



TradeMark Africa
Sanctions Policy

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TMA Sanctions Policy

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1. PREAMBLE

TMA Regulations – D. Procurement	
Sanctions Policy	
57. TMA may decide to sanction a supplier where there is demonstrable evidence of:	
a. The supplier undertaking unethical, illegal, corrupt, or fraudulent activities in connection with a TMA contract or a TMA-funded project; or	
b. Persistent poor performance by the supplier under a TMA contract or a TMA-funded contract in terms of quality of work or goods delivered, including consistently late delivery.	
58. TMA shall not contract any supplier who at the time has been sanctioned by a TMA donor, the World Bank or a Government with whom TMA has a Memorandum of Understanding.	
59. For the avoidance of doubt regarding the reference to “supplier” in Regulation D57 and D58, TMA may sanction any company, any director or directors of a company, any sole trader, or any individual, as the circumstances may require.	

2. INTRODUCTION AND OBJECTIVES

The need to manage the conduct of tenderers, suppliers, service providers and contractors is a key measure for good governance and to attain this, TMA has established a regime for the sanctioning of firms and individuals that are found to have engaged in specified forms of sanctionable activities in connection with TMA financed or executed projects. TMA has a **Fiduciary Duty** to ensure that its funds are used only for their intended purposes and in furtherance of this duty, TMA has developed this sanction policy.

Sanctions serve to create both negative incentives to discourage the sanctioned party and others from engaging in future Sanctionable Practices and positive incentives to encourage prevention, remediation and rehabilitation. Possible sanctions include restitution, settlement, reprimand, cooling off periods and permanent debarment.

The objectives of the Sanctions System are to help protect the integrity of TMA operations and ensure that the proceeds of TMA financing are used only for the purposes intended.

Sanctions are intended to deter but not to punish. Sanctions are not intended to replace criminal, civil or administrative measures by national authorities or other forms of legal recourse or remedy. All decisions and actions taken by TMA and its representatives in regard to the presentation and the adjudication of allegations of Sanctionable Practices, and imposition of Sanctions, therefore, are guided by the foregoing objectives.

3. DEFINITION OF TERMS

“Alleged Offender” refers to a party that is subject to sanctions review process. It could be individual, a company, an association or other body of persons whether incorporated or unincorporated.

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“Sanctions policy” refers to the TMA regulations that prevent certain suppliers or contractors from participating in TMA procurement processes due to past misconduct or failure to meet specific standards.

“Sanctionable Practice” means a:

- i. corrupt, fraudulent, coercive, collusive or obstructive practice, as such terms are defined in the TMA Anti-Corruption policy [\(link\)](#) and TMA’s supplier code of conduct [\(link\)](#).
- ii. Persistent poor performance by the supplier under a TMA contract or a TMA-funded contract in terms of quality of work or goods delivered, including consistently late delivery as defined in TMA procurement Policy or relevant supplier contract.

“Sanctions Committee” means the TMA Committee responsible for reviewing reports on investigations into sanctionable practices, sanctions requests and approving certain types of sanctions and or recommending to the Board for approval certain types of sanctions.

“Sufficient evidence” means evidence sufficient to support a reasonable belief, taking into consideration all relevant factors and circumstances, that it is more likely than not that the alleged offender has engaged in a sanctionable practice.

“Sanction List”: A list of service providers, contractors or suppliers who are sanctioned by TMA which the procurement unit must check before awarding contracts. The list may be publicly shared by TMA via the TMA website.

4. SANCTIONABLE PRACTICES

The following will form grounds for supplier Sanctioning:

- i. Committing irregular or fraudulent activities as described in the TMA’s prevention of corruption policy and TMA supplier code of conduct.
- ii. Failing to comply with specified conditions as outlined in the bid or contract document.
- iii. Committing of an offence which is inconsistent with the Supplier code of Conduct of TMA and/or statutory regulations.
- iv. Persistent non-performance in terms of quality of work/goods delivered, late delivery in contravention of contractual obligations.
- v. Where the service provider has been convicted of an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction.
- vi. A conviction in respect of a related criminal activity, by a competent court of law or a quasi-judicial body recognised by TMA.
- vii. Sanction by TMA’s donor or a multi-national donor or donor agency or a government where TMA has offices.
- viii. Provision of false information in the procurement or asset disposal process, to gain unfair advantage over other service providers.

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- ix. Any other ground as TMA may determine fit.

5. SANCTIONING PROCEDURE

5.1 Initiation of Sanctions process

TMA may receive information or allegations of a supplier committing sanctionable practices from various sources, including:

- a) The Head of procurement, following the conclusion of a procurement process or a supplier performance appraisal or a due diligence process.
- b) The Director of Governance, Risk and Compliance following a compliance review.
- c) The Head of Safeguarding on matters relating to breach of projects safeguarding standards.
- d) Director of Audit and Assurance based on results of an investigation.
- e) A law enforcement agency.
- f) TMA's whistleblowing channels.
- g) Any other party.

All requests for sanctions **shall** be presented to the Director of Audit and Assurance for preliminary screening before submission to the Sanctions Committee. In undertaking the preliminary screening, the Director of Audit and Assurance shall consider the following:

- a) Whether the allegations presented relate to a sanctionable practice as defined under this policy.
- b) Whether the allegations are credible enough to warrant a viable investigation.
- c) Whether there is an ongoing sanctions process against the vendor – in such circumstances, the Director of Audit and Assurance may propose that the new matter is consolidated with the ongoing case.
- d) On matters of supplier performance, whether the Head of Procurement has adhered to the requirements set out under contract management guidance on documenting the alleged poor performance.

On conclusion of the screening process, the Director of Audit and Assurance shall:

- a) Notify the Director Governance, Risk and Compliance to constitute a Sanction Committee - such a committee shall have a minimum of three members and a maximum of five, all of whom must be TMA staff and hold a position of Director and above and are not conflicted in the case under consideration. The committee shall be chaired by a SLT member.
- b) Prepare a sanctions case summary and submit the same to the Sanctions Committee. The Director of Audit and Assurance can recommend the following at this stage:

a) Proceed with sanctions process where:

- i. In the case of poor performance – There is sufficient evidence, and the Head of Procurement has adhered to the requirements on contract management on documenting the same.

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- II. In the case of fraud and corruption allegation – Director of Audit and Assurance has concluded an investigation, and the allegations of fraud and corruption have been substantiated.
- III. A competent authority has concluded investigations into sanctionable practices and judgment issued against the alleged offender.
- IV. The request is as a result of a sanctions decision by the World Bank and/or a similar organisation or other competent authority recognised by TMA.

b) Undertake investigations where:

- I. Allegations of sanctionable practices are credible but insufficient evidence is available – in such cases this will follow the TMA investigations process – as provided for in the Audit and Assurance manual.

c) No action required where:

- I. The request presented does not relate to a sanctionable practice or where it does, the information provided is not credible, sufficient or would not support a viable investigation.

5.2 Investigations

On receipt of the screening report from the Director of Audit and Assurance, the Sanctions Committee can proceed as follows:

- a) Commence the sanctions review (see section 5.3).
- b) Mandate the Director of Audit and Assurance or any other party to proceed with the investigations, where in the Committee's opinion the allegations warrant an investigation notwithstanding the recommendation from the Director of Audit and Assurance.

Investigations shall be undertaken in line with the TMA investigations process – as provided for in the Audit and Assurance manual. TMA investigations are not of a criminal nature, but rather administrative proceedings. TMA Investigations are required only to present “adequate evidence,” i.e., sufficient facts to permit a reasonable inference that a violation has occurred. The standard of proof required in all cases will be on the balance of probability.

5.3 Case Review procedure

In reviewing each case, the Sanctions Committee shall follow the following procedure:

- a) The Committee shall analyse a case within 30 days from the date of receipt of notification by DAA to determine whether there is a prima facie case for sanctioning.
- b) If the analysis establishes a prima facie case for sanctioning, the Committee shall issue a notice of intended sanctioning to the alleged offender, who shall be the subject of the sanction's proceedings requiring them to file a written response with the Committee.

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- c) The notice of intended sanctioning shall contain the grounds for the sanctions, a brief statement of the facts in support of the sanctions and the consequences that may arise from the sanctions.
- d) The alleged offender shall within 14 days of receipt of a notice of intended sanctioning, file a written response with the Committee. Where the facts of the intended sanctioning are contested, the Committee shall within 30 days of receipt of the response from the alleged offender hold a sanction hearing to determine the disputed facts.
- e) A notice of not less than 7 days shall be given to the alleged offender to appear before the Committee for hearing. The alleged offender shall be provided an opportunity to state their case before the committee or appoint another party to present their case. Where the alleged offender chooses to be represented by another party TMA shall not be liable to pay any attendant expenses.
- f) On conclusion of the sanctions hearing, the Committee shall prepare a report of its findings and recommendations and make determination on the request for sanctioning within 30 days from the date of hearing.
- g) The decision of the Committee shall be communicated to the parties involved in the sanction's proceedings within 7 days of determination.

Overall, in determination of sanctioning cases, the Committee shall have due regard to the principles of natural justice and may from time to time formulate its rules of procedure as deemed necessary.

5.4 Sanctions Decisions

Arising from the case review process of the Committee, the Committee may make the following decisions.

- a) **Exonerate alleged offender and strike out the request for sanctions:** Where the Committee makes a determination that the alleged offender did not engage in a sanctionable offence, the Committee shall issue a decision exonerating the alleged offender from the alleged ground(s) from sanctioning.
- b) **Sanction the Offender:** Where the Committee makes a determination that the alleged offender was in violation of any sanctionable offence the Committee shall proceed to sanction the offender with the relevant range of sanction as provided for in section 7 of this policy depending on the severity of the matter; In making a determination on the type of sanction, the Committee may consider the following circumstances.
 - i. Magnitude of loss or actual or potential harm arising from the identified grounds for sanctions.
 - ii. Frequency and history of repeat misconduct by the alleged offender.
 - iii. Actions undertaken by the alleged offender to mitigate the harm or damage including voluntary corrective action.
 - iv. Pervasiveness of the actions by the alleged offender
 - v. Level of positions held by persons contravening the identified grounds for sanctions – the higher the seniority, the more severe the sanctions.
 - vi. The nature of involvement and whether the Directors or Executives of the Alleged offender condoned the sanctionable practice.
 - vii. Where an investigation was undertaken, the extent of cooperation with the investigations team.

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- viii. Action taken against individuals responsible for the misconduct in the alleged offenders organization.
 - ix. Recognition of the harm caused and institution of measures to mitigate future occurrences.
 - x. Any other matters that may be sufficient to establish the applicable range of sanctions.
- c) **Any other decision:** The Committee may make any other decision that it considers will meet the ends of justice in matters sanctioning.

5.5 Appeal to sanctions

- a) A sanctioned party shall have the right to appeal a sanctions decision to TMA's Board. An appeal must be submitted to the Audit, Finance and Risk Committee of the TMA Board (AFRC) within 30 days of receipt of the sanction's decision.
- b) On receipt of the appeal the chair of the AFRC shall refer the matter to an independent consultant duly appointed by the AFRC to hear such appeal.
- c) AFRC shall maintain a shortlist of independent consultants who must hold requisite qualifications in arbitration and registered with the relevant authority within their jurisdiction.
- d) Prior to the appointment for the hearing, the sanctioned party shall be informed of the independent consultant involved in the process, before commencement.
- e) The sanctioned party may appear in person for the appeal process or appoint a third party to make submission on its behalf. Where the alleged offender chooses to be represented by another party TMA shall not be liable to pay any attendant expenses. The independent consultant shall consider whether the Sanctions Committee has adhered to the regulations and guidelines contained herein, and whether additional relevant evidence has become available that may change the decision. They will make a determination and submit recommendations to the AFRC within 21 days of their appointment.
- f) The AFRC will consider the recommendations of the independent consultant and make a final determination which will be limited to the following:
 - i. Upholding the Sanctions Committee's decision and the type of sanction.
 - ii. Upholding the Sanctions Committee's decision but varying the type of applicable sanction.
 - iii. Annulling the Sanctions Committee's decision.
- g) The Chair of AFRC will communicate the final decision to the alleged offender within 7 days of the determination of the appeal.

The TMA Board will be notified of all sanction decisions during its regular quarterly meetings.

5.6 Consequences of a Sanctions decision

Where an entity/consultant is sanctioned – (refer to section 7 on range of sanctions and duration of such sanctions).

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- a) They shall not be relieved of the obligations under any contract entered into with TMA before the sanctions.
- b) The sanctions shall also apply to the successor in interest of the sanctioned entity and where the sanctioned entity is a company or partnership, the sanctions shall apply to the directors and partners of that company or partnership.
- c) The same shall extend to any legal entity in which the sanctioned party has a controlling interest before or after the sanctions are imposed.

5.7 Uplifting of Sanctions:

The Sanctions Committee, on good reasons and grounds may recommend to the AFRC uplifting of a sanctions earlier imposed on a supplier. The Committee must show, document and give justification for uplifting the restriction. Such justifications could include satisfactory implementation of a compliance and integrity reform programme.

6. ROLES AND RESPONSIBILITIES OF PARTIES INVOLVED IN THE SANCTION PROCESS

6.1 TMA Procurement Unit

The Procurement unit through the Head of Procurement shall: -

- (a) Monitor and document vendor performance.
- (b) Submit requests for supplier sanction to the sanctions Committee.

6.2 Audit and Assurance Unit

The audit and assurance unit shall: -

- (a) Receive all initial requests for sanctions for screening purposes
- (b) Prepare a sanctions screening report for submission to the Sanctions Committee
- (c) Undertake/ supervise investigations of alleged sanctionable practices.

6.3 Director Governance, Risk and Compliance

- (a) Constitute a sanctions committee

6.4 Sanctions Committee

The Committee shall: -

- (a) Analyse request for sanctions submitted by Director of Audit and Assurance.
- (b) Hold a sanction hearing for contested sanctions process.
- (c) Prepare a report of its findings and recommendations.
- (d) Make a determination on the request for sanctions
- (e) Prepare and present to the Board quarterly and annual reports as applicable

6.5 Audit Finance and Risk Committee of the Board

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- (a) Receive appeals from sanctioned firms and appoint an independent consultant to hear the appeal.
- (b) Consider the recommendations of the independent consultant and make a final determination on the sanctions appeal process.
- (c) Receive quarterly and annual reports of the sanction's proceedings.

7. RANGE OF SANCTIONS

- A. Letter of Reprimand:** A Letter of Reprimand should most often be used to sanction an affiliate of the Alleged offender that was only guilty of an isolated incident of lack of oversight.
- B. Settlement—**Applied in exceptional circumstances, including those involving fraud in contract execution where there is a quantifiable amount and other type of sanctions are not applicable.
- C. Cooling off period with Conditional Release:** Cooling off period with conditional release means that the vendor cannot transact business with TMA until certain conditions are met. The purpose of the conditional release is to encourage the alleged offender's rehabilitation, to mitigate further risk to TMA-financed activities. Accordingly, the alleged offender will only be released from sanctions after (i) the defined sanctions period lapses, *and* (ii) the alleged offender has demonstrated that it has met the conditions set by the Sanctions Committee. Alleged offenders may not be released prior to the defined sanctions period, even if they meet the conditions prior to the period's lapse, but if so specified, compliance with certain conditions such as cooperation or remedial measures may lead to a reduction in the sanctions period. If the defined cooling off period exceeds 3 years, the alleged offender may, after 3 years, petition the Sanctions Committee for reduction of the period upon a demonstration of meeting the conditions enumerated by the Committee. Conditions imposed may include:
 - i) Implementation or improvement of an integrity compliance program; and
 - ii) Remedial measures to address the misconduct for which the alleged offender was sanctioned, including disciplinary action or termination of employee(s)/officer(s) responsible for the misconduct.

The Director of Audit and Assurance verifies whether conditions have been met. In case of poor performance, the Head of Procurement may seek references from clients where the offending party has recently provided services. Determinations of compliance by the Sanctions Committee are not subject to appeal.

- D. Cooling off for a defined period** TMA may apply this sanction if there would be no reasonable purpose served by imposing conditions. This would occur, for example, in cases where a sanctioned firm has already in place a robust corporate compliance program.
- E. Permanent Debarment:** Permanent debarment is generally only appropriate in cases where it is believed that there are no reasonable grounds for thinking that the alleged offender can be rehabilitated through compliance or other conditionalities. It is anticipated

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that permanent debarment would most commonly be applied to natural persons, closely held companies by such persons and shell companies.

Considerations for the type of sanction applicable

Cumulative Misconduct: Where the alleged offender has been found to have engaged in factually distinct incidences of misconduct (e.g. corrupt practices and collusion in connection with the same tender) or in misconduct in different cases (e.g. in different projects or in contracts under the same project but for which the misconduct occurred at significantly different temporal times), each separate incidence of misconduct may be considered separately and sanctioned on a cumulative basis. In the alternative, the fact that the alleged offender engaged in multiple incidences of misconduct may be considered an aggravating factor.

Aggravating Factors

Aggravating Factor	Impact on Sanction
A. <u>Severity of the Misconduct</u>	
<ol style="list-style-type: none"> 1. Repeated Pattern of Conduct. 2. Sophisticated means: This includes the complexity of the misconduct (e.g., degree of planning, diversity of techniques applied, level of concealment); the number and type of people or organizations involved; whether the scheme was developed or lasted over a long period of time, if more than one jurisdiction was involved. 3. Central role in misconduct: Organizer, leader, planner, or prime mover in a group of 2 or more. 4. Management's role in misconduct: If an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the misconduct. 5. Involvement of public official, TMA partner or TMA staff: If the alleged offender conspired with or involved a public official, TMA partners or TMA staff (including TMA Board) in the misconduct. 	1 – 3 yrs cooling off for this category
B. <u>Harm Caused by the Misconduct</u>	
<ol style="list-style-type: none"> 1. Harm to public safety/welfare: When misconduct either resulted in or involves a foreseeable risk of death or bodily injury, if public health or safety is endangered by the misconduct. 2. Degree of Harm to Project: Poor contract implementation (e.g., if the quality or quantity of the goods or service performed under the contract does not reflect the terms of the contract, either immediately or over time); delay caused. 	1-3 years cooling off for this category

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Aggravating Factor	Impact on Sanction
C. <u>Interference with Investigation</u>	
<p>1. Interference with investigative process: Deliberately destroying, falsifying, altering, or concealing evidence material to the investigation or making false statements to investigators in order to materially impede a TMA investigation and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation; or acts intended to materially impede the exercise of the TMA's contractual rights of audit or access to information.</p> <p>2. Intimidation/payment of a witness: If an alleged offender caused or threatened causing injury to a witness, his or her assets, employment, reputation, [family] or significant others, or if the alleged offender offered the witness a payment in exchange for non- cooperation with TMA.</p>	1-3 years cooling for this category
D. <u>Past History of Adjudicated Misconduct</u>	
<p>Prior sanctions or other penalty: Prior history must involve misconduct other than the misconduct for which the alleged offender is being sanctioned.</p> <p>Duration of offence – Where the sanctionable offence was carried out for a prolonged period of time – at least 3 years.</p>	5 years