

# PUBLIC PROCUREMENT BILL, 2019

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## **PUBLIC PROCUREMENT BILL, 2019**

### **A BILL FOR AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF A PUBLIC PROCUREMENT DEPARTMENT AND FOR CONNECTED MATTERS**

**Enacted by the Parliament of The Bahamas**

#### **PART I - PRELIMINARY**

**1. Short title and commencement.**

- (1) This Act may be cited as the Public Procurement Act, 2019.
- (2) This Act shall come into force on such date as the Minister may appoint by notice published in the *Gazette*.

**2. Interpretation.**

- (1) In this Act—
  - “**Act**” means the Public Procurement Act, 2019;
  - “**alternative bid**” means a response to a bid that does not meet the exact requirements of the specification but offers an alternative for consideration, and is submitted with an intentional variation to a specification or terms and conditions;
  - “**bid**” means a proposal or quotation, in accordance with the type of procurement method used, submitted by a bidder in response to an invitation by a procurement entity;
  - “**bidder**” means an individual, body or other legal entity, who submits a bid in response to an invitation by a procurement department;
  - “**Board**” means the Public Procurement Board established under section 12;

- “centralised procurement”** means procurement conducted by the Public Procurement Department on behalf of the procurement entities;
- “commonly used items”** includes cleaning supplies, office supplies, food and such other items as may be used by a procuring entity from time to time;
- “consultant”** means the provider of services for a specific project;
- “contractor”** means a legal or natural person under contract with a procurement entity to provide work;
- “Department”** means the Public Procurement Department established under section 4;
- “end-user department”** means the procuring entity which benefits from the procurement carried out by the Department;
- “financed in part by public funds”** means financed by more than fifty percent by public funds;
- “goods”** means objects of every kind and description including —
- (a) commodities, raw materials, products and equipment;
  - (b) objects in solid, liquid or gaseous form; and
  - (c) services incidental to the supply of goods where the value of such services does not exceed the value of the goods themselves;
- “high value procurement”** means contract or order for goods, works or services with an estimated value of at least one hundred thousand dollars;
- “intellectual services”** means any activity of an intellectual nature that does not lead to measurable physical output;
- “joint purchasing”** means processing by two or more entities to obtain the benefits of volume purchases and a reduction in administrative expenses;
- “limited bidding”** means a procurement method where circumstances, such as limited numbers of suppliers available or urgency, do not justify or permit the use of open bidding;
- “Minister”** means the Minister responsible for Finance;
- “officer”** means any person employed in the service of the Government;
- “procurement”** means the solicitation of the supply of goods, works and services;
- “procurement contract”** means a supply agreement between a procurement entity and a supplier or contractor resulting from procurement proceedings;
- “Procurement Review Tribunal”** or **“Tribunal”** means the Procurement Review Tribunal established under section 59;

**“procurement unit”** means the unit within a procuring entity responsible for procurement;

**“procuring entity”** means —

- (a) a government ministry, department or statutory body; or
- (b) a town committee or local council established under the provisions of the Local Government Act (*Ch. 37*),

and includes any division of the same;

**“research and development contracts”** means contracts for works, goods or services which are —

- (a) performed solely for purposes of research, testing or development; and
- (b) not performed with the aim of ensuring profitability or recovering research and development costs;

**“restricted bidding”** means a procurement method that limits the request for bids to a selected number of suppliers, contractors or service providers, from which a final choice is made;

**“selective bidding”** means competitive bidding preceded by pre-qualification;

**“services”** means the supply of professional services including —

- (a) intellectual services or other labour, time or effort; and
- (b) where their value does not exceed the value of the services, reports, goods, products or other tangible property produced or supplied incidental to the rendering of the services;

**“Special Drawing Rights”** means an international reserve asset, created by the IMF in 1969 to supplement its member countries’ official reserves;

**“supplier”** means a person in a procurement contract with a procuring entity to supply goods, construct works or provide other services;

**“thresholds”** means the financial thresholds fixed in this Act above or below which certain procurement procedures may be applied;

**“works”** means all works associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works including —

- (a) site preparation, excavation, erection, building, installation of equipment or materials, decoration and furnishing; and
- (b) services incidental to construction, such as drilling, mapping satellite, photography, seismic investigations and similar services, provided pursuant to a procurement contract where the value of such services does not exceed the value of the construction itself.

- (2) For the purpose of this Act —
  - (a) subject to paragraph (b), thresholds shall be calculated and expressed in Bahamian dollars; and
  - (b) thresholds contained in the *Third Schedule* shall be based on Special Drawing Rights applied in the context of international agreements to which The Bahamas is a party and the Minister may amend such thresholds in accordance with any applicable changes made to the level of Special Drawing Rights thresholds.

### **3. Application of Act.**

- (1) Subject to subsections (3) and (4), this Act shall apply to —
  - (a) all procurement carried out by a procuring entity;
  - (b) a body that is the recipient of public funds which applies those funds for the procurement of goods and services.
- (2) Subject to subsection (3)(i), —
  - (a) this Act shall not apply to the procurement carried out by a government corporation carrying out activities of an economic nature, as may be specified by the Minister by order published in the Gazette; or
  - (b) an entity carrying on procurement to which this Act does not apply, shall ensure that procedures involved are competitive, non-discriminatory and safe guarded by appropriate standards of transparency.
- (3) This Act shall not apply to —
  - (a) the extent that they conflict with the procurement rules of a donor or funding agency, the application of whose rules is mandatory pursuant to or under an obligation entered into by the Government, and the rules of such donor or funding agency shall prevail over this Act to the extent of such conflict;
  - (b) procurement contracts governed by different procedural rules and awarded —
    - (i) for the direct purpose of providing international assistance, including development aid;
    - (ii) pursuant to a concluded international agreement relating to the stationing of troops;
    - (iii) pursuant to an international agreement between the Government and one or more third countries and covering supplies, works or services intended for the joint implementation or exploitation of a project by the Government and one or more third parties;

- (iv) in support of military forces located outside the territory of The Bahamas;
  - (c) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;
  - (d) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
  - (e) arbitration and conciliation services;
  - (f) employment contracts;
  - (g) research and development services;
  - (h) the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes, including food aid;
  - (i) the procurement for the supply of electricity, telecommunications, water and sewerage, or any other similar service which is regulated by any other law provided that such body be subject to the provisions of section 59 in respect to contract award notice for all contracts in excess of fifty thousand.
- (4) The application of this Act shall, where the Minister responsible for National Security determines with the written approval of the Cabinet that a procurement is related to national defence or national security, be modified or suspended to the extent necessary for the protection of the public interest.

## **PART II – PUBLIC PROCUREMENT AUTHORITIES**

### **ESTABLISHMENT OF PUBLIC PROCUREMENT DEPARTMENT**

#### **4. Establishment of Public Procurement Department.**

- (1) There is hereby established a department to be known as the Public Procurement Department (hereinafter referred to as “the Department”) which shall have responsibility for enhancing economy, efficiency, transparency and due process in public procurement and the management of Government resources.
- (2) The Department shall consist of a Chief Procurement Officer, who shall be responsible for the day to day management of the Department, appointed by the Governor-General, acting on the advice of the Public Service Commission, on such terms and conditions as the Governor-

General may determine and such other staff as is required for the efficient performance of the functions of the Department.

## **5. Functions of Department.**

The functions of the Department are—

- (a) to implement policies and standards on public procurement;
- (b) to conduct centralised procurement in accordance with section 6;
- (c) to develop standard bidding and contract documents for goods, works and services to be used by procuring entities;
- (d) to assess the operations of the public procurement process and submit proposals for the improvement of the processes;
- (e) to develop, introduce and manage, for the procurement of goods, works and services in The Bahamas, an electronic procurement system providing for —
  - (i) electronic advertising;
  - (ii) convening and receipt of bids;
  - (iii) the development of framework agreements and contracts;
  - (iv) the use of electronic reverse auctions;
  - (v) a supplier registry;
  - (vi) materials management; and
  - (vii) establish and maintain a centralised electronic catalogue of common and non common use goods, supplies, materials and equipment;
  - (viii) any and all procurement modalities leading to the optimal use of public resources;
- (f) to ensure capacity building and human resource development for public procurement;
- (g) to promote public awareness of public procurement processes in consultation with other departments, the development and periodic updating of a procurement manual for use by procuring entities;
- (h) to issue appropriate instructions to procuring entities for the development of appropriate reporting formats and base line price indicators;
- (i) to establish and maintain a mechanism for the creation of a registration and classification system for contractors, including lists of suppliers;
- (j) to establish and maintain a secretariat to support the activities of the Public Procurement Board;

- (k) to advise on certification and professional education requirements for the staff of procuring entities;
- (l) to implement the debarment procedure as prescribed in the regulations;
- (m) to ensure that the Act and any regulations made thereunder are consistent with all international agreements and obligations entered into by The Bahamas;
- (n) obtain the requisite approvals for the procurement of specialised and sensitive goods and materials related to national security;
- (o) to implement guidance and practices designed to support, enhance and measure the participation of micro small and medium enterprises (hereinafter referred to as “MSMEs”) in public procurement;
- (p) to develop sustainable procurement practices and guidance aiming to reduce the adverse environmental and social impact through better selection and improved usage of purchased products and services;
- (q) to encourage suppliers to adopt practices that minimize their adverse environmental and social impacts in relation to their own operations and supply chains;
- (r) to obtain summary and detailed information from all procuring entities in respect to all procurement related activities and to provide period reports aggregating such information as may be prescribed;
- (s) to publish an annual report summarizing all procurement activities by agencies, including a summary list of all procurement contracts awarded except for specific contract details which may be withheld for national security purposes consistent with this law;
- (t) to perform such other duties as are necessary, incidental or conducive to the fulfilment of the Department's objectives.

## **6. Centralised procurement.**

- (1) The Department may, pursuant to its functions under section 5., organise the central procurement of commonly used items on behalf of all procuring entities, and in so doing shall —
  - (a) prepare and dispatch a consultation document to each procuring entity with a view to identifying the annual aggregated requirements for the centralization of procurement; and
  - (b) request each procuring entity to provide an indication of the goods, works or services that are required by way of centralised procurement.

- (2) The Department shall, in determining whether the aggregation of demand is appropriate, take into consideration —
  - (a) which items are of common use and likely to attract the same potential bidders;
  - (b) when the items will be ready for bidding;
  - (c) when delivery, implementation or completion of the items are required; and
  - (d) any other special factors related to the specific item.
- (3) Where the value of a proposed contract to procure a commonly-used item exceeds the sum of ten million dollars, the Department shall seek the approval of the Cabinet.

## **7. Functions of Chief Procurement Officer.**

The functions of the Chief Procurement Officer are—

- (a) the day to day management of the affairs of the Department;
- (b) the administration, organisation and supervision of the staff of the Department;
- (c) to prepare and publish an annual report on procurement activities of all procurement entities, no later than three months after the end of the fiscal year and the report shall be made available to the general public via an official website at no cost.
- (d) to provide periodic reporting to the Financial Secretary as necessary including the preparation of the Department's annual report for the Financial Secretary to transmit to the Minister; and
- (e) to manage the funds, budget and other property of the Department.

## **8. Tenure of Chief Procurement Officer.**

The Chief Procurement Officer —

- (a) may hold office for a period of five years and shall, at the expiration of such period, be eligible for a reappointment;
- (b) shall not be eligible for reappointment to office after having served a period of ten years in total.

## **FINANCIAL PROVISIONS**

## **9. Funds and revenue.**

The funds, revenue and resources of the Department shall consist of—

- (a) such sums as may be appropriated by Parliament; and

- (b) all other sums or property which may in any manner become payable to the Department.

#### **10. Deposit to Consolidated Fund.**

All sums received by the Department pursuant to section 9(b) shall be deposited into the Consolidated Fund.

#### **11. Accounts and audit.**

- (1) The Department shall prepare for each new financial year, an annual budget of revenue and expenditure which shall be submitted to the Minister at least two months prior to the commencement of the financial year.
- (2) The Department shall keep proper accounts and other records in relation thereto and shall prepare in respect of each financial year of the Department a statement of accounts.
- (3) The accounts of the Department for each financial year shall be audited annually by auditors appointed by the Department with the approval of the Minister from among members of The Bahamas Institute of Chartered Accountants.
- (4) Three months after the end of each financial year, the Department shall submit a copy of the audited accounts to the Minister together with a copy of any report made by the auditor.
- (5) The Minister shall lay a copy of every such audited account before each House of Parliament together with a copy of any report made by the auditor on the accounts.

### **ESTABLISHMENT OF PUBLIC PROCUREMENT BOARD**

#### **12. Establishment of Public Procurement Board.**

- (1) There shall be established a board to be known as the Public Procurement Board (hereinafter referred to as “the Board”) which shall have the duties as specified in section 13.
- (2) The Board shall consist of —
  - (a) a Chairperson appointed by the Prime Minister from whom shall be competent and knowledgeable in public procurement;
  - (b) the Financial Secretary, *ex officio* or his representative;
  - (c) the permanent secretary of a Government Ministry designated by the Prime Minister in rotation for a period of three years with no Ministry being eligible for designation for consecutive three year terms;

- (d) the Director of Public Works;
  - (e) two persons from civil society appointed by the Prime Minister;
  - (f) a public officer appointed by the Prime Minister to act as secretary to the Board.
- (3) The Prime Minister may at his discretion authorize such remuneration, if any, whether by way of honorarium, salary or fees, and such allowances, if any, to a member of the Board.

### **13. Duties and powers of Board.**

- (1) The duties and powers of the Board are —
- (a) to establish appropriate internal procedures for the operations of the Board and ensure compliance with them;
  - (b) to review the recommendations of a tender evaluation committee in excess of two hundred and fifty thousand dollars, and —
    - (i) approve the recommendation for the award of the procurement contract;
    - (ii) require the tender evaluation committee to make a fresh or further evaluation on specified grounds; or
    - (iii) defer the approval of a recommendation for award and advise further the tender committee on procurement matters the Board may consider conducive to the exercise of its functions;
  - (c) to make recommendations to the Minister for the award of procurement contracts in excess of two hundred and fifty thousand dollars but not exceeding one million two hundred thousand dollars;
  - (d) to make recommendations to the Cabinet for the award of procurement contracts in excess of one million two hundred thousand dollars.
- (2) Where a procuring entity does not follow the recommendations of the Board pursuant to subsection (1)(c), the Secretary shall not proceed with the proposal without the written concurrence of the Minister provided in the form of a reasoned decision.

## **PROCURING ENTITIES AND UNITS**

### **14. Functions of procuring entities.**

- (1) The procurement of goods, works or services shall be conducted by the procuring entity in a fair, equitable and transparent manner using competitive open bidding procedures —

- (a) based on the application of objective and non-discriminatory technical specifications, selection and award criteria;
  - (b) with a view to providing the Government with value for money goods, works and services, by the most timely, cost-effective and efficient means possible; and
  - (c) in accordance with any regulations made hereunder.
- (2) A procuring entity which directly purchase works, supplies and services from or through the Department shall be deemed to have complied with this Act to the extent that the department has complied with it.
- (3) Subject to subsection 5(r), a procuring entity shall report to the Department all procurement activities, including completed or cancelled contracts proceedings, in the form and time prescribed.
- (4) A procuring entity shall utilize the electronic government procurement system managed by the Department for all procuring activities.

#### **15. Procurement units.**

- (1) The head of each procuring entity shall establish a procuring unit and where such person determines that —
- (a) the level of procurement activity does not justify the creation of a procurement unit, such head shall —
    - (i) nominate a single public officer to carry out the functions of a procurement unit; or
    - (ii) request procurement to be carried out on the entity's behalf by the Department; or
  - (b) there is insufficient procurement capacity within the procurement unit, request that procurement be carried out by the Department on behalf of the procuring entity.
- (2) The head of the procuring entity shall determine the size, location and structure of its procurement unit having regard to its procurement requirements and the number of trained and experienced staff available.

#### **16. Functions of procurement units.**

- (1) The functions of a procurement unit shall include —
- (a) the planning of procurement for the procuring entity;
  - (b) the preparation of invitations to bid and of bidding documents;
  - (c) the publication and distribution of invitations to bid;
  - (d) the reception and safeguarding of bids;
  - (e) the administration and implementation of a procurement contract;
  - (f) where the value of a contract does not exceed fifty thousand dollars —

- (i) the opening and evaluation of bids; and
  - (ii) the award of the contract or purchase order in relation thereto;
- (g) where the value of a contract exceeds fifty thousand dollars —
  - (i) the performance of secretariat services for the relevant tender committee;
  - (ii) the preparation of recommendations for the Board or higher authority in relation to the contract.
- (2) A procurement unit shall not seek procurement in excess of the funds at its disposal.

## TENDER COMMITTEES

### **17. Tender committees.**

- (1) Each procuring entity shall establish a tender committee responsible for awarding all contracts whose value is less than fifty thousand dollars.
- (2) A tender committee shall be appointed as required by the head of the procuring entity and comprise a minimum of three and a maximum of five members including —
  - (a) the head or deputy head of the procuring entity;
  - (b) the chief financial officer of the procuring entity;
  - (c) the head of the procurement unit; and
  - (d) two other members as required to provide technical, legal or commercial expertise.
- (3) A tender committee may appoint technical evaluation committees and advisers to assist the procurement unit in evaluating bids and making recommendations for award.

### **18. Functions and powers of tender committees.**

- (1) The functions of a tender committees include —
  - (a) the verification of proper procurement planning and preparation of procurement proceedings;
  - (b) the conduct of the opening of bids;
  - (c) subject to the provisions of this Act, the awarding of contracts and rejection of unsuccessful bids;
  - (d) the performance of any other functions specified under this Act.
- (2) A tender committee shall have power to —

- (a) approve of proposed invitations, notices, requests, and other documents related to procurement proceedings;
- (b) review and approve evaluation reports and contract award recommendations;
- (c) approve contract documents.

## **19. Threshold for proposed contracts.**

- (1) Where the value of a proposed contract exceeds the sum of —
  - (a) five thousand dollars, the tender committee shall award the contract;
  - (b) fifty thousand dollars, the tender committee shall award the contract subject to the approval of the Minister responsible for the procuring entity;
  - (c) two hundred and fifty thousand dollars, the tender committee shall forward to the Board the recommendation for award together with all necessary documentation;
  - (d) one million two hundred thousand dollars, the Board shall make a recommendation to the Cabinet and seek the approval thereof.
- (2) Where a recommendation for award is to be forwarded pursuant to subsection (1)(c), the Board shall first seek the approval of the Minister responsible for the procuring entity.
- (3) Where an approval for a recommendation sought pursuant to section (1)(d) is rejected, the Cabinet may —
  - (a) refer the recommendation back to the Board for further advice; or
  - (b) direct that a new procurement process be carried out.

## **20. Artificial division of procurement.**

A procuring entity shall not, for the purposes of determining the appropriate procurement method, artificially divide a procurement with the intention of avoiding the prescribed financial thresholds.

## **21. Division into lots.**

- (1) Notwithstanding section 20, a procuring entity may divide a procurement requirement which could be procured as a single contract into a package, consisting of several lots that are to be tendered together, where it is anticipated that the award of several separate contracts may result in the best overall value for the procuring entity.
- (2) A requirement shall not be divided into lots —
  - (a) for the sole purpose of avoiding thresholds;

- (b) where the award of several separate contracts would create problems of compatibility or inter-changeability between items procured as separate lots or would unduly strain contract administration resources;
  - (c) where the award of several separate contracts would increase the costs of servicing, maintenance or similar requirements.
- (3) A procuring entity shall, where a requirement which could be procured as a single contract is divided into lots —
- (a) permit bidders to bid for a single lot, any combination of lots, or all lots; and
  - (b) demonstrate, prior to contract award, that the recommended contract award or combination of contract awards offers the best overall value for the procuring entity.

## **PART III - PROCUREMENT PLANNING AND METHODS**

### **PROCUREMENT PLANNING**

#### **22. Annual procurement plan.**

- (1) Every procuring entity shall prepare, in writing, a procurement plan for each fiscal year.
- (2) The procurement plan referred to in subsection (1) shall include —
  - (a) a detailed breakdown of the goods, works and services required;
  - (b) a schedule of the delivery, implementation or completion dates for all goods, works and services required;
  - (c) an indication of whether goods, works and services will be procured —
    - (i) as a single package;
    - (ii) through aggregation with another procuring entity; or
    - (iii) through centralized procurement by the Department;
  - (d) an indication of the anticipated procurement method for each procurement requirement, including any need for pre-qualification, and the anticipated time for the complete procurement cycle taking into account the applicable approval requirements;
  - (e) an estimate of the value of each package of goods, works and services required and details of the budget available and sources of funding;
  - (f) such other details as may be relevant to any item in the procurement plan.

- (3) Every procuring entity shall in addition to the requirements of subsection (1) prepare a summary of the plan referred to in subsection (1) in accordance with the template provided by the Department forward the same to the Department within one month of the commencement of the fiscal year for electronic publication.
- (4) The procuring entity in preparation of a procurement plan under subsection (1) shall take into consideration the budgeted allocated sums for that current fiscal year.
- (5) Notwithstanding subsection (4), every procuring entity shall ensure approved budgetary availability, prior to the commencement of each procurement process, with the exception of emergencies.

**23. Specific procurement plan.**

- (1) Subject to subsection (3), every procuring entity shall prepare a procurement plan in writing for each individual procurement requirement.
- (2) The procurement plan shall include —
  - (a) a description of the requirement including the schedule required for delivery, implementation or completion of goods, works or services and any division into lots;
  - (b) the estimated value of the requirement and, where applicable, individual lots;
  - (c) subject to section 24, the proposed procurement method and a justification for the use of any method other than competitive bidding or, in the case of consultancy services, a request for proposals;
  - (d) an estimate of the time required for each stage in the procurement cycle, taking into account publication requirements and the applicable approval requirements;
  - (e) an indication of the resources required and available for management of the procurement process and contract administration; and
  - (f) any other relevant information.
- (3) Where the estimated value of the procurement is such that the request falls within the method referred to in section 31(1), a written procurement plan shall not be required.

## METHODS OF PROCUREMENT

### **24. Selection of procurement method.**

- (1) A procuring entity shall, as part of the procurement planning process, select the most appropriate method of procurement for each requirement being one of the methods as provided for in sections 25 to 32.
- (2) The selection of procurement method shall take into account —
  - (a) the estimated value of the procurement, calculated in accordance with the valuation rules shown in the *Second Schedule*;
  - (b) the potential sources for the procurement including —
    - (i) the competitiveness of the national and international market for the goods, works or services; and
    - (ii) the likely interest of potential national and international bidders, given the size and nature of the requirement;
  - (c) the nature of the goods, works or services required.

### **25. Competitive bidding.**

- (1) The public procurement of goods, works and non-consultancy services shall be undertaken by means of advertised competitive bidding proceedings to which equal access shall be provided to all eligible and qualified bidders without discrimination.
- (2) Subject to sections 27 to 32, methods of procurement other than competitive bidding shall not be permitted;
- (3) A procuring entity shall, where a method of procurement other than competitive bidding is used, include in the record of the procurement proceedings a written justification of the decision to utilise the procurement method, including the grounds for taking such a decision.
- (4) Consultancy services shall be procured by the request for proposals method in accordance with sections 32 and 45.

### **26. Two stage competitive bidding.**

- (1) Competitive bidding may be carried out in a single stage or in two stages.
- (2) Competitive bidding may be held in two stages where —
  - (a) it is not feasible to define fully the technical or contractual aspects of the procurement to elicit competitive bids; or
  - (b) due to the complex nature of the goods, works or services to be procured, the procuring entity wishes to consider and discuss with bidders various technical or contractual solutions and their relative

merits before deciding on the final technical or contractual specifications.

- (3) A procuring entity may, in the first stage of the two-stage bidding method, engage in discussions with any or all bidders whose proposals satisfy the conditions set forth in the bidding documents in order to —
  - (a) further understand the proposals; or
  - (b) indicate to bidders the changes required to make the proposals acceptable and to seek the bidder's willingness to make such changes.
- (4) A procuring entity shall keep minutes of first-stage bidding discussions engaged in pursuant to subsection (3) and such minutes shall form part of the procurement records.
- (5) A procuring entity may, at the end of the first stage of the two-stage bidding method —
  - (a) reject those bids which are substantially non responsive or do not meet, and in respect of which bidders are unwilling or unable to change to meet the —
    - (i) basic requirements;
    - (ii) minimum performance; or
    - (iii) required completion time;
  - (b) modify the technical specifications, evaluation criteria, and contract conditions, while seeking to maximize competition and articulate appropriate evaluation methodology.
- (6) A procuring entity shall, in the second stage of the two-stage bidding method, invite bidders whose bids have not been rejected to submit final bids with prices responsive to the revised bidding documents.
- (7) A bidder who does not wish to submit a final bid may withdraw from the bidding proceedings without forfeiting the bid security that such bidder may have been required to provide and the final bids shall be evaluated and compared in accordance with the criteria and methodology included in the revised documents.
- (8) Subject to the provisions of this section, the procedures for single stage competitive bidding shall also apply to two-stage competitive bidding.

## **27. International bidding.**

- (1) Where the estimated contract amount in a proposed procurement is higher than the value of the thresholds set out in the *Third Schedule* —
  - (a) all procurement notices shall be published in accordance with section 35(2);

- (b) all invitations to bid or to pre-qualify, and bidding documents, shall be in English;
  - (c) a procuring entity shall allow sufficient time for the invitation to reach candidates and to enable them to prepare and submit applications to pre-qualify and bid in accordance with the instructions given in the bidding documents;
  - (d) bidders shall express their bids in Bahamian dollars unless otherwise specifically permitted within the bidding documents;
  - (e) general and special conditions of contract shall be a kind generally used in international trade;
  - (f) technical specifications shall, to the extent compatible with national requirements, be based on international standards or standards widely used in international trade.
- (2) This section applies to competitive bidding, selective bidding and restricted bidding.
  - (3) The Bahamian dollar value of the thresholds set out in the *Third Schedule* may vary from time to time based on the exchange rates between the Bahamian dollar and special drawing rights fixed by the International Monetary Fund from time to time.

## **28. Selective bidding.**

- (1) Selective bidding may be used in cases of high value or complex procurements where it is necessary or desirable to identify, prior to the submission of bids, those bidders that are qualified.
- (2) The requirements and criteria for assessing the qualifications of bidders in selective bidding shall be in accordance with section 38.
- (3) In the pre-qualification stage of the selective bidding process —
  - (a) the procuring entity shall —
    - (i) provide pre-qualification documents to all bidders responding to the invitation to pre-qualify;
    - (ii) respond promptly to any request by a bidder for clarification of the pre-qualification documents received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to pre-qualify; and
  - (b) the pre-qualification documents shall provide bidders with the information required to prepare and submit applications for pre-qualification.
- (4) The procuring entity —
  - (a) shall make a decision with respect to each application to pre-qualify;

- (b) shall invite all bidders who have been pre-qualified to submit bids in the procurement proceeding;
  - (c) may at any time prior to the contract award require a pre-qualified bidder to demonstrate anew its qualifications in accordance with the same criteria used to pre-qualify such bidder; and
  - (d) shall disqualify any bidder who fails to demonstrate anew its qualifications if requested to do so.
- (5) Subject to this section, the provisions of the competitive bidding method apply to selective bidding.

**29. Restricted bidding.**

- (1) Restricted bidding may be used where —
- (a) the goods, works or services are only available from a limited number of bidders; or
  - (b) the time and cost of considering a large number of bids are disproportionate to the estimated value of the procurement having regard to the nature of the procurement.
- (2) The procuring entity shall in the case of restricted bidding invite bids from —
- (a) where restricted bidding is used pursuant to subsection (1)(a), all potential bidders;
  - (b) where restricted bidding is used pursuant to subsection (1)(b), sufficient bidders to ensure effective competition,
- and in all cases, a minimum of three bidders.
- (3) The procuring entity may, in selecting bidders to be invited to bid, use —
- (a) the contractor registration system of supplier lists maintained in accordance with procedures established by the public procurement department;
  - (b) lists of pre-qualified bidders;
  - (c) the procuring entity's own knowledge of the market;
  - (d) any other appropriate sources of information.
- (4) The procuring entity shall, where it uses restricted bidding pursuant to subsection (1)(b), publish a notice in accordance with section 35. stating —
- (a) the nature of the procurement requirement;
  - (b) that the procuring entity is using restricted bidding on the grounds that the time and cost of considering a large number of bids are disproportionate to the estimated value of the procurement having regard to the nature of the procurement;
  - (c) the proposed bidders;

- (d) that any potential bidder requiring information on the procurement requirement or wishing to participate in the procurement may contact the procuring entity; and
  - (e) the deadline for a request for information or participation in the procurement.
- (5) Subject to this section, the provisions of the competitive bidding method apply to restricted bidding.

**30. Limited bidding.**

- (1) A procuring entity may award a public contract by limited bidding procedure where —
- (a) no suitable bids have been submitted in response to a competitive or selective bidding procedure and the procuring entity makes the contract subject to the condition that the requirements of the initial tender may not be substantially modified by the bidder;
  - (b) for technical or artistic reasons or for reasons connected with protection of exclusive rights, the contract may be performed only by a particular supplier and no reasonable alternative or substitute exists;
  - (c) for reasons of extreme urgency brought about by events unforeseen by the procuring entity, the products or services could not be obtained in time by means of competitive or selective bidding procedures;
  - (d) the contract is for additional deliveries of goods or services by an original supplier in circumstances where a change of supplier would —
    - (i) compel the procuring entity to procure equipment or services not meeting the requirements of interchangeability with already existing equipment or services procured under the initial procurement; and
    - (ii) cause significant inconvenience or substantial duplication of costs to the procuring entity;
  - (e) the procuring entity procures prototypes or a first product or service developed at its request in the course of and for a specific contract for research, experiment, study or original development;
  - (f) additional services within the objectives of the original bid documentation but not included in the initial contract have, through unforeseen circumstances, become necessary to complete the services described in such documentation and the total value of contracts awarded for such additional services do not exceed fifty per cent of the amount of the initial contract;

- (g) the contract is for new services —
    - (i) consisting of the repetition of similar services which conform to a basic project for which an initial contract was awarded following an open or selective procurement method; and
    - (ii) for which the procuring entity has indicated in the notice of intended procurement that a limited procurement method might be used in awarding contracts for such new services;
  - (h) the contract is for products purchased on a commodity market; or
  - (i) the contract is for purchases —
    - (i) made under exceptionally advantageous conditions of unusual disposals which arise only in the very short term such as from liquidations, receiverships or bankruptcies; and
    - (ii) which are not routine purchases from regular suppliers.
- (2) Under the limited bidding method —
- (a) the procuring entity shall prepare a written description of its needs and any special requirements as to quality, quantity, terms and time of delivery, except where circumstances of emergency or extreme urgency render this task impractical because of the time involved;
  - (b) a quotation shall be invited from at least one and, where possible, additional suppliers or contractors;
  - (c) the procuring entity may give a time limit to the bidders to prepare and submit bids or may fix a time limit by mutual agreement with the bidders;
  - (d) the compliance of an offer or offers with the specifications, terms and conditions shall be considered;
  - (e) negotiations to bring down the prices may be carried out if the prices offered are deemed to be excessive or substantially in excess of the prevailing market prices.
- (3) Where a procuring entity awards a public contract by limited bidding procedure in accordance with subsection (1)(c), that procuring entity shall —
- (a) provide written justification of the decision to utilise the procurement method, including the grounds for taking such a decision; and
  - (b) ensure that the procured goods, works or services are distributed in accordance with the urgent need which necessitated the procurement and submit written evidence of the same to the Department.

### **31. Request for quotations.**

- (1) The request for quotations method may be used for the procurement of goods, works and services where —
  - (a) the procurement is for readily available commercially standard goods, not specially manufactured to the particular specifications of the procuring entity and its estimated value does not exceed five thousand dollars;
  - (b) the estimated value of the procurement of works does not exceed ten thousand dollars; or
  - (c) the estimated value of the procurement of services does not exceed five thousand dollars.
- (2) A quotation shall, under the request for quotations method, be requested in writing from as many bidders as practicable and, in all cases, from a minimum of three bidders.
- (3) A request for quotations shall contain a clear statement of the requirements of the procuring entity as to quality, quantity, terms, time of delivery, and any other special requirements.
- (4) Bidders shall be given adequate time to prepare and submit their quotations and each bidder shall be permitted one quotation only which may not be altered or negotiated.
- (5) The procuring entity shall place a purchase order with the bidder providing the lowest-priced quotation meeting the delivery and other requirements of the procuring entity.
- (6) A purchase order shall include —
  - (a) the quoted price;
  - (b) the contract number;
  - (c) the name of the contractor or of the supplier;
  - (d) the name of the officer of the contractor or of the supplier who signed the contract;
  - (e) the terms and the date of delivery.

### **32. Request for proposals.**

- (1) A procuring entity shall, for the purposes of procuring the services of a consultant —
  - (a) prepare a list of three to six consulting firms comprising, to the greatest extent feasible, consultants of the same category and similar capacity and business objectives;
  - (b) provide the request for proposals for services to the listed firms; and

- (c) establish the short-list of at least three consulting firms from among those listed firms having the capacity to perform the required services as demonstrated in their submissions.
- (2) The procuring entity shall, where the estimated value of the procurement exceeds one million dollars, prepare the list referred to in paragraph (a) of subsection (1) by inviting expressions of interest through publication of a notice —
  - (a) in the *Gazette*; and
  - (b) where appropriate, in a relevant trade publication or technical or professional journal;
  - (c) by any other electronic means.
- (3) The procuring entity may, where the estimated value of the procurement assignment is lower than one million dollars, prepare the list referred to in paragraph (a) of subsection (1) —
  - (a) from market knowledge or other sources of information; and
  - (b) in the case of assignments which have an estimated value above fifty thousand dollars but less than one million dollars, or are particularly complex, through the utilization of advertisements.
- (4) The request for proposals shall provide short-listed bidders with the information necessary to enable them to participate in the procurement proceedings and to submit proposals that are responsive to the needs of the procuring entity including —
  - (a) the name and address of the procuring entity;
  - (b) the nature, time frame and location of the services to be provided, terms of reference, required tasks and outputs;
  - (c) the criteria to be used in evaluating and comparing proposals and their relative weights as compared to price;
  - (d) the contractual terms of the procurement and the manner of entry into force of the contract;
  - (e) instructions for preparation and submission of proposals and the place and deadline for submission of proposals;
  - (f) the final selection procedures to be applied;
  - (g) notice of conflict of interest restrictions and anti-fraud and corruption rules, including the grounds for potential debarment from future participation in procurement of goods, service or works that may result from the assignment under consideration; and
  - (h) such matters as may be specified in standard documents issued by the Department.
- (5) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

**33. Prohibition of multiple bids by same beneficial owner.**

- (1) A procuring entity in reviewing all bids shall ascertain the beneficial ownership of each bidder to ensure that multiple bids from the same beneficial owner does not undermine the bidding process.
- (2) A procuring entity in ensuring that the bidding process is not undermined, may request from a bidder documentation to satisfy the procuring entity that the beneficial ownership of a bidder is independent from all other bidders.
- (3) In the event that it is discovered that —
  - (a) multiple bids have been submitted by the same person;
  - (b) there has been a breach of the code of conduct or the trade of inside information by any contractor or supplier; or
  - (c) a bidder is found to be in breach of this subsection or any other provision of this Act,  
the procuring entity —
    - (i) shall disqualify the bid or bids; and
    - (ii) debar the bidder or bidders in accordance with section 70,  
and may continue the process where there are two or more compliant bidders remaining; or
    - (iii) cancel the flawed proceedings in its entirety.

## **PART IV – BIDDING PROCESS**

**34. Solicitation documents to state object of procurement.**

- (1) Each procuring entity shall, in preparing its solicitation documents for a bidding process (hereinafter referred to as “bidding documents”), specify, with respect to the goods, works or services, the —
  - (a) quality;
  - (b) quantity;
  - (c) certification;
  - (d) testing and test methods;
  - (e) qualification criteria for potential bidders; and
  - (f) any other means,  
for evaluating the conformity of the performance of the contract to the requirements.
- (2) The procuring entity shall in preparing any relevant bidding documents and pre-qualification documents —

- (a) use such templates as may be approved by the Department from time to time, including any manuals or guidance issued by the Department;
  - (b) provide descriptive information that does not unnecessarily favour a particular bidder; and
  - (c) provide wherever possible, the desired performance or output requirements of the object of the procurement.
- (3) Where bidding documents require technical specifications, the bidding documents shall include —
- (a) the purpose and objectives of the goods;
  - (b) a full description of the requirement;
  - (c) a generic specification to an appropriate level of detail and such specifications shall include no requirement of or reference to a particular trademark or name, patent, design or type, specific original producer or service provider unless —
    - (i) there is no other practical way of describing the procurement requirements; and
    - (ii) words such as “or equivalent” are included in the specifications;
  - (d) a functional description of the goods, including any environmental or safety features;
  - (e) where appropriate, performance parameters, including outputs, time scales and any indicators or criteria by which satisfactory performance can be measured and judged;
  - (f) process and materials descriptions;
  - (g) dimensions, symbols, terminology language, packaging, marking and labelling requirements;
  - (h) inspection and testing requirements; and
  - (i) any applicable standards.
- (4) The reference to “standards” in subsection (3)(i), is a reference to national standards or international standards.

### **35. Publication of procurement notice.**

- (1) A notice of invitation to bid or to pre-qualify in a bidding process, (hereinafter referred to as a “procurement notice”) as the case may be, shall be—
- (a) published in the *Gazette* or in one or more national newspapers of wide enough circulation to reach sufficient bidders to ensure effective competition; and

- (b) published on the internet, including on any website established by the Department.
- (2) A procuring entity that considers that it is necessary to ensure wide competition —
  - (a) may send a procurement notice, after the date of publication, directly to potential bidders; and
  - (b) shall keep a record of any bidders to whom a procurement notice is sent directly,  
and such record shall form part of the procurement record.
- (3) A notice published under subsection (1), as the case may be, shall include information on —
  - (a) the identity and address of the procuring entity and the contact details of the person from whom further information can be obtained;
  - (b) the nature and time-frame of the procurement, including the place of delivery of goods or services and the location of any works;
  - (c) the price of and the manner of obtaining the bidding documents or, where applicable, any pre-qualification documents required;
  - (d) the place and deadline for submission of bids or of applications to pre-qualify;
  - (e) the method of procurement, where appropriate; and
  - (f) such other matters as may be provided in the templates approved by the Department.

### **36. Provision of bidding documents to bidders.**

- (1) The procuring entity shall provide, immediately after the publication of a procurement notice in accordance with section 35. and in a non-discriminatory manner, the requisite bidding documents —
  - (a) to all potential bidders that respond to the invitation to bid; or
  - (b) in the case of selective bidding, to all bidders that have been pre-qualified.
- (2) The procuring entity may charge for the bidding documents a price that reflects only the cost of printing and distributing the documents.
- (3) The bidding documents shall provide all the information required in order for bidders to submit bids that are responsive to the needs of the procuring entity, including information —
  - (a) stating the nature and time frame of the procurement, including but not limited to the contractual terms of the procurement, and the manner of entry into force of the contract;

- (b) in all cases other than selective bidding, providing the prescribed bidder qualification and documentation requirements in order to secure evidence that a bidder meets the necessary qualification criteria to perform the contract as regards the bidder's —
  - (i) professional and technical qualifications and competence;
  - (ii) financial resources, equipment and other physical facilities;
  - (iii) managerial capability;
  - (iv) experience in the object of the procurement;
  - (v) business reputation; and
  - (vi) personnel;
- (c) on site visits and pre-bid conferences;
- (d) providing instructions for preparation and submission of bids, including the deadline for submission of bids and the time and place of bid opening;
- (e) giving the components to be reflected in the price, the currency or currencies in which the bid price may be stated, and the currency and related exchange rate to be used for comparison of bids;
- (f) providing the criteria and methodology for evaluation of bids and the selection of the successful bidder —
  - (i) quantified in monetary terms;
  - (ii) expressed in the form of pass or fail requirements and, where this is not possible, expressed by relative weights; and
  - (iii) stating that the evaluation criteria for consideration by the procuring entity shall consist only of the —
    - (aa) bid price;
    - (bb) cost of operating, maintaining and repairing the goods or works;
    - (cc) time for delivery of the goods, completion of the works or provision of the services;
    - (dd) functional characteristics of the goods or works;
    - (ee) terms of payment and of guarantees in respect of the goods, works or services;
- (g) stating the preference, if any, for domestic goods and contractors as may be prescribed by the public procurement department;
- (h) on any grouping of goods, works or services into lots and packages and the manner of evaluation of the lots and packages;
- (i) stating whether alternatives to the technical or contractual specifications would be considered and, if so, how those alternatives would be evaluated;

- (j) where suppliers are permitted to submit bids for only a portion of the goods, works or services to be procured, providing a description of the portion or portions for which bids may be submitted;
  - (k) stating the required validity period of bids;
  - (l) providing the amount and acceptable forms of any required bid, performance or other security;
  - (m) stating the conditions of contract which will be entered into with the successful bidder;
  - (n) providing notice of conflict-of-interest restrictions and anti-fraud and corruption rules;
  - (o) stating the manner in which bidders may obtain review of actions, omissions and decisions of the procurement entity; and
  - (p) on such other matters as may be prescribed by regulations or in manuals and standard forms issued by the public procurement department.
- (4) The procuring entity shall, for the purposes of subsequent communications with bidders, make a record of the name, postal address, telephone and fax numbers and email address of all persons to whom an invitation to bid is issued and shall file a copy of such record in the procurement documents file.

## EXPRESSION OF INTEREST

### **37. Pre-qualification criteria of potential bidder.**

Subject to section 38(2), a procuring entity may, in order to satisfy the qualification criteria established in the bidding documents, by notice invite potential bidders to express interest in the bidding process by providing evidence of that bidder's—

- (a) technical abilities, in relation to the nature, quantity, importance or use of the works, suppliers or services, by evidence of —
  - (i) experience and reliability;
  - (ii) financial resources, equipment and other physical facilities;
  - (iii) personnel;
  - (iv) managerial capability;
  - (v) possession of the necessary professional and technical qualifications and competence; and
  - (vi) subject to the right of the bidder to protect its intellectual property rights and trade secrets, possession of the requisite intellectual property rights or trade secrets;

- (b) legal capacity to perform the contract furnished by evidence that —
  - (i) the bidder has satisfied all the legal requirements to carry on business in The Bahamas and, where the bidder has its headquarters outside The Bahamas, is entitled to carry on business in the foreign jurisdiction;
  - (ii) the bidder is not insolvent, in bankruptcy, in receivership or under liquidation; and
  - (iii) legal proceedings have not been taken, and are not anticipated to be taken, that would materially affect the ability or the legal capacity of the bidder to carry out the contract;
- (c) good standing with the Government and fulfilment of its obligations to pay taxes, levies, license fees and other fees or charges, including national insurance contributions, or conclusion of arrangements satisfactory to the Minister and the National Insurance Board to fulfil such obligations;
- (d) integrity, including evidence that neither the bidder nor any director, officer, manager or supervisor of the bidder has, within a period of three years preceding the date of issuance of the invitation to bid, been —
  - (i) convicted of any criminal offence, whether in The Bahamas or elsewhere —
    - (aa) relating to the bidder's or his professional conduct;
    - (bb) relating to the making of false statements or misrepresentations as to the bidder's or his qualifications to enter into a procurement contract;
    - (cc) involving dishonesty;
    - (dd) under anti-corruption legislation; or
  - (ii) suspended or disbarred by administrative or judicial proceedings from participating in procurements, whether in The Bahamas or elsewhere; or
- (e) or any other documentary evidence to certify the potential bidder's eligibility.

### **38. Permitted criteria.**

- (1) The procuring entity shall, in establishing the qualifications referred to in section 37, be limited to criteria designed to demonstrate that a bidder possesses —
  - (a) the necessary professional and technical qualifications and competence;
  - (b) financial resources;

- (c) equipment and other physical facilities;
  - (d) managerial capability;
  - (e) experience in the procurement object;
  - (f) business reputation and personnel,  
to perform the contract.
- (2) The qualification criteria referred to in subsection (1) shall —
    - (a) not be unduly restrictive or designed to reduce competition; and
    - (b) be prepared for each procurement requirement, taking into account the size, complexity and technical requirements of the proposed contract.
  - (3) The procuring entity shall not impose any requirement as to qualifications in the invitation to bid other than a requirement specified in sections 37 and 55.
  - (4) This section shall govern entry, or the denial of entry, on or to any list or register of suppliers, service providers or contractors held by a procuring entity, and any system of pre-qualification, based on qualification criteria.

## INVITATION TO BID

### **39. Invitation to bid.**

- (1) Where a method of procurement does not require a procurement notice, the procuring entity shall issue an invitation to bid.
- (2) An invitation to bid shall include —
  - (a) bidding documents in accordance with section 34;
  - (b) the information required under section 35(4); and
  - (c) requirements regarding —
    - (i) minimum bidding requirements;
    - (ii) alternative bids;
    - (iii) provision of performance security;
    - (iv) domestic preference; and
    - (v) provision of bid security.

### **40. Minimum bidding periods.**

- (1) All bidding documents shall be made available upon publication of the invitation to bid.
- (2) Except for limited bidding, the bidding period shall commence on the date of the first publication and shall finish on the date of the bid submission deadline.
- (3) The minimum bidding period shall be, in respect of —

- (a) competitive bidding, thirty calendar days;
  - (b) international competitive bidding, forty-five calendar days;
  - (c) selective bidding, twenty calendar days;
  - (d) restricted bidding, twenty calendar days;
  - (e) selective international competitive bidding, thirty calendar days; and
  - (f) restricted international competitive bidding where section 31(b) applies, thirty calendar days.
- (4) All bidders shall, in selective bidding, be given a minimum of thirty calendar days following the publication of a notice to pre-qualify to submit their pre-qualification applications.
- (5) A procuring entity shall, in determining the appropriate bidding period for each requirement, take into account in addition to the minimum bidding period —
- (a) the time required for preparation of bids, having regard to the level of detail required and the complexity of the bids;
  - (b) any need for bidders to submit authenticated legal or similar documents as part of their bids and the time required to obtain such documents;
  - (c) the location of potential bidders and the time required to obtain the bidding documents and for the delivery and submission of bids to the procuring entity; and
  - (d) any restrictions relating to the time the goods, works or services are required.

#### **41. Alternative bids.**

- (1) Alternative bids shall not, except where specifically indicated in the bidding documents, be permitted.
- (2) A procuring entity may permit alternative bids where it is anticipated that bidders may be able to offer goods, works or services which, although they do not conform precisely to the description of requirements, meet the objectives of the procurement in an alternative manner.
- (3) Alternative bids may be permitted —
  - (a) in areas of rapidly changing technology or where a need could be satisfied in a number of different ways; and
  - (b) where the procuring entity wishes to encourage cost efficient and technically innovative approaches by bidders.
- (4) The bidding documents shall, where alternative bids are permitted, state that the alternative bid does not need to conform precisely to the description of requirements but the bid must —

- (a) meet the objectives or performance requirements prescribed in the description of requirements;
- (b) be substantially within any delivery or completion schedule, budget and other performance parameters stated in the bidding documents; and
- (c) clearly state the benefits of the alternative bid over any solution which conforms precisely to the description of requirements in terms of technical performance, price, operating costs or any other benefit.

#### **42. Domestic preferences.**

- (1) A margin of domestic preference may be applied to eligible bids —
  - (a) where so indicated in the bidding document; and
  - (b) strictly in accordance with any rules or schemes for domestic preference issued through circulars by the Department.
- (2) All bidding documents and Department circulars permitting a margin of domestic preference to be applied to eligible bids shall clearly state the —
  - (a) eligibility requirements for the margin of preference in terms of ownership, location of bidder or production facilities, origin of labour, raw materials or components, extent of sub-contracting or association with local partners, or any other relevant factor;
  - (b) documentation required as evidence of eligibility for the margin of preference; and
  - (c) percentage of the margin of preference and the manner in which it will be applied during the evaluation.
- (3) The percentage of domestic preference permitted in schemes issued by a Department circular shall be between five and ten per cent and may be reviewed annually by the Department.
- (4) Every procuring entity shall endeavour to allocate no less than ten per cent of its overall procurements to MSMEs in accordance with any rules or schemes for domestic preference issued through circulars by the Department.

#### **43. Performance security.**

- (1) A procuring entity may request a performance security to secure the contractor's obligation to fulfil the contract and shall set out in the bidding documents and the contract the requirements for such performance security.

- (2) The value of a required performance security shall be no more than ten per cent of the contract value and may be expressed either as a fixed amount or as a percentage of the contract value.
- (3) The procuring entity shall, in determining the amount of performance security required, take into account —
  - (a) the cost to the contractor of obtaining a performance security;
  - (b) the value of the contract;
  - (c) the risk of a contractor failing to fulfil his contractual obligations; and
  - (d) the extent of protection offered to the procuring entity through alternative means, such as payment retentions.
- (4) The value of a performance security may, where appropriate, be progressively reduced in line with the contractor's progress in delivering or completing the goods, works or services to which the security relates.
- (5) The bidding documents and contract shall state that the performance security must —
  - (a) be in accordance with the format and wording provided in the bidding documents;
  - (b) be in a form acceptable to the procuring entity;
  - (c) where the security is issued by a financial institution, be from an institution acceptable to the procuring entity; and
  - (d) be valid for the period prescribed in the contract.
- (6) The conditions for forfeiture of the performance security shall be specified in the contract.
- (7) The procuring entity shall authorise the release of the performance security promptly to the contractor upon —
  - (a) completion of all the contractor's contractual obligations which are subject to the security; or
  - (b) termination of the contract for a reason that is not attributable to any fault of the contractor.

#### **44. Bid security.**

- (1) A procuring entity —
  - (a) may require a bid security in order to deter non-compliant bids and encourage bidders to fulfil the conditions of their bids; and
  - (b) shall include in the bidding documents any requirement for a bid security.

- (2) The value of a required bid security shall be expressed as a fixed amount and not as a percentage and such amount shall be between two and five percent of the estimated value of the contract.
- (3) The procuring entity shall, in determining the amount of bid security required, take into account the —
  - (a) cost to bidders of obtaining a bid security;
  - (b) estimated value of the contract;
  - (c) risk of bidders failing to fulfil the conditions of their bids; and
  - (d) need for the amount of the bid security to be high enough to deter irresponsible bids but not so high as to discourage competition.
- (4) The bidding documents shall state that a bid security must be —
  - (a) in accordance with the format and wording provided in the bidding documents;
  - (b) in a form acceptable to the procuring entity, including —
    - (i) cash;
    - (ii) a bank guarantee;
    - (iii) an equivalent instrument, such as a security issued by a insurance company or stand-by letter of credit;
    - (iv) property pledged by the bidder; or
    - (v) an alternative form acceptable to the procuring entity including a form permitted under schemes authorised by Department to facilitate access to securities by small enterprises;
  - (c) in the case of instruments issued by financial institutions, from an institution acceptable to the procuring entity; and
  - (d) valid for a period of twenty-eight days after the expiry of the bid validity period, or for such other period as may be prescribed in the bidding documents.
- (6) A procuring entity may forfeit a bid security only where there is a —
  - (a) modification or withdrawal of a bid after the deadline for submission of bids and during its period of validity;
  - (b) refusal by a bidder to accept a correction of an arithmetical error appearing on the face of the bid;
  - (c) failure by the successful bidder to sign a contract in accordance with the terms set forth in the bidding documents; or
  - (d) failure by the successful bidder to provide a security for the performance of the contract if required to do so by the bidding documents.

- (7) A procuring entity shall authorise the release of a bid security promptly to an unsuccessful bidder upon the earlier of the —
  - (a) expiry of the term of the security; or
  - (b) formation of a contract with the successful bidder and submission of any required performance security.
- (8) The bid security of a successful bidder shall not be authorised for release until a performance security, if required, has been received.

**45. Request for proposals award, quality and cost selection.**

- (1) The selection of the successful proposal in a request for proposals method shall, as appropriate, be based on the —
  - (a) technical quality of the proposal, the consultant's relevant experience, the expertise of its staff, the proposed work methodology, and the price of the proposal;
  - (b) quality of the technical proposal submitted within a predetermined fixed budget; or
  - (c) best financial proposal submitted by the candidates that have obtained an acceptable technical score pre-disclosed in the request for proposals.
- (2) The method of selection and the criteria to be applied shall be set out in detail in the request for proposals.
- (3) A consultant may be selected exclusively on the basis of the technical quality of the proposal where —
  - (a) the head of the procuring entity has approved the use of such method; and
  - (b) the services —
    - (i) are of an exceptionally complex nature;
    - (ii) will have a considerable impact on future projects or national economy; or
    - (iii) may lead to the submission of proposals which are difficult to compare.

**BID OPENING**

**46. Bid opening.**

- (1) Bids shall be opened or accessed electronically, as the case may be, by the procurement unit, tender committee or the Board, as appropriate, at the time and place indicated in the bidding documents and the time of bid opening shall coincide with or follow immediately after the deadline for

submission of bids, allowing a minimum time interval for logistical reasons.

- (2) Bidders or their representatives may attend the bid opening and the procurement unit, tender committee or the Board, as the case may be, shall cause to be read out loud and recorded —
  - (a) the name of each the bidder;
  - (b) the total amount of each bid;
  - (c) any discounts or alternatives offered; and
  - (d) the presence or absence of any required bid security or essential supporting documents.
- (3) A copy of the record shall be made available to any bidder on request.
- (4) No decision regarding the disqualification or rejection of a bid shall be taken or announced in the bid opening session.
- (5) A bidder shall not, after the opening of the bids and until the preliminary decision on award has been notified to the successful bidder, make any unsolicited communication to the procuring entity or the Board or attempt in any way to influence the examination and evaluation of the bids.

#### **47. Submission of bids.**

- (1) A bid shall be submitted before the deadline for submission of bids in written form, duly signed and sealed, in an envelope or electronically, whichever method has been specified.
- (2) Bids received after the deadline for submission of bids shall be returned unopened or denied electronic access.
- (3) Invitations for pre-qualification and bidding documents shall permit the submission of applications to pre-qualify or bids by hand or mail, or by courier or electronically.
- (4) Bids shall remain valid for the period of time indicated in the bidding documents but modification or withdrawal of a bid during the bid validity period shall be subject to forfeiture of the bid security.
- (5) The procuring entity shall not extend, or be deemed to have extended, the validity period of a bid without the written agreement of the bidder concerned and, where a bidder agrees in writing to an extension of the validity period of its bid, the bid security where such security was required shall also be correspondingly extended.

#### **48. Confidentiality.**

Notwithstanding any law to the contrary, information relating to the content of pre-qualification applications and bids, or the examination, clarification,

evaluation and comparison of bids, shall not be disclosed by the procuring entity to —

- (a) suppliers or contractors; or
- (b) any other person not involved officially in the examination, evaluation or comparison of bids or in making the decision whether a bid should be accepted.

## EXAMINATION AND EVALUATION OF BIDS

### **49. Examination and evaluation of bids.**

- (1) The procuring entity shall, following the opening of bids, examine the bids in order to determine whether —
  - (a) bids are complete and have been properly signed by the bidder or bidding entity;
  - (b) required documents to establish the legal validity of the bidder or the bidding entity and required bid security have been furnished; and
  - (c) bids are substantially responsive to the technical specifications and contract conditions set forth in the bidding documents.
- (2) A bid shall be rejected and excluded from further evaluation and comparison where the bid is —
  - (a) not complete or properly signed;
  - (b) not accompanied by a bid security in the prescribed form where such security is required;
  - (c) not accompanied by requested supporting documents including but not limited to business registration certificates, business licences and tax receipts; or
  - (d) substantially non-responsive to the technical specifications or contract conditions or to other critical requirements in the bidding documents.
- (3) In selective bidding, a bid received from an entity other than the pre-qualified bidders shall be rejected and excluded.
- (4) Bids not excluded from consideration pursuant to subsection (2) shall be evaluated in accordance with the criteria and methodology stated in the bidding documents.
- (5) The procuring entity —
  - (a) may seek clarification in writing from any bidder to facilitate evaluation;

- (b) shall not ask or permit a bidder to change the price or any other aspect of the bid; and
  - (c) where a bidder amends its bid in any manner, shall reject the bid and forfeit the bid security.
- (6) In a bid —
- (a) the amount in words shall, where there is a discrepancy between figures and words, prevail; and
  - (b) where a discrepancy is due to misplacement of decimal point, the mistake shall be rectified and the bidder notified.
- (7) During an evaluation —
- (a) minor deviations in a bid which did not merit rejection of the bid at an earlier stage, such as a minor variation, shall where possible be costed; and
  - (b) the evaluation cost of a bid referred to in paragraph (a) shall then be compared to those of other bids to determine the lowest evaluated bid.
- (8) In selective bidding, the qualifications of the lowest evaluated bidder shall be verified again to take account of any change since the original pre-qualification.
- (9) In methods other than selective bidding, the qualifications of the lowest evaluated substantially responsive bidder shall be checked against the criteria specified in the bidding documents and, if that bid fails, the same check shall be applied to the next ranked bid.

**50. Prohibition of negotiations.**

- (1) Where the examination and evaluation of bids has commenced in accordance with section 49., no negotiations shall take place between the procuring entity and a bidder with respect to a bid submitted by that bidder.
- (2) Subsection (1) shall not apply in circumstances where there is only one bidder.

**51. Unsatisfactory bids.**

Where the lowest evaluated responsive bid exceeds the budget for the contract by a substantial margin, the procuring entity shall investigate the causes for the excessive cost and —

- (a) may consider requesting new bids; or
- (b) subject to approval by the head of the procuring entity, may negotiate a satisfactory contract with the lowest evaluated bidder

for a reduction in the scope of the goods, works or services reflected in a corresponding reduction of the contract price.

**52. Amendment or withdrawal of bid.**

- (1) A bidder may amend or withdraw a bid by submitting a notice of amendment or withdrawal to the procuring entity not later than the date and time for the close of submission of bids.
- (2) The notice of amendment or withdrawal shall be submitted in the same manner as the original bid and clearly labelled “Amendment of Proposal” or “Withdrawal of Proposal” and shall comply with any additional directions, if any, in the invitation to bid.

**53. Bidder debriefing.**

- (1) A procuring entity shall, upon request, communicate promptly to a bidder the reason for the rejection of its application to pre-qualify, or of its bid.
- (2) A debriefing shall —
  - (a) be provided in writing within a reasonable period of time of the receipt of the request;
  - (b) state —
    - (i) at which stage of the evaluation the bid was rejected and provide brief details of any material deviation, reservation or omission leading to rejection of the bid; or
    - (ii) that a bid was substantially responsive but failed to offer the lowest evaluated price or highest score as required;
  - (c) not provide details on any other bids, other than information that is publicly available from bid openings or published notices.

**CANCELLATION OF BIDS**

**54. Unsuccessful procurement procedures.**

- (1) The procuring entity shall, where no responsive bids are received or procurement proceedings are otherwise unsuccessful —
  - (a) investigate the failed procurement proceedings; and
  - (b) record in the procurement report the reasons why the procurement was unsuccessful and the course of action taken.
- (2) An investigation pursuant to subsection (1) shall consider all relevant issues, including whether —
  - (a) the bidding period was sufficient, having regard to the factors referred to in section 40.(5);

- (b) the requirements of the bidding documents and the terms and conditions of the proposed contract were clear, non-discriminatory, proportionate, reasonable and not so excessive as to deter competition;
  - (c) the invitation notice was published in an appropriate publication and on the required date;
  - (d) there was delay in issuing the bidding documents;
  - (e) any amendments or clarifications to the bidding documents allowed sufficient time for bidders to take them into account in preparing their bids;
  - (f) there were other extraneous events or circumstances which may have affected the ability of bidders to respond;
  - (g) the evaluation process was conducted in accordance with this Act and the bidding documents and whether the tender committee had adequate skills and resources;
  - (h) there is any suspicion of collusion between potential bidders; and
  - (i) the original choice of procurement method was appropriate.
- (3) The procuring entity shall, after completion of its investigation, take any appropriate action suggested by the cause or causes of failure including but not limited to —
- (a) the use of an alternative method of procurement;
  - (b) amendments to the bidding documents, including bidding requirements, the type of contract, or the terms and conditions of the proposed contract;
  - (c) alternative publication of any invitations to bid, similar notices or bidding documents; and
  - (d) the introduction of international competition.

## **55. Disqualification.**

- (1) A procuring entity shall disqualify a bidder if the procuring entity finds that the information submitted in a bid concerning the bidder's qualifications is false or misleading.
- (2) A procuring entity may disqualify a bidder if the procuring entity —
  - (a) finds that the information submitted in a bid concerning the bidder's qualifications is materially inaccurate or materially incomplete; or
  - (b) gives written notice to the bidder to remedy in writing, within ten days after the bidder's receipt of the notice, the material inaccuracies or material omissions in a bid concerning the bidder's qualifications and the bidder fails or refuses to do so within the time specified.

**56. Cancellation of procurement proceedings.**

- (1) Cancellation of procurement proceedings shall be permitted where the procuring entity makes a determination in writing that —
  - (a) the procurement need has ceased to exist or has changed significantly;
  - (b) insufficient funding is available for the procurement;
  - (c) there has been a significant change in the required technical details, bidding conditions, conditions of contract or other details making it necessary to commence procurement proceedings anew;
  - (d) insufficient or no responsive bids have been received;
  - (e) there is evidence of collusion among bidders; or
  - (f) cancellation is otherwise in the public interest.
- (2) Bids received shall, where procurement proceedings are cancelled, be returned.

**AWARD OF CONTRACT**

**57. Award of Contract.**

- (1) The contract shall be awarded to the bidder who submitted the bid —
  - (a) where the price is a determinant criterion, the lowest bid price; or
  - (b) where the price together with other evaluation criteria specified in the bidding documents are considered, the most advantageous combination.
- (2) The procuring entity shall, prior to the expiry of the bid validity period, give notice to the successful bidder of the proposed award, specifying the time within which, subject to any intervening complaints filed, the contract must be signed.
- (3) The procuring entity shall, where a contract is awarded by way of competitive bidding, or has a value in excess of —
  - (a) five thousand dollars for goods and services; or
  - (b) ten thousand dollars for works,give notice to the other bidders specifying —
  - (i) the name and address of the proposed successful bidder;
  - (ii) the price of the contract; and
  - (iii) that the contract shall not be signed until at least fourteen calendar days have passed following the date of the notice.
- (4) The procuring entity, where the successful bidder fails within the prescribed time limits to sign a written contract or to provide a required performance security, shall —

- (a) accept the next ranked bidder from among the remaining bids that are in force;
  - (b) in selecting the next ranked bidder, comply with the bid opening provisions set out in section 46. as appropriate and the notice requirements of subsection (3).
- (5) A written procurement contract that is required to be signed shall enter into force when the contract is signed by the supplier or contractor and by the procuring entity.
- (6) A procurement contract in accordance with the terms and conditions of the accepted bid shall, where notice is dispatched while the bid is in force in accordance with subsection (2), enter into force when the notice is dispatched to the successful supplier or contractor that submitted the bid and this fact must be stated in the solicitation documents.
- (7) Contracts shall be signed by the head of a procuring entity or a person delegated by the head of such entity.

**58. Contract award notice.**

- (1) The procuring entity shall publish promptly, and in any event within two months of the contract award, a notice of the procurement contract award in accordance with the requirements for procurement notices under section 35.
- (2) A notice published under subsection (1), shall include information on —
- (a) the title of the bid;
  - (b) the name of the procuring entity;
  - (c) the selection method;
  - (d) the awarded bidder's name and address; and
  - (e) the contract price.

## **PART V – CHALLENGES AND APPEAL**

### **REVIEW TRIBUNAL**

**59. Procurement Review Tribunal.**

- (1) There is established for the purpose of this Part a tribunal to be known as the Procurement Review Tribunal.
- (2) The Procurement Review Tribunal shall—
- (a) be an independent, *ad hoc* tribunal;
  - (b) exercise its functions, when required, by panels constituted in accordance with regulations;

- (c) have an official seal that shall be judicially noticed;
  - (d) consist of the President and such other members as may be prescribed by regulations; and
  - (e) develop its own rules of procedure.
- (3) The Tribunal shall have exclusive jurisdiction to hear and determine all appeals, matters and disputes referred to it under the Act or any regulations made thereunder or conferred upon it by any other law.
- (4) An appeal from a decision of the Tribunal shall lie to the Supreme Court.

**60. Appointment of Tribunal president.**

- (1) The Governor-General acting on the advice of the Judicial and Legal Service Commission shall appoint the president of the Tribunal.
- (2) A person shall not be eligible for appointment as president of the Tribunal unless such person —
- (a) is a member of The Bahamas Bar for a period of at least ten years; and
  - (b) appears to the Judicial and Legal Service Commission to have appropriate experience and knowledge to enable him to discharge his functions as a member of the Tribunal.
- (3) A person may not be appointed to serve as president for more than an aggregate period of eight years.
- (4) Notwithstanding subsection (3), the president may be temporarily re-appointed for the purpose of continuing to act as a member of the Tribunal as constituted in order to complete any proceedings instituted before the end of the president's term of office.
- (5) The president may at any time resign his office by notice in writing to the Judicial and Legal Services Commission.
- (6) The Governor-General acting on the advice of the Judicial and Legal Services Commission may remove a person from office as president where satisfied that the president is unable, unwilling or unfit, for whatever reasons, to perform his functions as a member of the Tribunal.
- (7) Subject to this section, the president shall hold and vacate office in accordance with the president's terms of appointment.

**61. Appointment of Tribunal members.**

- (1) The Governor-General shall, acting on the advice of the Minister, appoint a maximum of four persons to serve as ordinary members of the Tribunal.
- (2) Members appointed pursuant to subsection (1) —

- (a) shall be persons with experience, expertise or professional qualifications that the Governor-General considers relevant to exercising the jurisdiction of the Tribunal; and
  - (b) may include economists, lawyers, surveyors, accountants or persons with substantial and relevant experience in public procurement and related fields of expertise.
- (3) A minimum of one-third of all members of the Tribunal shall be legal members.
- (4) A person shall not be eligible for appointment as a legal member unless such person —
  - (a) is a member of The Bahamas Bar and has been for a period of at least seven years; and
  - (b) appears to the Minister to have appropriate experience and knowledge to enable him to discharge his functions as a legal member of the Tribunal.
- (5) A person shall not be appointed as a member of the Tribunal for more than eight years in aggregate.
- (6) Notwithstanding subsection (5), a member may be temporarily re-appointed for the purpose of continuing to act as a member of the Tribunal as constituted in order to complete any proceedings instituted before the end of the member's term of office.
- (7) A member may resign his office at any time by notice in writing to the president.
- (8) The Governor-General acting on the advice of the Minister may remove a member from office where satisfied that the member is unable, unwilling or unfit, for whatever reasons, to perform the member's functions as a member of the Tribunal.
- (9) Subject to this section, members shall hold and vacate office in accordance with their terms of appointment.

**62. Tribunal registrar.**

- (1) The president shall appoint, and supervise, the registrar of the Tribunal who shall be responsible for the administration of the Tribunal.
- (2) The president may in writing assign such functions to the registrar as the president deems fit.
- (3) The registrar shall serve for a term of four years and shall be eligible for re-appointment.
- (4) Subject to any directives of the president, the functions, powers and duties of the registrar are to —

- (a) require any application or other reference to the Tribunal to be amended in accordance with the rules, practice and procedure of the Tribunal or to be re-presented after an amendment has been made at the direction of the registrar;
  - (b) register applications and maintain the register of applications;
  - (c) fix dates and make all other practical arrangements, including the issuing of notices to parties and witnesses, for sittings of the Tribunal or a panel of the Tribunal;
  - (d) arrange for publication of the proceedings and judgements of the Tribunal;
  - (e) give directions for any formal amendment of the record of the Tribunal;
  - (f) order the provision of copies of documents to parties; and
  - (g) grant leave to inspect the records of the Tribunal.
- (5) The registrar shall have custody of the seal and records of the Tribunal and shall exercise such other functions as may be assigned to the registrar by order of the President.

### **63. Tribunal panels.**

- (1) The functions of the Tribunal shall be exercised by panels of the Tribunal.
- (2) A panel of the Tribunal shall sit at such time and in such place as the president may direct and more than one panel may sit at a time.
- (3) The president shall make arrangements for determining which members of the Tribunal are to constitute a panel of the Tribunal in relation to the exercise of any function.
- (4) Arrangements made pursuant to subsection (3) shall ensure that each panel is constituted as —
  - (a) the president sitting alone;
  - (b) the president sitting with two ordinary members; or
  - (c) a legal member sitting with two ordinary members.

## **PROCEDURE FOR COMPLAINTS**

### **64. Complaints.**

- (1) A potential or actual bidder who claims to have suffered, or to be likely to suffer, loss or injury due to a breach of a duty imposed on a procuring entity by this Act may at any stage apply by way of complaint to the procuring entity for a review of the procurement proceedings.

- (2) The procuring entity shall not process an application made pursuant to subsection (1) unless —
  - (a) the complaint which is the subject of the application is made in writing;
  - (b) the complaint identifies the specific act of omission or commission alleged to contravene this Act and the bidding documents; and
  - (c) the complaint is made in respect of a contract award.
- (3) A procuring entity shall process a complaint by way of a review of the procurement proceedings where such complaint —
  - (a) concerns alleged improprieties in the solicitation of bids or applications to pre-qualification; and
  - (b) such alleged improprieties were not apparent prior to bid opening but have come to light after bid opening.

#### **65. Procuring entity review procedure.**

- (1) A complaint prior to the entry into force of a contract shall be made by the bidder, in the first instance, in writing to the head of the procuring entity.
- (2) The head of the procuring entity shall not entertain a complaint made pursuant to subsection (1) unless the complaint was submitted within fourteen working days of the bidder becoming aware of the circumstances giving rise to the complaint, or should have become aware of such circumstances, whichever is earlier.
- (3) The head of the procuring entity shall, unless the complaint is resolved by mutual agreement —
  - (a) suspend the procurement proceedings unless satisfied that urgent public interest considerations require the procurement to proceed;
  - (b) review the complaint; and
  - (c) within five working days after submission of the complaint, issue a written decision to the complainant stating the reasons the complaint has been rejected or, where the complaint is upheld, the corrective measures to be taken.
- (4) The complainant may, where the head of the procuring entity upon review does not issue a decision within five days or the complainant is not satisfied with the decision issued, appeal to the Procurement Review Tribunal.

#### **66. Appeal Tribunal.**

- (1) A person may make an application to the Procurement Review Tribunal for review where such person —

- (a) is aggrieved by a decision of the head of procuring entity made pursuant to section 55; or
  - (b) has a complaint in respect of the award of a contract that has already come into force.
- (2) An application for review may be made to the Tribunal —
- (a) in the form of an appeal by the complaining bidder against a decision by the head of a procuring entity filed within ten working days of the date on which the procuring entity's decision was communicated to the complaining bidder;
  - (b) where the head of a procuring entity to whom a complaint is made fails to render a decision within the required time or where the complainant is not satisfied with the decision issued by the procuring entity, and the application is filed within ten working days of the expiry of the required time for decision-making by the procuring entity;
  - (c) where the contract has already entered into force, in the form of an appeal in the first instance to the Tribunal filed within ten working days of the bidder becoming aware of the circumstances giving rise to the complaint, or should have become aware of such circumstances, whichever is earlier;
- (3) The president of the Tribunal shall within ten working days of receiving an application for review —
- (a) appoint a panel to hear the matter; and
  - (b) fix a date, to be known as the date of establishment, for the commencement of the panel's deliberations.

## **67. Panel decisions.**

- (1) A panel of the Procurement Review Tribunal shall make a written decision, containing the reasons for the decision, within ten working days after the conclusion of its deliberations.
- (2) A panel decision shall be binding on all the parties.
- (3) An application for review may be dismissed for —
  - (a) failure to comply with any of the prescribed requirements;
  - (b) containing only obligations that do not —
    - (i) state a valid basis for a complaint; or
    - (ii) set forth a detailed legal and factual statement;
  - (c) having been filed in an untimely manner —
    - (i) at the initial level of review by the procuring entity; or
    - (ii) with respect to deadlines for filing of an application with the Tribunal;

- (d) being concerned with contract implementation or administration rather than contract award.
- (4) The Tribunal panel may, on review of an application brought before it, dismiss a complaint or order a remedy —
  - (a) prohibiting the procuring entity from acting or deciding in an unauthorised manner or from following incorrect procedure;
  - (b) annulling in whole or in part any unauthorized act or decision of a procuring entity, other than an act or decision bringing the contract into force;
  - (c) reversing a decision by the head of a procuring entity, or substituting its own decision for such a decision, other than a decision bringing the contract into force.
- (5) Subject to subsection (6), the submission of an application for review within the time periods specified in this Act shall suspend the procurement proceedings until a decision on the matter is issued by the Tribunal panel.
- (6) The president of the Tribunal may upon the application of the procuring entity end the suspension of procurement proceedings pursuant to subsection (5) where the procuring entity satisfies the president that the continuation of the suspension would cause disproportionate harm to —
  - (a) the public interest;
  - (b) the procuring entity; or
  - (c) other suppliers and contractors.
- (7) The lifting by the president of a suspension pursuant to subsection (6) shall —
  - (a) permit the procuring entity to continue with the procurement procedure up to contract award; and
  - (b) not permit a contract to be concluded before a decision is made by the Tribunal panel.
- (8) The Tribunal panel shall in all cases ensure that all parties to a dispute are heard and given fair opportunity to make their case.

## **PART VI – DEBARMENT PROCEDURE**

### **68. Interpretation of Part.**

For the purposes of this Part —

**“debarment”** or **“debar”** means exclusion from eligibility to be awarded a procurement contract under this Act;

“**person**” whether legal or natural, includes a bidder, supplier or contractor;

“**suspension**” means a temporary status of ineligibility for procurement transactions, pending completion of an investigation or legal proceedings.

## 69. Suspension.

Where the Department determines that immediate action is necessary to protect the interest of the Government, the Department may suspend a person where there is adequate evidence that there may be a cause for debarment.

## 70. Debarment.

The Department may debar a person —

- (a) if that person is convicted or has a civil judgement against them for —
  - (i) commission of fraud or a criminal offence in connection with —
    - (aa) obtaining;
    - (bb) attempting to obtain; or
    - (cc) performing a public contract or subcontract;
  - (ii) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, non-payment of tax, violating tax laws, or receiving stolen property; or
- (b) commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the bidder's present responsibility;
- (c) upon a preponderance of evidence for —
  - (i) violation of the terms of a Government contract, subcontractor, or public agreement so serious as to justify debarment including but not limited to —
    - (aa) willful failure to perform in accordance with the terms of a contract; or
    - (bb) a history of failure to perform, or of unsatisfactory performance of a contract;
  - (ii) knowing failure by a principal, within three years after final payment on any Government contract, to timely disclose credible evidence of —
    - (aa) commission of fraud or bribery;
    - (bb) significant overpayment on the contract;

- (d) based on a determination by the Department of Immigration or the Office of the Attorney-General that the person is in contravention of the Immigration Act (*Ch. 191*);
- (e) based on any other cause of so serious or compelling a nature that it affects the present responsibility of the person; and
- (f) submitting multiple bids in contravention of section 33..

**71. Period of debarment.**

- (1) Debarment shall be for a period commensurate with the seriousness of the cause but shall not generally exceed three years.
- (2) If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

## **PART VII – MISCELLANEOUS**

**72. Confidentiality.**

- (1) A person having an official duty or being employed in the administration of this Act or engaged as a consultant to the Board shall consider and deal with all documents and information relating to the functions of the Board as confidential.
- (2) Subject to section 44. a person in possession of or control over any document or information relating to any business or transaction of the Board shall not communicate or attempt to communicate any information contained in that document or pass on the document to any person other than a person authorised under this Act to receive the document.

**73. Conflicts of interest.**

- (1) Procuring entities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.
- (2) For the purposes of this section —
  - “**conflict of interest**” means any situation where a relevant staff member has, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure;
  - “**relevant staff member**” means a staff member of the procuring entity, which is involved in the conduct of the procurement procedure or may influence the outcome of that procedure.

#### **74. Offences.**

- (1) No person, whether that person has made an offer or not, shall, with intent to gaining any advantage or concession for himself or any other person —
  - (a) offer any member of the Board or a committee thereof or any employee of the Board or any consultant or person providing service under this Act, a gift of money or other thing;
  - (b) approach any member of the Board, committee or any officer under this Act with respect to any matter that is before the Board or a committee or that is expected to come before the Board or Committee.
- (2) No person appointed under this Act shall accept any gift of money or other thing which is intended—
  - (a) to influence the vote at any meeting of the Board; or
  - (b) to influence the Board or any member of the Board or committee with respect to any matter that is before the Board or committee or that is expected to come before the Board or committee.
- (3) A person who contravenes section 13. commits an offence and is liable on summary conviction to a fine of ten thousand dollars or to a term of imprisonment for twelve months or to both.
- (4) A person who contravenes section 14. commits an offence and is liable on conviction on indictment to a fine of one hundred thousand dollars or to a term of imprisonment for five years or to both.
- (5) Where a person who commits an offence under subsections (1) and (2) is a corporate body, every director or officer thereof who knowingly or negligently authorised or conspired with another person to commit the offence and is liable on conviction to a fine of one hundred thousand dollars or to a term of imprisonment for five years or to both.

#### **75. Review of Act.**

- (1) This Act shall be reviewed from time to time by a Committee of both Houses of Parliament appointed by the Prime Minister in consultation with the Leader of the Opposition for that purpose.
- (2) The first review of this Act shall be conducted not later than two years after the date of the first appointed day notice under this Act.

#### **76. Annual report.**

The Minister shall cause to be prepared before the 30<sup>th</sup> day of September each year an annual report on the overall functioning of the public procurement system, including a profile of procurement activities.

**77. Minister to lay annual report.**

The Minister shall by the first sitting of the House of Assembly in the month of October or thereafter of each year cause the annual report of the Department to be laid before both chambers of Parliament together with the Minister's assessment of the work of the department for the relevant financial year.

**78. Non-derogation.**

Nothing in this Act shall derogate from the provisions of the Financial Administration and Audit Act (*No. 26 of 2010*).

**79. Regulations.**

The Minister may make regulations generally providing for any matter necessary or conducive to giving effect to the provisions of this Act and shall, make regulations specifically providing for —

- (a) a code of conduct in respect of —
  - (i) procuring entities and procurement units; and
  - (ii) contractors and suppliers;
- (b) fees payable for the submission of bids under the Act.

**80. Repeals.**

- (1) The Financial Administration and Audit (Amendment) Act, 2013 (*No. 13 of 2013*) is hereby repealed.
- (2) Section 29 – 32 of the Local Government Act (*Ch. 37*) is hereby deleted.
- (3) Section 25(e) of the Financial Administration and Audit Act (*Ch. 359*) is hereby deleted.
- (4) Regulations 56 – 58 of the Financial Regulations (*Ch. 359*) is hereby deleted.

**81. Transitional.**

- (1) Where a procurement contract is executed before the coming into force of this Act and the contract subsists, this Act shall apply to the contract as if that contract were executed under this Act, except that this Act shall not adversely affect the rights of any party to the contract.
- (2) The Minister may make regulations providing for any transitional matters arising as a consequence of the coming into force of this Act.

## **FIRST SCHEDULE**

(section 12(3))

### **Procedures of the Board.**

- (1) Subject to the Act and any regulations made thereunder, the Board may regulate its meetings and procedure as the Board thinks fit.
- (2) The Board shall have such structures and organization as the Minister may determine necessary for the efficient performance of its functions.

### **Tenure of members.**

The Chairperson and other Board members, not being ex officio members, shall hold office for a term of three years and shall be eligible for re-appointment except in the case of members appointed pursuant to section 4.(1)(d).

### **Remuneration of members.**

The Chairperson and other Board members shall be paid by the Department such remuneration, fees, allowances and reimbursements for expenses incurred, in connection with the discharge of their functions as the Minister may determine.

### **Quorum.**

The quorum at a meeting of the Board shall be five, excluding the Secretary.

### **Meetings.**

- (1) The Board shall meet not less than once per month.
- (2) The Board shall cause minutes of all its meetings to be taken by the secretary to the Board, signed by the Chairperson, and kept in the proper form as a public document.

### **Voting.**

Each Board member excluding the Secretary shall have one vote but the Chairperson shall, where there is an equality of votes, have a casting vote.

## **SECOND SCHEDULE**

(section 24)

### **PROCUREMENT VALUATION RULES**

- (1) For the purposes of estimating the value of a procurement, the estimated value shall —
  - (a) be cost-effective, transparent and a fair use of public funds;

- (b) take into account —
    - (i) published national and international prices;
    - (ii) other official indicative prices;
    - (iii) local market prices;
    - (iv) prices of previous contracts; or
    - (v) prices collected through the electronic government procurement system;
  - (c) be based on a comparison between the references in paragraph (1) (b), whenever they exist, with a cost analysis of the relevant technical specifications of the goods, services or works to be procured;
  - (d) include any applicable taxes, duties and other charges separate from the prices of the goods, materials, and labour; and
  - (e) include reasonably foreseeable elements of the ultimate price to be paid.
- (2) Where procurement is to be conducted in multiple lots with contracts to be awarded at the same time or over a given period to one or more suppliers, the calculation of the estimated value must be based on the estimated total maximum value of all lots making up the procurement.
  - (3) With regard to the procurement of works, calculation of the estimated value shall take into account both the cost of all works and the total estimated value of the supplies and services necessary for executing the works.
  - (4) With regard to the procurement of services, calculation of the estimated value shall take into account all forms of remuneration, including any premiums, fees, commissions, interest and other revenue streams that may be provided for as appropriate.
  - (5) Where the procurement is by lease, including hire-purchase or rental or does not specify a total price, the basis for valuing the procurement is —
    - (a) for a fixed-term contract where the term is twelve months or less, the total estimated contract value for the contract's duration;
    - (b) for a fixed-term contract where the term exceeds twelve months, the total estimated contract value including the estimated residual value that is payable at the end of the contract; or
    - (c) for a contract for an indefinite period or where there is doubt as to whether the contract is to be fixed-term, the estimated monthly instalment multiplied by forty-eight.
  - (6) Where the procurement contains an option for extension of the contract for additional deliveries or services for the same price and under the same

conditions, the basis for calculating the estimated procurement value must be the highest possible total permitted for the purchase, lease, rental or hire purchase options included.

- (7) Procuring entities shall not use a particular method for estimating the value of a procurement for the purposes of lowering the estimated contract value below any relevant procurement threshold value in order to avoid the application of any relevant procurement procedure.

### **THIRD SCHEDULE**

(section 27 (1))

#### **INTERNATIONAL BIDDING THRESHOLDS**

- (1) Six million, five hundred thousand Special Drawing Rights, in the case of a works contract.
- (2) One hundred fifty-five thousand Special Drawing Rights, in the case of a goods contract and a contract for non-consultancy services.

#### **OBJECTS AND REASONS**

This Bill seeks to provide for the establishment of a public procurement department and for process of public procurement incorporating best practices.

Clauses 1 to 3 of the Bill provides for the short title, the definitions of terms used in the Bill and set out the types of contracts that are covered by the Bill.

Clauses 4 and 5 of the Bill seeks to provide for the establishment of the Public Procurement Department and the functions of the Department.

Clause 6 of the Bills seeks to provide for centralised procurement that is the Department organizing the central procurement of commonly used items and where the value of a proposed contract to purchase commonly used items exceeds the sum of ten million dollars the Department shall seek Cabinet's approval.

Clause 7 seeks to provide for the functions of the Chief Procurement Officer to lead and manage the day to day operations of the Department and to periodically report to the Financial Secretary.

Clause 8 seeks to provide for the tenure of the Chief procurement officer to be a period of five years that is renewable but not exceeding ten years.

Clause 9 provides that the funds revenue and resources of the Department shall

consist of sums appropriated by Parliament and other sums that may become payable to the Department.

Clause 10 provides that all sums received by the Department shall be deposited into the Consolidated Fund.

Clause 11 seeks to provide that the Department prepare an annual budget of revenue and expenditure which shall be submitted to the Minister not less than two months prior to the beginning of each financial year. The statement of accounts for the Department shall be audited annually by auditors appointed by the Department with the approval of the Minister and audited accounts shall be submitted to the Minister who shall lay such audited accounts before the House of Assembly.

Clause 12 seeks to provide for the establishment and constitution of the Public Procurement Board.

Clause 13 seeks to provide for the duties and powers of the Board to make recommendations to the Minister for the award of contracts required by the government in excess of two hundred and fifty thousand dollars but not exceeding one million two hundred and fifty thousand dollars.

Clause 14 seeks to outline the functions of the procuring entities shall be to procure goods works or services in a fair equitable and transparent manner using competitive bidding procedures with a view to obtaining value for money by the most efficient means possible.

Clause 15 seeks to provide for the establishment of procuring unit within each procuring entity that is Ministry or Department.

Clause 16 outlines the functions of the procurement units which include planning of procurement, preparation of invitations to bid publication, distribution, and reception of bids administration and implementation of procurement contracts.

Clause 17 seeks to provide that each procuring entity establishes a tender committee that will be responsible for awarding all contracts where the value exceeds fifty thousand dollars. The members of this committee would be appointed by the head of the procuring entity which in most cases will be the Permanent Secretary. The committee will comprise a minimum of three and a maximum of five members.

Clause 18 seeks to provide for the functions and powers of the tender committee. The functions of a tender committee includes verification of proper procurement planning, the conduct of opening of bids, and the award of contracts.

Clause 19 seeks to provide that where the value of proposed contract exceeds two hundred and fifty thousand dollars the tender committee shall forward its recommendation for award to the Board and where the value of the proposed contract exceeds one million two hundred thousand dollars the Board shall seek the approval of Cabinet.

Clause 20 prohibits the division of a procurement with the intention of avoiding

the prescribed thresholds.

Clause 21 seeks to permit the division of a procurement where it is anticipated that the award of several contracts may result in the best overall value for the procuring entity. This is subject to clause 20.

Clause 22 seeks to provide that every procuring entity prepare a procurement plan for each fiscal year. The procurement plan shall include a detailed breakdown of the goods, works and services required, a schedule of the delivery, implementation or completion dates for all goods works and services required, on indication of whether goods or services will be procured as a single package, through aggregation with another procuring entity, or through centralized procurement by the Department; an indication of the anticipated procurement method for each procurement requirement; an estimated value of each procurement of good and services.

Clause 23 seeks to provide that every procuring entity prepare a procurement plan for each individual procurement requirement which should include a description of the requirement, the estimated value, the proposed procurement method and an estimate all the time required for each stage in the procurement cycle and any other relevant information.

Clause 24 seeks to require that a procuring entity select the most appropriate method of procurement for each requirement which shall take into account the estimated value of the procurement, the potential sources for the procurement and the nature of the goods or services required.

Clause 25 provides that public procurement shall be undertaken by means of advertised competitive bidding proceedings to which equal access shall be provided to all that eligible out and qualified bidders without discrimination.

Clause 26 provides that competitive bidding may be held in two stages where it is not feasible to define the technical or contractual aspects of the procurement to elicit competitive bids or due to the complex nature of goods or services to be procured the procuring entity wishes to consider and to discuss with bidders various technical or contractual solutions and their merits before deciding on the final specifications.

Clause 27 makes provision for international bidding. It stipulates that all invitations to bid or pre-qualify and bidding documents shall be in English; sufficient time should be allowed for candidates to receive an invitation, prepare and submit an application to pre-qualify and bid in accordance with the instructions given. Bidders shall express their bids in United States currency or Bahamian dollar.

Clause 28 seeks to provide for selective bidding to be used in cases of high value or complex procurements.

Clause 29 seeks to provide for the circumstances in which restricted bidding may be permitted where bidding is invited from a limited number of selected bidders.

Clause 30 seeks to provide for limited bidding where there is extreme urgency,

technical or artistic reasons or for reasons connected with protection of exclusive rights that the contract may only be performed by a particular supplier.

Clause 31 outlines the request for quotation method of procurement which is suitable for where goods or services does not exceed five thousand dollars and works does not exceed ten thousand dollars.

Part IV deals with the bidding process.

Clauses 34 to 36 provides for the preparation and publication of solicitation documents to be disseminated in a non discriminatory manner to ensure effective competition.

Clauses 37 and 38 provides that the procuring entity may require bidders to show that they meet the pre-qualification criteria set by the procuring entity in order to participate in the bidding process.

Clauses 39 and 40 provides that, except for limited bidding, where a procuring entity does not require a procurement notice an invitation to bid shall be issued for minimum bidding periods.

Clause 41 provides that alternative bids are prohibited except where a need could be satisfied in a number of different ways.

Clause 42 provides for domestic preferences so that every procuring entity allocate not less than ten percent of its overall procurements to MSMEs in accordance with rules issued by the department.

Clause 43 provides that a procuring entity may request a performance security to secure the contractor's obligation to fulfill the contract.

Clause 44 provides that a procuring entity may require bid security in order to deter non compliant bids

Clause 45 provides that request for proposals method may be used where the method of selection and criteria to be applied is to be set out in detail in the request for proposals.

Clauses 46 to 48 provides for the procedure to submit bids and the opening of bids. The bids shall be opened or accessed electronically at the time and place indicated in the bidding documents.

Clauses 49 to 53 provides for the examination and evaluation of bids. The bids are examined to determine whether bids are complete and have been properly signed by the bidder and that bids are substantially in line with the technical specifications and contract conditions set out in the bidding documents. Once examination and evaluation have started no negotiations should take place between the procuring entity and the bidder with respect to the bid submitted by that bidder. A procuring entity shall whenever requested by a bidder give reasons for the rejection of its bid.

Clauses 54 to 56 provides for cancellation of bids where no responsive bids are

received or the procurement proceedings are otherwise unsuccessful. A bidder may be disqualified if it is found that the information submitted in a bid concerning the bidder's qualification is false or misleading. Cancellation should also take place where the procurement need has ceased to exist or has changed significantly.

Clauses 57 and 58 provides that the contract shall be awarded to the bidder who submitted the lowest evaluated cost which meets only those criteria specified in the bidding documents. The procuring entity shall publish promptly a notice of the procurement contract award including details of the selection method, the awarded bidders name and address and the contract price.

Clauses 59 to 63 provides for a Procurement Review Tribunal which is an independent ad hoc tribunal that has an official seal that shall be judicially noticed. The tribunal shall consist of a president and a maximum of four ordinary member a minimum of one third must be legal members (that is the person is a member of the Bahamas Bar for at least seven years. The functions of the Tribunal is exercised by panels which are determined by the president. Panels may be constituted as the president sitting alone, the president sitting with two ordinary members or a legal member sitting with two ordinary members.

Clauses 64 to 67 outlines procedures for complaints about the procurement process. A potential or actual bidder who claims to have suffered loss or is likely to suffer loss due to an entity not following the Act may apply firstly to the procuring entity for a review of the procurement proceedings within fourteen working days. The head of the procuring entity suspend the procurement proceedings, review the complaint, and within five working days issue a written decision. The complainant may appeal to the Procurement Review Tribunal within ten working days of the written decision.

Clauses 68 to 71 provides for debarment procedures where a person may be excluded from eligibility to be awarded a procurement contract.