FOUR

INTRODUCTION

As has been seen in the two preceding chapters, tenders in Zambia are regulated by the Public Procurement Act 2008. The Act regulates the whole process from start to finish. In this chapter, recommendations shall be given as to how the law on tenders may be more adequately regulated.

RECOMMENDATIONS

Firstly, the Director-General of the Zambia Public Procurement Authority who is also the Chief Executive Officer of the Authority, should be appointed independent of government so as to ensure security of tenure of their office and true independence to oversee and regulate the public procurement/ tender process.

At present, the Director-General of the Authority is appointed by the President\(^1\), on terms and conditions which the latter shall determine fit. In addition, the Director-General’s office is an office in the public service.\(^2\) The Director-General is also the general supervisor of the inspectorate unit of the Authority.\(^3\) The inspectorate unit monitors procuring entities to ensure that their activities are in compliance with the Act. This effectively means that it is the government policing the government.

The Authority is meant to be an independent, regulatory body ensuring that, \textit{inter alia}, all procuring entities that are undertaking procurement activities are doing so in keeping with the regulations stipulated in the Act. Procuring entities are either government agencies, parastatal bodies, or other organisations that are tasked with functions that involve them using

\(^1\) Public Procurement, Act No.12 of 2008, s.7(1)

\(^2\) Public Procurement, Act No.12 of 2008, s.7(1)

\(^3\) Public Procurement, Act No.12 of 2008, s.9(1)
public funds. Thus, these entities come under the general umbrella of the government. Their activities are being monitored by a unit that is headed by a government appointed agent. As such, it is difficult to ensure that there is complete impartiality in the oversight function that the Director-General of the Authority, as supervisor of the inspectorate unit, is meant to operate.

This research recommends that the Director-General be appointed independent of the Government and of the President to ensure that in carrying out his direct and oversight duties, he may do so free from the threat of losing office or of incurring censure. This way, there is more of a guarantee that he is executing his duties correctly, effectively and extensively.

Secondly, the Government should ensure that the Zambia Public Procurement Authority starts operating as a regulatory authority as envisaged by the Act. Currently, the Authority cannot be recognised as a regulatory authority because it is also involved in the procurement process of Government and statutory bodies in procurements which are above stipulated thresholds.

The Authority should ensure that the procurement thresholds for Government ministries and statutory bodies are removed completely to allow them to procure all goods, works and services on their own without referring to the Authority.

The involvement of the Zambia Public Procurement Authority in the procurement process has resulted in a lack of impartiality on their part when resolving problems associated with disregard to the procurement regulations by procuring entities because at a certain stage they will also be involved in the procurement process. Thus, the line between regulator and the regulated becomes blurred.
An example of this is where the Authority has been mentioned in the recent Commission of Inquiry into the operations of the Energy Regulation Board on the procurement of fuel for the period 2007 to 2011. It was alleged by the Commission that two trillion Kwacha was lost by the Government due to none adherence to procurement procedures and corrupt practices by some individuals involved in the procurement process. The Zambia Public Procurement Authority was mentioned in the Commission’s report.

This is defeating the mission of the Authority which is to regulate and monitor procurement procedures as envisaged by the Act. It is hard to see how the Authority can regulate and control practices in public sector procurement if they themselves are also involved in the procurement process. The Government has again reconstituted the Central Tender Committee in Circular No.2 dated 6th February 2012 from the Ministry of Finance. This clearly shows that the Authority will continue to be involved in the procurement process which defeats its role as regulator.

Thirdly, this research recommends that there should be recourse to the courts in situations where bidders are dissatisfied, as opposed to arbitration only. This would ensure that the bidders need not only rely on contractual issues to have their tender-related litigation dealt with (as discussed in Chapter 1) and will ensure that a body of case law is developed that will provide adequate protections for bidders in the tender process.

Arbitration is provided for in Part VIII of the Act. A bidder that is dissatisfied with a decision of a procuring entity may appeal against the decision in issue to the Zambia Public Procurement Authority (the ‘Authority’). For such an appeal to be accepted by the Authority it should be submitted within ten working days from the date the aggrieved bidder was aware

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4 Kombe Chimpinde, “Rupiah, James in Trouble over Oil,” The Post Newspaper, April 18, 2012
5 Public Procurement, Act No.12 of 2008, s.70(1)
of the circumstances that produced the dissatisfaction or from the date that the bidder should have been aware, whichever is the earlier date.\(^6\)

Where there is no dismissal of the application or resolution between the bidder and the procuring entity, there are certain steps the Authority will take.\(^7\) Upon receipt of the application the Authority shall begin an investigation.\(^8\) In addition, the Authority shall ensure that no contract is awarded before the application has been resolved.\(^9\) Furthermore, the Authority shall give a written decision within ten working days of the application being submitted.\(^10\) This decision will state whether or not the application has been upheld or dismissed; the reasons for such decision; and any corrective measures that should be taken by either the procuring entity or the bidder.\(^11\) A bidder that is further dissatisfied by the decision of the Authority may submit the issue to arbitration in accordance with the Arbitration Act.\(^12\)

On the face of it the provisions of Part VIII seem more than fair and effective. Decisions made by procuring entities may be reviewed by the Authority and through the process of arbitration dissatisfied bidders may have recourse to relief. In addition, the timeframe in which they have to wait for decisions is quite short which is advantageous in business where delays may often mean a loss of money. However, the fact that a bidder must themselves bring an application within ten days may sometimes prove unfair especially in light of the fact that those ten days may be calculated from the date that they should have been aware of the grievous decision.

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\(^{6}\) Public Procurement, Act No.12 of 2008, s.70(3)
\(^{7}\) Public Procurement, Act No.12 of 2008, s.70(4)
\(^{8}\) Public Procurement, Act No.12 of 2008, s.70(4)(a)
\(^{9}\) Public Procurement, Act No.12 of 2008, s.70(4)(b)
\(^{10}\) Public Procurement, Act No.12 of 2008, s.70(4)(c)
\(^{11}\) Public Procurement, Act No.12 of 2008, s.70(5)
\(^{12}\) Public Procurement, Act No.12 of 2008, s.71
The issue with arbitration is that if it is compulsory and binding as between the parties, they effectively waive their rights to have the matter heard in court and thus to have a judge decide their case. Even if the arbitration between the parties is not mandatory, this form of dispute resolution means that there are very limited courses of appeal, meaning that it is difficult to have decisions overturned or set aside. Therefore, it is this research’s recommendation that the Act, which is the principal regulatory force of the public procurement/tender regime, should stipulate recourse to the Zambian courts of law for dissatisfied bidders to bring actions challenging tender awards. In this manner, bidders would be able to have decisions that they feel were not correctly arrived at overturned or set aside on appeal. At the very least it would ensure that all legal avenues have been exhausted.

The fourth recommendation is that there be adequate and proper training provided to the relevant staff at the Authority. As shown in Chapter 3, one sentiment about the current public procurement/tenders regime is that there appears to be a gap between what the Act stipulates should be done and the duties of the Authority, and what the Authority is actually doing to ensure that procuring entities are adhering to the Act’s provisions. At present, there have been incidences of procuring regulations being flouted by institutions as a result of the Authority, as regulator, not being able to effectively monitor the implementation of the Act’s provisions.

One way of combating this is to ensure that all staff at the Authority are aware of its jurisdiction and functions and are aware of the measures that need to be taken to ensure that their duties as regulator are discharged with. The Act provides that the Authority may
collect any data and report from procuring entities; access information, documents, records and reports of a procuring entity...; access...the premises of any procuring entity...and request for any relevant information...\textsuperscript{13}

Thus, the Authority is given wide, legal powers to monitor the implementation of provisions of the Act but this is not always being done. To bridge the gap staff should be taught in detail the provisions of the Act; be trained in various areas, such as IT, to enable them to carry out their regulatory functions; and they should be offered support and assistance from other law enforcement agencies such as the police to enable them to best carry out their functions free from fear of threat. This will enable the Authority to adequately and effectively monitor implementation of the provisions of the Act to better regulate the law of tenders.

Fifthly, this research recommends that procuring entities be allowed to make the decision to award contracts based on their evaluation of the tenders submitted. Under the current procurement regime, the decision to award a contract is taken by the appropriate approvals authority of the procuring entity.\textsuperscript{14} The best evaluated bidder shall be recommended to the approvals authority.\textsuperscript{15} Although this decision by the approvals authority does not itself constitute a contract\textsuperscript{16}, it is one of the necessary conditions provided for in the Act, for a contract award to be made.\textsuperscript{17} Without it, any contract purported to have been made between a procuring entity and a bidder is void.\textsuperscript{18}

At every other stage in the procurement process, as has been seen from chapter 2 of this research, the procuring entity is fairly autonomous in the procurement process with the

\textsuperscript{13} Public Procurement, Act No.12 of 2008, s.6(3)(a)-(c)
\textsuperscript{14} Public Procurement, Act No.12 of 2008, s.52(2)
\textsuperscript{15} Public Procurement, Act No.12 of 2008, s.52(1)
\textsuperscript{16} Public Procurement, Act No.12 of 2008, s.52(3)
\textsuperscript{17} Public Procurement, Act No.12 of 2008, s.54(2)(b)
\textsuperscript{18} Public Procurement, Act No.12 of 2008, s.54(3)
proviso that they are adhering to the Act. As such, they should be allowed to take the contract award decision themselves. Of course from the abovementioned wording of s.52, an approvals authority cannot arbitrarily ignore the procuring entity’s recommendation of the best evaluated bidder. However, it stands to reason from interpretation of the statute that the fact that the approvals authority is mandated as decision maker means that they are able to, in circumstances undefined, to decide a contract award to another bidder.

Thus, it is a recommendation of this research that the procuring entity which is involved from start to finish in the procurement process, should be allowed to take the contract award decision themselves. They are the party that know best their own procurement requirements, their own evaluation method mentioned in the solicitation documents, and the bidder best suited to supply their needs. The Authority is there to regulate the procurement process and ensure adherence to procurement rules. Thus, it is unclear why the approvals authority is necessary to take a decision that they did not implement any steps to arrive at.

CONCLUSION

The law on tenders in the Zambian jurisdiction is a dichotomy of both the simple and the complex. On the one hand it is almost entirely regulated by statute which provides relief for disgruntled bidders in the form of applying to the Authority and finally taking the dispute to arbitration, thus effectively precluding the matter from being dealt with by the Courts with recourse to an appeals system. On the other hand, one finds that parties are finding other ways to bring their tender-related matters to Court by arguing other aspects of the case such as the contractual elements. Thus, it would appear that the law on tenders needs to be re-evaluated not just in relation to the recommendations discussed above regarding the Act, but also in relation to providing the Courts as a form of dispute resolution in the tender process.
This will hopefully give birth to a body of case law that will supplement and assist the statutory provisions for the public procurement regime.
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