

## **FOREWORD TO THE DRAFT RULES OF THE IRC**

These draft rules are intended to embrace simplicity and brevity, in equal proportion. The two concepts are based on the notion that quasi-judicial procedures are not the exclusive domain of legal practitioners, and the avowed purpose behind such procedures is often the need to avoid drawn-out and overly technical processes.

The drafter is not aware of any legal formalities to be complied with prior to promulgation of the rules, and believes that publication in the agency's website would be adequate. It might also be a good idea to publish the rules in the Gazette. I leave this in the hands of the Agency.

It is always a good idea to get some kind of feedback from stakeholders. In this context I have shared the draft with all members of the present panel, with a view to elicit comments and suggestions from them, seeing that they have a practical perspective to the work of the IRC. I am immensely grateful to the panellists for their useful comments and suggestions, and I have incorporated them in the final draft.

T. M. Mlangeni

# **RULES OF PROCEDURE FOR THE IRC**

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## **RULES OF PROCEDURE**

For: Independent Review Committee of SPPRA, promulgated in terms of Section 16 (3) of The Procurement Act No. 11, 2011.

### **1. CITATION.**

These rules may be cited as “Independent Review Committee Rules of Procedure” – IRC r p.

### **2. INTERPRETATION.**

In these rules and the attached forms –

“Act” means The Procurement Act No. 7 of 2011.

“Agency” means Swaziland Public Procurement Regulatory Agency (SPPRA).

“IRC” means Independent Review Committee.

References to “Sections” relate to The Procurement Act.

### **3. EFFECTIVE DATE.**

These rules shall come into effect on the 1<sup>st</sup> day of July 2017 and will be published in the Agency’s website and once in the Gazette.

### **4. RIGHT TO SEEK ADMINISTRATIVE REVIEW.**

Any person or entity being a tenderer who is dissatisfied with the decision of a procuring entity in respect of a specific tender or tenders may institute review process in terms of Section 48 read together with Section 49 of the Act.

**5. FORMAT OF APPLICATION FOR ADMINISTRATIVE REVIEW.**

- 5.1 The process shall be in the form of an application in writing which shall, as far as possible, be in accordance with the format in IRC Form 02.
- 5.2 The process shall comprise a statement of facts in not more than five hundred (500) words.
- 5.3 The statement of facts does not have to be under oath but requires to be certified as correct by those that make it.

**6. CONTENT OF THE STATEMENT OF FACTS.**

The statement of facts which the applicant relies upon for the relief that they seek shall be sufficiently informative regarding the factual and legal basis for the application.

**7. CHIEF EXECUTIVE OFFICER OF SPPRA TO ENSURE THAT APPLICATION IS WITHIN STIPULATED TIME LIMIT.**

- 7.1 Upon receipt of the application for review the Chief Executive Officer of SPPRA shall satisfy himself that the application is within a period of ten (10) working days from date when the decision sought to be reviewed was made or taken.
- 7.2 The calculation of ten (10) working days shall, for the avoidance of doubt, exclude public holidays and weekends.
- 7.3 An application that is received after the ten day period shall be liable to be rejected forthwith, such rejection to be in writing and the reason thereof stated unequivocally.
- 7.4 The decision to reject a late application shall be taken by the Chief Executive Officer after due consultation with the IRC.

**8. PROCEDURE AFTER RECEIPT OF APPLICATION BY CHIEF EXECUTIVE OFFICER OF SPPRA.**

8.1 Upon receipt of an application that is within the stipulated time limit the Chief Executive Officer of the Agency shall make and forward legible copies thereof, together with all annexures and attachments if any, to the procuring entity and all other interested parties.

8.2 The application shall be forwarded under cover of IRC Form 03.

**9. RESPONSE BY PROCURING ENTITY.**

9.1 The procuring entity shall, within a period of ten (10) working days, present to the agency a written response to the application, together with relevant annexures and attachments. The attachments and annexures need not be originals.

9.2 Copies of the procuring entity's written response, together with attachments and annexures if any shall be served upon the applicant and all other interested parties prior to filing with the Agency.

**10. REPLY BY THE APPLICANT.**

10.1 The Applicant may file its written reply within a period of three (3) working days of receipt of the Respondent(s) written responses.

10.2 Other interested parties who are involved in the proceedings shall also file their papers if any, within the period of three (3) working days.

11. Documents may be filed electronically, in which case they shall be for purposes of reading only (pdf).

**12. POINTS OF LAW.**

12.1 A Respondent or Respondents may raise points of law without addressing the factual averments that have been made by the Applicant.

12.2 In the event that a Respondent or Respondents raise points of law only, without pleading over, it shall be deemed to have waived its right to respond to the factual allegations.

**13. INTERVENTION BY A PARTY NOT CITED IN THE PROCEEDINGS.**

13.1 Any party with a direct and substantial interest in the subject matter of the application and/or the outcome thereof who is not cited therein may make written application to the IRC for leave to intervene as a party in the proceedings.

13.2 The application for leave to intervene must be made within a period of three (3) working days of becoming aware of the proceedings for review, and must be served upon the Applicant and all other interested parties that the intervening party is aware of.

**14. APPLICATION TO INTERVENE TO BE DETERMINED PRIOR TO THE MAIN APPLICATION.**

An application for leave to intervene shall be determined prior to the main application, and the IRC may make such orders thereon as it deems fit, in respect of filing further papers by any of the parties.

**15. MEETING FOR THE PURPOSE OF SETTING DATE OF HEARING ORAL SUBMISSIONS / ARGUMENTS.**

The IRC shall convene a meeting of all parties involved in the proceedings, upon reasonable notice, for the purpose of determining the date, time and place for hearing oral representations.

## **16. REQUEST FOR ORIGINAL DOCUMENTS.**

- 16.1 At the meeting referred to in Rule No. 15 above the IRC may require the procuring entity or any other party or entity not a party to the proceedings to avail to it original documents which are of relevance to a determination of the matter before it.
- 16.2 The request for original documents may be made at any other time prior to the conclusion of oral submissions.
- 16.3 The request for original documents must be specific as to date and / or content.
- 16.4 In the event that the entity required to furnish documents is not a party to the proceedings the request must be in writing and there must be proof of delivery of the written request upon a competent person.
- 16.5 The party or entity required to avail documents shall do so without undue delay.
- 16.6 A party or entity who, without reasonable justification , fails or refuses or neglects to comply with a request for documents may be subjected to such punitive measures as the IRC may deem fit, including but not limited to financial sanction, which shall be for the credit of the Agency.

## **17. LIMITATION UPON ORAL SUBMISSIONS.**

At the hearing of oral submissions on behalf of the parties each party shall be accorded a maximum of two hours (2hrs), and in the case of reply thirty (30) minutes.

## **18. ORAL EVIDENCE.**

- 18.1 If, during the hearing of oral submissions, it becomes apparent to the IRC that oral evidence is required in respect of a specific issue or issues, the IRC may in its sole discretion order that such evidence be led, upon reasonable notice and upon such terms as it may deem fit, and to that end the hearing may be postponed to a later date.

18.2 Where oral evidence is required the rules of evidence shall apply.

**19. AMENDMENT.**

Parties shall not be allowed to amend their papers without leave being granted by the IRC during the hearing of a matter.

**20. POSTPONEMENTS.**

20.1 Once a date of hearing is set, postponement may be allowed upon proper motivation by the party who requires a postponement.

20.2 Written notice of postponement is to be furnished in advance of the date of hearing.

20.3 Postponements cannot be arranged electronically but must be motivated at the scheduled hearing.

**21. NON-APPEARANCE BY A PARTY.**

If a party does not appear at a scheduled hearing and does not furnish reasonable explanation in advance, the hearing shall proceed in the absence of such party and an appropriate ruling or decision made by the IRC.

**22. JUDGMENT TO BE IN WRITING.**

22.1 Judgments of the IRC shall be in writing and signed by all the sitting members of the IRC.

22.2 Within a period of ten (10) days of handing down of judgment, it should be uploaded on the Agency's website.

22.3 Judgements shall be delivered to parties and all other interested parties within a period of fifteen (15) working days after the last hearing of the matter.

22.4 Judgements shall incorporate the reasons for the decision. If the application is granted, the relief or orders granted shall be stated in clear and precise terms.

**23. JUDICIAL REVIEW.**

A party who wishes to obtain judicial review of an IRC decision shall institute appropriate proceedings within a period of ten (10) working days from date of the IRC decision or judgment. This period may only be extended by leave of the review court.

**24. JUDICIAL REVIEW NOT TO GRANT AUTOMATIC STAY OF EXECUTION.**

24.1 The instituting of proceedings for judicial review shall not automatically have the effect of staying execution of IRC judgment or decision.

24.2 The review court may, upon application, make an order for interim stay upon such terms as it may deem fit.

**25. RECORD OF PROCEEDINGS.**

25.1 The Secretariat of the Agency shall keep an electronic record of all proceedings of the IRC, including interlocutory hearings.

25.2 Such record shall be produced in print in the event that it is required.

26. These rules shall apply, with necessary modifications (*mutatis mutandis*), in respect of appeals in terms of Section 57 of the Act.

**FORM IRC 01**

**DECLARATION BY IRC MEMBER, TECHNICAL SPECIALIST OR STAFF  
I.T.O. SECTION 50(7) OF THE PROCUREMENT ACT, 2011**

In the matter of:-

.....Applicant

And

.....1<sup>st</sup> Respondent

.....2<sup>nd</sup> Respondent

.....3<sup>rd</sup> Respondent

Before:-

.....Chairperson

.....Member

.....Member

I, the undersigned, hereby solemnly declare that I have no interest, direct or indirect, in the outcome of the above-captioned review or matter.

Full Names(s):-.....

Signature:-.....

Date:-.....

**FORM IRC 02**

(APPLICATION FOR ADMINISTRATIVE REVIEW ITO SECTION 49)

To: Chief Executive officer

Swaziland Public Procurement Regulatory Agency (SPPRA)

.....

..... physical address

.....

1. Date received by SPPRA.....signature & stamp.....
2. Date of decision sought to be reviewed.....

(attach copy)

If decision not made, last date upon which such decision should have been made.....

3. Full Particulars of Applicant, including physical address

.....

.....

.....

e-mail

4. Full Particulars of Respondent(s), including physical address(es)

1<sup>st</sup> Respondent.....

.....

.....e-mail

2<sup>nd</sup> Respondent.....

.....

.....e-mail

3<sup>rd</sup> Respondent.....

.....  
.....e-mail

4<sup>th</sup> Respondent.....  
.....  
.....e-mail

Further Respondents .....

5. Full particulars of the Tender

.....  
.....  
.....

6. Summary of Relevant Facts/Cause/Concerns (not more than five hundred words)

7. Relief sought

(i).....  
(ii).....  
(iii).....

8. Certification by Applicant / on behalf of Applicant.

I, the undersigned, hereby certify that the information given above is true and correct in every material respect.

Full Name:..... Capacity:.....

Signature:.....

9. Date on which IRC decision / judgment entered.....

**FORM IRC 03**

**(NOTIFICATION TO PROCURING ENTITY ITO SECTION 49(3) (a))**

To: The Principal Secretary / Chief Executive Officer

.....

.....

.....

e-mail

1. Kindly receive herewith an application for administrative review on behalf of

.....

(name of applicant)

2. In terms of Section 49(3)(b) you are forthwith prohibited from awarding a contract in respect of tender.....until completion of the administrative review process.
3. Take further notice that an independent review committee shall immediately be convened to investigate and decide on the application. You will be notified of the membership of the Independent Review Committee as soon as it is convened.

Chief Executive Officer

SPPRA

Signed:..... Date Stamp:.....