

**OBJECTS AND REASONS**

This Bill would regulate public procurement and in particular promote integrity, fairness, transparency, value for money and efficiency in public procurement.

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## **BARBADOS**

A Bill entitled

An Act to regulate public procurement and in particular to promote integrity, fairness, transparency, value for money and efficiency in public procurement.

ENACTED by the Parliament of Barbados as follows:

PART I

PRELIMINARY

**Short title**

1. This Act may be cited as the *Public Procurement Act, 2018*.

**Interpretation**

2. In this Act,

“accounting officer” has the meaning assigned to it by section 2 of the *Financial Management and Audit Act, Cap. 5*;

“coercive practice” means harming or threatening to harm, directly or indirectly, a person or the property of a person, so as to influence participation or a decision in procurement proceedings or affect the execution of a procurement contract or framework agreement;

“collusive practice” means a scheme or arrangement between 2 or more suppliers, with or without the knowledge of a procuring entity, designed to establish submissions at prices that are artificial or non-competitive and includes a scheme or arrangement for price-fixing and bid-rigging as described in sections 33 and 35, respectively, of the *Fair Competition Act, Cap. 326C*;

“common item” means a good or service that is regularly required by more than one procuring entity but does not include a drug;

“conflict of interest” means a situation in which the personal interest of a person or that of a close relative of the person, might be furthered, directly or indirectly, from the official actions of the person or in which the personal interest of the person or that of a close relative, might prevent the person from acting impartially and in the public interest;

“contract management record” means the record required to be kept pursuant to section 86(1)(b);

“corrupt practice” means the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence the action of an officer in procurement proceedings or in the execution of a procurement contract or framework agreement;

“day” does not include a Saturday, Sunday or public holiday;

“Director” means the Director of Finance and Economic Affairs;

“drug” has the meaning assigned to it by section 2 of the *Pharmacy Act*, Cap. 372D;

“*force majeure*” means an event that is beyond the reasonable control of a person and which makes the person’s performance of his obligations impossible or so impractical as to be reasonably considered to be impossible in the circumstances;

“framework agreement” means an agreement that is executed with a supplier upon completion of the first stage of a framework agreement procedure and sets out the terms under which the supplier will enter into a procurement contract during the period to which the agreement relates;

“framework agreement procedure” means a procedure conducted in two stages - a first stage to select a supplier to be a party to a framework agreement and a second stage to award a procurement contract to a supplier who is a party to the agreement;

“fraudulent practice” means the misrepresentation or omission of facts in order to influence procurement proceedings or the execution of a procurement contract or framework agreement;

“head of a procuring entity” means, in relation to

- (a) a procuring entity that is a statutory body, the chief executive officer or other officer who holds a similar position in the entity;
- (b) a state-owned company, the chief executive officer or other officer who holds a similar position in the company;

(c) any other procuring entity, the accounting officer of the entity;

“medical practitioner” has the meaning assigned to it by section 2 of the *Medical Profession Act, 2011* (Act 2011-1);

“officer”, in relation to a procuring entity, means a public officer or other employee, including a temporary employee and a chief executive officer and, where the entity is managed or governed by a board or other similar body, the members of the board or other body, as the case may be;

“open framework agreement” means a framework agreement to which any supplier, in addition to the initial parties, may subsequently become a party;

“open tendering” means tendering in response to a solicitation to the public at large;

“pharmacist” has the meaning assigned to it by section 2 of the *Pharmacy Act, Cap. 372D*;

“pre-qualification document” means a document issued by a procuring entity that sets out the terms and conditions of pre-qualification proceedings;

“procurement contract” means a contract between a procuring entity and a supplier in respect of a procurement;

“procurement record” means the record required to be kept pursuant to section 86(1)(a);

“procuring entity” means any

(a) ministry, department, agency, organ, unit or other authority of Government;

(b) statutory body; or

(c) state-owned company,

that uses public funds for any purpose whatsoever;

“public funds” means

- (a) revenue, including all tolls, taxes, imposts, rates, duties, fees, penalties, forfeitures, rents and dues and proceeds of sale and other receipts, from whatever sources arising, over which Parliament has the power of appropriation;
- (b) money raised in circumstances from which it can be reasonably inferred that the Crown accepts ultimate liability in the case of default; and
- (c) money raised in accordance with any enactment for a public purpose;

“public officer” has the meaning assigned to it by section 2 of the *Public Service Act*, Cap. 29;

“public-private partnership” means an arrangement governed by a long term procurement contract between a procuring entity and a private party involving the designing, financing, building and operation of an infrastructure project or the provision of a service through the appropriate sharing of resources, risks and rewards;

“public procurement” or “procurement” means the acquisition of goods, works or services by a procuring entity;

“single-source procurement” means procurement initiated by soliciting one supplier;

“solicitation” means an invitation to tender or to submit quotations or proposals;

“solicitation document” means a document which sets out the terms and conditions of a procurement and is issued by a procuring entity to suppliers to guide their preparation and presentation of submissions;

“standstill period” means the period commencing with the date of dispatch of a successful tender notice pursuant to section 34(1) and ending with such date as a procuring entity determines in accordance with section 34(3) and (4);

“state-owned company” means a company that is wholly owned by the Crown or in respect of which the Crown owns the majority of the shares;

“statutory body” has the meaning assigned to it by section 2 of the *Financial Management and Audit Act*, Cap. 5;

“submission” means a tender, quotation or proposal submitted by a supplier in response to a solicitation by a procuring entity;

“supplier” means a provider of goods, works or services;

“Suppliers Register” means the register referred to in section 65(1);

“tenders committee” means the General Tenders Committee, the Drug Tenders Committee or a special tenders committee established by or pursuant to section 7;

“tender security” means a security that a procuring entity requires from a supplier to secure the performance of an obligation relating to a matter referred to in section 21(1)(b) but, for the avoidance of doubt, does not include a security for the performance of a procurement contract;

“Tribunal” means the Public Procurement Tribunal established by section 8;

“undue influence” includes any form of pressure brought to bear by an official, elected or appointed, who is in a position either to provide a benefit to, or exact punishment against, any person involved in procurement activities or decisions.

### **Application of Act**

**3.(1)** This Act applies to public procurement including, for the avoidance of doubt, public procurement in respect of public-private partnerships.



(2) Notwithstanding subsection (1), to the extent that this Act conflicts with an obligation of the Crown under or arising out of a treaty or other form of agreement between Barbados and

- (a) another State, including an agreement for technical or other cooperation;
- (b) any subdivision or local authority of another State or any other authority of the State; or
- (c) an international financial institution,

the requirements of the treaty or other agreement shall prevail.

## PART II

### ADMINISTRATION

#### **Management of public procurement**

**4.** The Chief Procurement Officer shall be responsible for the management of public procurement.

#### **Functions of Chief Procurement Officer**

**5.(1)** Without prejudice to the generality of section 4, the Chief Procurement Officer shall

- (a) formulate or recommend for the approval of the Minister, policies and rules on public procurement;
- (b) formulate or recommend for the approval of the Director, for public dissemination, manuals, standard documents and guidelines to facilitate the implementation and operation of this Act;
- (c) monitor the operation and performance of the public procurement system, prepare annual reports on the operation and performance of the system and recommend changes to the system where desirable;

- (d) promote and advise on capacity building in the public procurement system and advise on the professional qualifications and competencies required for officers engaged in procurement proceedings;
- (e) monitor the procurement proceedings of procuring entities to determine whether such entities are in compliance with this Act;
- (f) advise the Director and procuring entities on matters relating to public procurement;
- (g) organise and maintain systems for the management and public dissemination of data, statistics and other information on public procurement; and
- (h) whether on his own initiative or at the request of the Director, investigate and report to the Director on any procurement proceedings that are suspected to be in violation of this Act.

(2) The Chief Procurement Officer may, in pursuance of his functions and, in particular, in order to determine whether a procuring entity is in compliance with this Act, inspect the offices, and have access to the records, books and other documents, of the entity, and require from the entity such information as may be necessary for the purpose.

### **Functions of head of procuring entity**

**6.(1)** The head of a procuring entity shall ensure that the entity conducts public procurement in accordance with this Act and performs its functions under this Act in a timely and efficient manner.

(2) Without prejudice to the generality of subsection (1), the head of a procuring entity shall

- (a) ensure that
  - (i) an officer within the entity is designated to coordinate the procurement proceedings of the entity;

- (ii) officers engaged in procurement proceedings are supervised to prevent embezzlement, fraud, carelessness or the waste of resources;
  - (iii) appropriately skilled persons are assigned to
    - (A) prepare statements of requirements and perform other functions relevant to procurement proceedings; and
    - (B) sit on evaluation committees; and
  - (iv) appropriately qualified persons provide technical input into the procurement proceedings; and
- (b) before a procurement is initiated, confirm that funds are available to conduct the procurement.
- (3) The head of a procuring entity may, in writing, delegate to another officer of the entity on such conditions as he may determine, any of the duties set out in subsections (1) and (2), but such a delegation does not relieve the head of the entity of his responsibility under this Act.

### **Tenders committees**

**7.(1)** There is established a committee, to be known as the General Tenders Committee, which shall, in respect of procurement by means of open tendering and restricted tendering

- (a) review and, where appropriate, approve pre-qualification documents, solicitation documents, notices and shortlists of suppliers and any amendments thereto prior to their issue;
- (b) determine whether to grant extensions of deadlines where so requested by procuring entities;
- (c) conduct and record openings of tenders;
- (d) consider evaluation reports and recommendations by procuring entities as to which tenders should be accepted as successful tenders; and

- (e) consider recommendations by procuring entities to cancel particular procurement activities.
- (2) There is also established a committee, to be known as the Drug Tenders Committee, which shall, notwithstanding subsection (1), discharge the functions set out in subsection (1) in respect of the procurement of drugs.
- (3) Notwithstanding subsection (1), where the Crown borrows money from an international financial institution and the money is to be expended by the Crown, there shall be established a committee, to be known as a special tenders committee, which shall discharge the functions set out in subsection (1) in respect of procurement arising out of the purpose for which the money is to be expended.
- (4) The *First Schedule* has effect as to the constitution of the tenders committees and otherwise in relation thereto.
- (5) Notwithstanding subsections (1) to (4), the chairman of a tenders committee may, where this Act so provides, discharge a function of the tenders committee on behalf of the committee.

#### **Establishment of Public Procurement Tribunal**

- 8.(1)** There is established a body to be known as the Public Procurement Tribunal which shall hear and determine matters that come before it pursuant to this Act.
- (2) The Tribunal is a body corporate to which section 21 of the *Interpretation Act*, Cap. 1 applies.
- (3) The *Second Schedule* has effect as to the constitution of the Tribunal and otherwise in relation thereto.

PART III

PLANNING AND INITIATION OF PROCUREMENT

**Planning of procurement**

- 9.(1) A procuring entity shall
- (a) plan its procurement activities in a rational manner;
  - (b) aggregate its requirements for goods, works and services, where practicable, to obtain value for money and to reduce the cost of procurement;
  - (c) prepare and submit to the Chief Procurement Officer prior to a financial year
    - (i) an annual procurement plan; and
    - (ii) an estimation of its requirements for goods, works and services, for the year; and
  - (d) prepare, where requested to do so by the Chief Procurement Officer, an individual procurement plan for any particular procurement identified by the Chief Procurement Officer.
- (2) Notwithstanding subsection (1)(c), the Chief Procurement Officer may permit a procuring entity to submit a procurement plan in respect of a period other than a year.

**Publication of forthcoming procurement**

- 10.(1) A procuring entity shall, prior to a financial year, publish a list of the procurement activities it plans to conduct during the year.
- (2) The list shall
- (a) contain an indication of the types of goods, works and services likely to be required; and



**Estimation of value of procurement**

**13.(1)** A procuring entity shall not

- (a) divide its procurement activities or value a contract in parts; or
- (b) use any valuation method for estimating the value of a procurement,

so as to limit competition among suppliers or otherwise avoid its obligations under this Act.

(2) A procuring entity shall, in estimating the value of a procurement contract, include the estimated maximum total value of the contract or, where a framework agreement is contemplated, of all procurement contracts envisaged under the agreement over its entire duration, taking into account all forms of remuneration.

**Procurement of common items**

**14.(1)** Common items shall be procured, at the discretion of the Chief Procurement Officer, by

- (a) the Chief Procurement Officer on behalf of procuring entities; or
- (b) procuring entities under arrangements established for the purpose by the Chief Procurement Officer.

(2) The Chief Procurement Officer

- (a) shall
  - (i) consult with procuring entities in order to determine
    - (A) which goods and services are common items; and
    - (B) the estimated need for the items;
  - (ii) distribute to procuring entities every 6 months, a list of items designated as common items;

- (iii) enter into appropriate contractual arrangements for the procurement of common items; and
  - (iv) issue regularly updated information to procuring entities on the common items available and the prices, delivery times and arrangements established for ordering or obtaining the items; and
- (b) may utilise warehouses, where appropriate, for the cost-effective storage and distribution of common items.
- (3) The Chief Procurement Officer shall, for the purpose of procurement under subsection (1)(a), operate a bank account into which shall be paid
- (a) money provided for the procurement of common items;
  - (b) money by way of repayments made by procuring entities in respect of procurement conducted on their behalf; and
  - (c) any other money which he may receive in the course of his official duties.
- (4) The Chief Procurement Officer shall pay out of the account referred to in subsection (3), any amounts due in settlement for common items procured.

**Use of agents**

**15.** The Chief Procurement Officer, or a procuring entity with the approval of the Chief Procurement Officer, may procure goods or services through an agent, whether local or overseas, where it appears prudent to do so.



## PART IV

## METHODS OF PROCUREMENT

**Selection of method of procurement**

- 16.(1)** A procuring entity
- (a) shall, subject to subsection (2)(a) and (b), conduct procurement by means of open tendering where the estimated or actual value of the procurement contract exceeds
    - (i) \$300 000, for the procurement of goods or services or a combination of goods and services; and
    - (ii) \$500 000, for the procurement of works or a combination of works and goods, of works and services or of works, goods and services; and
  - (b) may conduct procurement by means of open tendering in any other case where it considers it appropriate to do so.
- (2) A procuring entity may
- (a) conduct procurement by means of restricted tendering in the circumstances set out in section 18(1);
  - (b) engage in single-source procurement in the circumstances set out in section 47(1); and
  - (c) conduct procurement by means of a request for quotations where the estimated or actual value of the procurement contract does not exceed the relevant threshold specified in subsection (1)(a).
- (3) A procuring entity may, in conducting procurement, utilise a framework agreement procedure in accordance with section 53.
- (4) Subject to subsections (1) and (2), a procuring entity shall, in selecting a method of procurement, select the method that is the most efficacious in the

circumstances of the procurement and seek to maximise competition to the extent practicable.

(5) The Minister may, by Order subject to negative Resolution, vary the amounts set out in subsection (1).

### *Open Tendering and Restricted Tendering*

#### **Open tendering**

**17.(1)** Where a procuring entity intends to engage in open tendering, the entity shall publish a notice to be called an invitation to tender.

(2) The invitation to tender shall include

- (a) the principal terms and conditions of the procurement contract;
- (b) any key technical, eligibility or qualification requirements;
- (c) whether the entity will convene a meeting of suppliers; and
- (d) the procedure, place and deadline for presenting tenders.

(3) Subsection (1) does not apply where a procuring entity engages in pre-qualification proceedings.

#### **Restricted tendering**

**18.(1)** Subject to subsection (2), a procuring entity may, with the permission of the Director, conduct procurement by means of restricted tendering in any of the following circumstances:

- (a) the goods, works or services to be procured are available from 10 suppliers or less; or

- (b) there is an urgent need for the goods, works or services to be procured and
  - (i) the circumstances giving rise to the urgency were neither foreseeable by the entity nor the result of dilatory conduct on the part of the entity; and
  - (ii) engaging in open tendering would be impractical.
- (2) A procuring entity shall submit a request for permission to engage in restricted tendering to the Chief Procurement Officer for submission to the Director.
- (3) The entity shall submit with its request, in a case where it seeks to engage in restricted tendering on the ground set out in
  - (a) subsection (1)(a), a list of the suppliers from whom the entity believes the goods, works or services are available; or
  - (b) subsection (1)(b), the list of suppliers from whom the entity intends to solicit tenders.
- (4) The Director may, on the advice of the Chief Procurement Officer, grant permission to a procuring entity to engage in restricted tendering where any of the circumstances set out in subsection (1) exists.
- (5) Notwithstanding subsections (1) and (4), where, after a procuring entity applies to the Director for permission to engage in restricted tendering on the ground set out in subsection (1)(a), it is discovered that the goods, works or services are available from more than 10 suppliers, the Director may grant permission to the entity to engage in restricted tendering where he is satisfied, on the advice of the Chief Procurement Officer, that the entity made reasonable efforts to discover the number of suppliers from whom the goods, works or services are available.

(6) Where a procuring entity engages in restricted tendering on the ground set out in

- (a) subsection (1)(a), the entity shall solicit tenders from all suppliers from whom the goods, works or services are available;
- (b) subsection (1)(b), the entity shall
  - (i) in a non-discriminatory manner, select suppliers from whom to solicit tenders; and
  - (ii) in order to ensure effective competition, select a sufficient number of suppliers.

**Solicitation documents for tendering**

**19.(1)** A procuring entity shall provide a solicitation document

- (a) to each supplier who responds to its invitation to tender in accordance with the procedures and requirements specified therein;
- (b) to each supplier who pre-qualifies pursuant to pre-qualification proceedings or, where the entity selects a limited number of pre-qualified suppliers from whom to solicit tenders, who is among the number of selected, pre-qualified suppliers; or
- (c) in a case of restricted tendering on the ground set out in
  - (i) section 18(1)(a), to each supplier from whom the goods, works or services are available; or
  - (ii) section 18(1)(b), to each supplier from whom the entity intends to solicit tenders.

(2) The entity shall prepare the solicitation document in the form of the standard document, if any, issued or approved by the Director for the purpose and include in the document

- (a) information on the management of the procurement proceedings and the applicable laws;

- (b) the eligibility requirements of suppliers and an indication of any documentary evidence required to be submitted as proof of eligibility;
- (c) a clear statement of the qualification criteria, the procedures to be used to ascertain the qualifications of suppliers and any documentary evidence required to be submitted to demonstrate those qualifications;
- (d) a description of the subject matter of the procurement in the form of a statement of requirements;
- (e) instructions on the preparation and presentation of tenders, including any requirement for the presentation of separately sealed technical and financial tenders, and the procedure, place and deadline for presenting tenders;
- (f) where a tender security is required, a statement to that effect, and any requirement as to the nature, form, amount and other principal terms and conditions of the security and the issuer, with sufficient specificity to enable a supplier to be reasonably certain of the type of security that the procuring entity would consider acceptable;
- (g) the duration of the standstill period or, where no standstill period will be applied, a statement to that effect and the reason for not applying one;
- (h) the procedure, place, date and time for the opening of tenders;
- (i) the criteria and procedure for evaluating tenders including
  - (i) whether the successful tender will be ascertained on the basis of price or of price and other criteria;
  - (ii) where price and other criteria are to be used in the evaluation, the relative weights of all criteria; and
  - (iii) the manner of application of the criteria in the evaluation;
- (j) any formalities required for a procurement contract to be executed once a successful tender is accepted;

- (k) the principal terms and conditions and proposed form of the procurement contract; and
  - (l) notice of the right to challenge decisions or actions of a procuring entity or tenders committee that are allegedly not in compliance with this Act.
- (3) The entity may charge a non-refundable fee for the provision of a solicitation document to a supplier but the fee shall reflect only the cost of providing the document to the supplier.

**Clarification and modification of invitations to tender and solicitation documents**

**20.(1)** Where a procuring entity receives, at least 2 weeks prior to the deadline for the presentation of tenders, a request from a supplier for clarification of an invitation to tender or a solicitation document, the entity shall, without identifying the source of the request, provide the clarification to all suppliers involved in the procurement proceedings, including the supplier who made the request, at the same time and within sufficient time to enable them to present their tenders before the deadline for presentation.

(2) Without prejudice to the generality of subsection (1), a procuring entity shall provide clarification of a solicitation document to all suppliers to whom the entity provided the document.

(3) A procuring entity may, prior to the deadline for presenting tenders, and with the approval of the chairman of the relevant tenders committee, whether on its own initiative or as a result of a request by a supplier for a clarification, modify an invitation to tender or a solicitation document by issuing an addendum.

(4) The addendum shall

(a) in the case of

- (i) an invitation to tender, be published in the same manner and place as the invitation to tender; and

- (ii) a solicitation document, be made available to each supplier to whom the entity provided the solicitation document; and
- (b) be binding on the suppliers.

**Tender securities**

- 21.(1)** Where a procuring entity requires a tender security
- (a) the requirement shall apply to all suppliers who present tenders; and
  - (b) any requirement that the entity sets out in the solicitation document in respect of the security that refers directly or indirectly to the conduct of a supplier shall relate to
    - (i) the withdrawal or modification of the tender after the deadline for presenting tenders; or
    - (ii) the failure to
      - (A) execute a procurement contract where so required by the solicitation document;
      - (B) provide a security, where so required by the solicitation document, for the performance of the procurement contract after the successful tender is accepted; or
      - (C) comply with any other condition precedent to executing the procurement contract, as specified in the solicitation document.
- (2) Where a supplier breaches a requirement set out in a solicitation document in relation to a matter specified in subsection (1)(b)(i) or (ii), his tender security shall be forfeited.
- (3) A procuring entity shall
- (a) make no claim to the amount of a tender security; and

- (b) promptly return the security document where any of the following occurs:
  - (i) the expiry of the tender security;
  - (ii) the execution of a procurement contract and the provision of a security for the performance of the contract, where such a security for performance is required by the solicitation document;
  - (iii) the cancellation of the procurement; or
  - (iv) the withdrawal of the relevant tender prior to the deadline for presenting tenders.
- (4) A procuring entity may reject a tender security on the ground that the issuer has become insolvent or has otherwise ceased to be creditworthy.

#### **Meetings with suppliers prior to presentation of tenders**

- 22.(1) Where a procuring entity convenes a meeting of suppliers prior to the deadline for presenting tenders, the entity shall prepare minutes of the meeting.
- (2) The minutes shall
  - (a) include any request, without identifying the source of the request, submitted at the meeting for clarification of the solicitation document, and the response of the entity to the request; and
  - (b) be provided promptly to the suppliers to whom the entity provided the solicitation document to enable the suppliers to take the minutes into account in preparing their tenders.

#### **Deadline for presenting tenders**

- 23.(1) A procuring entity shall express a deadline for presenting tenders as a specific date and time and shall, taking into account the reasonable needs of the entity, allow sufficient time for suppliers to prepare and present tenders.
- (2) Where a procuring entity issues a clarification or modification of an invitation to tender or a solicitation document, the entity shall, prior to the



deadline for presenting tenders, request the chairman of the relevant tenders committee to extend the deadline, where necessary, in order to afford suppliers sufficient time to take the clarification or modification into account in preparing their tenders.

(3) The chairman of a tenders committee may, in his absolute discretion, prior to a deadline for presenting tenders, extend the deadline where it is not possible for one or more suppliers to present tenders by the deadline because of any circumstance beyond their control.

(4) Notice of an extension of a deadline shall, in the case of a clarification or modification of

- (a) an invitation to tender, be published in the same manner and place as the invitation to tender; and
- (b) a solicitation document, be given to each supplier to whom the entity provided the solicitation document.

### **Presentation of tenders**

24.(1) A tender shall be presented

- (a) in accordance with the procedure, and at the place and by the deadline, specified in the solicitation document;
- (b) in writing, signed and, where in
  - (i) paper form, in a sealed envelope; or
  - (ii) any other form, according to the requirements specified in the solicitation document, which shall ensure at least a similar degree of authenticity, security, integrity and confidentiality.

(2) The relevant tenders committee shall

- (a) provide a secure means by which suppliers may submit tenders and provide each supplier with a receipt showing the date and time when his tender was received;

- (b) preserve the security, integrity and confidentiality of the tender; and
  - (c) ensure that the content of the tender is examined only after its opening in accordance with section 27.
- (3) A tender received by a tenders committee after the deadline for presenting tenders shall not be opened and shall be returned to the supplier who presented it.
- (4) Notwithstanding subsection (3), a tender received by a tenders committee after the deadline for presenting tenders may be accepted and opened in circumstances where it can be ascertained that the presentation of the tender was delayed by *force majeure*.

**Presentation of separately sealed technical and financial tenders**

**25.** A procuring entity may request separately sealed technical and financial tenders where the entity needs to consider the financial aspects of the tenders separately and only after completion of the examination and evaluation of the technical, quality and performance characteristics of the tenders.

**Validity of tenders, modification and withdrawal of tenders**

**26.(1)** Tenders shall remain valid for the period specified in the solicitation document.

- (2) A procuring entity may, prior to the expiry of the period of validity, request suppliers to extend the period for an additional specified period.
- (3) A supplier may refuse to extend the period of validity of his tender without forfeiting his tender security, if any.
- (4) A supplier who agrees to an extension of the validity of his tender shall extend the period of validity of any tender security he provided or provide a new tender security to cover the extended period of validity of his tender.

- (5) A supplier whose tender security is not extended or who does not provide a new tender security shall be considered to have refused the request to extend the period of validity of his tender.
- (6) A supplier may modify or withdraw his tender prior to the deadline for presenting tenders without forfeiting his tender security.
- (7) A modification or notice of withdrawal of a tender is effective where it is received by the procuring entity prior to the deadline for presenting tenders.

### **Opening of tenders**

**27.(1)** Tenders shall be opened at the time and place specified in the solicitation document and in accordance with the procedure specified in that document.

- (2) A supplier who presents a tender or his representative shall be
  - (a) permitted by the tenders committee to be present at the opening of tenders; and
  - (b) deemed to have been permitted to be present at the opening of tenders where he is notified of the time and place for the opening of tenders.
- (3) The name and address of each supplier whose tender is opened and the tender price shall be
  - (a) announced to the persons present at the opening of tenders;
  - (b) communicated, on request, to a supplier who presents a tender but is not present or represented at the opening of tenders; and
  - (c) included immediately in the procurement record.
- (4) Notwithstanding subsections (2) and (3), section 31 shall apply where a procuring entity requests separately sealed technical and financial tenders.
- (5) Notwithstanding subsection (3), tender prices need not be announced where it is impractical to do so because of the volume of the prices.

(6) With the exception of late tenders, which shall be returned in accordance with section 24, no tender shall be accepted, rejected or evaluated at the opening of tenders.

(7) A tenders committee shall note, in a record to be called a record of tender opening, any discrepancies or missing documents in respect of a tender, but shall not otherwise comment on such discrepancies or missing documents at the opening of tenders.

### **Evaluation committees**

**28.(1)** A procuring entity shall, for each procurement, establish an evaluation committee to be responsible for the evaluation of tenders and the preparation of an evaluation report.

(2) The membership of the committee shall depend on the value and complexity of the procurement but shall in all cases be not less than 3 persons.

(3) A procuring entity may appoint an external, technical specialist or procurement agent to conduct the evaluation of tenders and prepare an evaluation report on its behalf.

(4) A procuring entity shall require any person appointed pursuant to subsection (1) or (3) to declare whether he has any conflict of interest in respect of the procurement being evaluated.

(5) Where a person declares a conflict of interest, the person shall have no further involvement in the procurement proceedings and shall be immediately replaced by the procuring entity.

(6) An evaluation report prepared under this section may include

- (a) the method of assessment;
- (b) a copy of any relevant notice and the date of issue of the notice;
- (c) the deadline for presentation of tenders;
- (d) the date of the opening of tenders;

- (e) any addendum issued or query received;
  - (f) copies of all other relevant documents;
  - (g) comments on arithmetic corrections;
  - (h) any notification to a supplier of an arithmetic correction and any response to such a notification;
  - (i) a table showing any corrected prices with relevant comments;
  - (j) a comparison of tenders; and
  - (k) the recommendation of the committee or person appointed pursuant to subsection (3), including any recommendation to negotiate with a supplier together with appropriate justification for the recommendation.
- (7) A procuring entity shall submit each evaluation report to the relevant tenders committee for consideration.

#### **Evaluation criteria and procedures**

- 29.(1)** The criteria to be used to evaluate a tender shall relate to the goods, works or services to be procured.
- (2) The evaluation criteria may include
- (a) the price;
  - (b) the cost of operating, maintaining and repairing goods or works;
  - (c) the time for the delivery of the goods, completion of the works or provision of the services, as the case may be;
  - (d) the characteristics of the goods, works or services, such as functional and environmental characteristics;
  - (e) the terms of payment and of guarantees in respect of the goods, works or services; and

- (f) where relevant, the experience, reliability and professional and managerial competence of the supplier and of the personnel to be involved in providing the goods, works or services.
- (3) All non-price evaluation criteria shall, to the extent practicable, be objective and quantifiable.
- (4) A procuring entity shall, in evaluating tenders and determining the successful tender, use only the criteria and procedures specified in the solicitation document and apply the criteria and procedures in the manner specified in that document.
- (5) No criterion or procedure that has not been set out in accordance with this section and section 19(2) shall be used in any evaluation under this Act.

**Examination and evaluation of tenders**

- 30.(1)** A procuring entity may ask a supplier for clarification of his tender where the clarification would assist the entity in the examination and evaluation of the tender.
- (2) A procuring entity shall correct purely arithmetic errors discovered during the examination of a tender and give prompt notice of the correction to the supplier who presented the tender.
- (3) No change in a matter of substance in the tender, including a change in price and a change aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.
- (4) Any items having a zero price shall be deemed to be included in the price of other items except in the case of line-item bidding where a zero price shall be considered a non-offer for the item.
- (5) A procuring entity shall regard a tender as responsive where it conforms to all requirements set out in the solicitation document.

(6) Notwithstanding subsection (5), a procuring entity may regard a tender as responsive even where it contains

- (a) minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation document; or
- (b) errors or oversights that are capable of being corrected without touching on the substance of the tender,

and any such deviations shall be quantified, to the extent possible, and appropriately taken into account in the evaluation of the tender.

(7) Notwithstanding subsection (6), where a specification states that an item is critical to the functioning of the entire lot or procurement, the failure of such critical item to be responsive shall be cause for the tender in respect of the entire lot or procurement to be regarded as unresponsive.

(8) A procuring entity shall reject a tender

- (a) where the supplier who presented the tender is not qualified or the entity is obliged, under this Act, to exclude the supplier from participation in public procurement;
- (b) where the supplier who presented the tender does not accept a correction of an arithmetic error made pursuant to subsection (2);
- (c) where the tender is unresponsive; or
- (d) in the circumstances set out in section 32.

(9) The entity shall evaluate the tenders that have not been rejected in order to ascertain the successful tender in accordance with the criteria and procedures set out in the solicitation document.

(10) The successful tender shall be

- (a) where price is the only criterion, the tender with the lowest price; or

(b) where there are price and other criteria, the most advantageous tender ascertained on the basis of the criteria and procedures, specified in the solicitation document, for evaluating the tenders.

(11) Where tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders, the tender prices of all tenders shall be converted to the currency specified in the solicitation document according to the rate set out in that document.

(12) A procuring entity may, whether or not it has engaged in pre-qualification proceedings, require a supplier who presented a tender that is determined to be a successful tender to demonstrate or reconfirm his qualifications.

(13) The criteria and procedures to be used for the demonstration or reconfirmation of the qualifications of a supplier shall be set out in the solicitation document.

(14) Where a procuring entity has engaged in pre-qualification proceedings, the criteria for confirming qualifications shall be the same as those used in the pre-qualification proceedings.

(15) Where a supplier who presented a successful tender is requested to demonstrate or reconfirm his qualifications but fails to do so, the entity shall reject the tender and shall

(a) subject to section 35(2), select the next highest ranked tender from among those remaining valid; or

(b) cancel the procurement.

### **Separate opening, examination and evaluation of technical and financial tenders**

**31.(1)** This section applies, in addition to section 30, where a procuring entity intends to consider the financial aspects any of tenders separately and only after the completion of the examination and evaluation of the technical, quality and performance characteristics of the tenders.



- (2) A procuring entity shall, before it requests the opening by the tenders committee of the financial tenders, examine and evaluate the technical, quality and performance characteristics of tenders in accordance with the criteria and procedures specified in the solicitation document.
- (3) The results of the examination and evaluation of the technical, quality and performance characteristics of the tenders shall be immediately included in the procurement record.
- (4) Where the technical, quality and performance characteristics of a tender
  - (a) meet or exceed the relevant minimum requirements, the tender shall be regarded as responsive;
  - (b) fail to meet the relevant minimum requirements, the tender shall be regarded as unresponsive and shall be rejected on that ground.
- (5) The procuring entity shall, in the case of
  - (a) a responsive tender,
    - (i) promptly communicate to the supplier who presented the tender, the score of the technical, quality and performance characteristics of his tender; and
    - (ii) invite all such suppliers or their representatives to the opening, by the tenders committee of the financial tenders; and
  - (b) an unresponsive tender
    - (i) promptly send to the supplier who presented the tender a notice of rejection together with the reason for the rejection; and
    - (ii) ensure that his financial tender is returned unopened.

- (6) The name and address of each supplier whose tender is responsive, the score of the technical, quality and performance characteristics of his tender and the price of his financial tender shall
- (a) be announced to the persons present at the opening of the financial tenders; and
  - (b) communicated, on request, to a supplier who was invited to, but was not present or represented at, the opening of tenders.
- (7) The price of each corresponding financial tender referred to in subsection (6) shall be included in the procurement record.
- (8) The procuring entity shall compare the financial aspects of the responsive tenders and on that basis identify the successful tender in accordance with the criteria and procedures set out in the solicitation document.
- (9) The successful tender shall be the tender with the best combined evaluation in terms of
- (a) the criteria, other than price, specified in the solicitation document; and
  - (b) the price.

### **Rejection of abnormally low tenders**

- 32.(1)** A procuring entity may, subject to subsection (2), reject a tender where the entity determines that the price, in combination with other constituent elements of the tender, is abnormally low in relation to the goods, works or services to be procured and raises concerns with the entity as to the ability of the supplier who presented the tender to perform the procurement contract.
- (2) A procuring entity shall not reject a tender pursuant to subsection (1) unless the entity
- (a) requests in writing from the supplier details of the aspect of the tender that gives rise to its concerns as to the ability of the supplier to perform the procurement contract; and

- (b) takes account of any information provided by the supplier pursuant to the request and of the information included in the tender but continues, on the basis of all such information, to hold such concerns.
- (3) The decision of a procuring entity to reject the tender of a supplier pursuant to this section and the reason for the decision shall be communicated to the supplier.

#### **Determination of successful tender**

**33.(1)** Where a procuring entity determines that a tender is the successful tender in respect of a procurement, the entity shall submit to the relevant tenders committee for consideration, the evaluation report on the matter and a recommendation that the tenders committee treat and accept as the successful tender, the tender identified as such by the entity.

- (2) The tenders committee may
  - (a) accept the recommendation of the procuring entity as to the successful tender; or
  - (b) where it does not accept the recommendation, subject to sections 29 to 32 and taking the evaluation report into account, make its own decision as to which tender is the successful tender.
- (3) A determination as to the successful tender does not constitute acceptance of the tender.

#### **Successful tender notice and standstill period**

**34.(1)** Where the relevant tenders committee determines that a tender should be accepted as a successful tender, the entity shall dispatch to each supplier who presented a tender, a notice, to be called a successful tender notice, informing the supplier that the entity intends to accept the successful tender at the end of the standstill period.

- (2) The successful tender notice shall include
  - (a) the name and address of the supplier who presented the successful tender;
  - (b) the contract price or, where the successful tender was ascertained on the basis of price and other criteria, the contract price and a summary of the other characteristics of the tender that made the tender the successful tender; and
  - (c) the duration of the standstill period.
- (3) The standstill period shall be at least 10 days from the date of dispatch of the notice.
- (4) Where the means of dispatch of the notice is not expected to result in the delivery of the notice to a supplier in less than 5 days, the procuring entity shall extend the standstill period for such additional period as the entity may consider appropriate in the circumstances.
- (5) Notwithstanding subsection (1), no successful tender notice or standstill period is required where the entity determines that urgent public interest considerations require the procurement to proceed without a standstill period.

#### **Successful tender acceptance notice**

- 35.(1)** A procuring entity shall, upon the expiry of the standstill period, or, where no standstill period is required, as soon as practicable after the successful tender is determined, dispatch to the supplier who presented the successful tender, a notice to be called a successful tender acceptance notice.
- (2) Notwithstanding subsection (1), no successful tender acceptance notice or other communication in any form conveying acceptance of a successful tender or the award of a procurement contract shall be issued unless
    - (a) the relevant tenders committee determines that a particular tender should be accepted as the successful tender; and

- (b) it is confirmed that
  - (i) the procurement is not subject to an application for reconsideration under section 76 or an appeal to the Tribunal;
  - (ii) funding is available for the procurement; and
  - (iii) any regulatory approvals required have been granted.
- (3) A procuring entity shall not be liable for the provision of goods, works or services by a supplier who receives a successful tender acceptance notice or for anything done by the supplier in connection with such provision unless the supplier, prior to the provision of the goods, works or services or the doing of anything in connection with such provision, enters into a procurement contract with the entity in accordance with this Act.

### **Negotiations**

- 36.(1)** Where the relevant tenders committee determines that a tender should be accepted as a successful tender, negotiations may be held with the supplier who presented the tender.
- (2) Negotiations shall not relate to the price of the tender except where price was not a factor in the evaluation.
  - (3) Negotiations may relate to
    - (a) minor amendments to the special conditions of the contract, the delivery or completion schedule or work plan or the technical details of the statement of requirements; or
    - (b) the minor reduction of quantities for budgetary reasons.
  - (4) Notwithstanding subsection (3), negotiations shall not be conducted
    - (a) to alter substantially the technical, quality or performance characteristics of a tender, including the scope of the responsibilities of the supplier;

- (b) to alter materially the terms and conditions of the proposed procurement contract;
  - (c) solely for the purpose of reducing prices or fee rates except where changes are required to reflect any agreed technical changes; or
  - (d) to alter substantially anything that was a deciding factor in the evaluation.
- (5) A procuring entity shall
  - (a) prepare minutes of any negotiations held; and
  - (b) obtain the written agreement of the supplier that the minutes are a true and accurate record of the negotiations.

#### **Execution of procurement contract**

**37.(1)** Where a solicitation document requires a supplier whose tender is accepted to execute a procurement contract conforming to the terms and conditions of the accepted tender

- (a) the procuring entity and the supplier shall execute the procurement contract within a reasonable period after the successful tender acceptance notice is dispatched to the supplier; and
  - (b) between the time when a successful tender acceptance notice is dispatched to the supplier and the execution of the procurement contract, neither the entity nor the supplier shall take any action that is likely to interfere with the execution of the procurement contract or with its performance.
- (2) Where a supplier whose tender is accepted fails to
  - (a) execute a procurement contract as required; or
  - (b) provide any required security for the performance of the contract,the procuring entity may, subject to section 35(2), select the next highest ranked tender from among those remaining valid or cancel the procurement.

**Notice of award of procurement contract**

**38.(1)** A procuring entity shall, upon the execution of a procurement contract, promptly issue a notice of the award of the contract to the suppliers whose tenders were unsuccessful and, upon request by such a supplier, communicate to the supplier the grounds for the failure of his tender.

(2) The notice shall state the name of the supplier to whom the contract was awarded and the contract price.

(3) A procuring entity shall, at least twice yearly, publish a cumulative list of all procurement contracts awarded in the year.

**Management of procurement contract**

**39.(1)** A procuring entity shall nominate a contract administrator for each procurement contract awarded.

(2) The contract administrator shall

- (a) monitor the performance of a supplier to ensure that all delivery or performance obligations are met and that appropriate action is taken by the procuring entity in the event that obligations are not met;
- (b) prepare any required amendments to the procurement contract and refer the amendments for the approval of the Solicitor General or another legal officer nominated by the Solicitor General, or, in the case of a procuring entity that is a statutory body or a state-owned company, of such legal officer as the entity may approve for the purpose;
- (c) manage any handover or acceptance procedures;
- (d) refer any recommendation for the termination of the contract for the consideration of the Solicitor General or another legal officer nominated by the Solicitor General, or, in the case of a procuring entity that is a statutory body or a state-owned company, of such legal officer as the entity may approve for the purpose; and

- (e) ensure that
  - (i) the supplier submits all required documentation;
  - (ii) the procuring entity meets all its payment and other obligations on time and in accordance with the contract;
  - (iii) there is adequate cost, quality and time control, where required;
  - (iv) all tests required in the contract are satisfactorily completed;
  - (v) performance under the contract is satisfactorily completed before closing the contract management record; and
  - (vi) the contract management record is kept in accordance with this Act.

### **Reports on supplier performance**

**40.(1)** A procuring entity shall submit to the Chief Procurement Officer, a report on the performance of each supplier with whom the entity has a procurement contract.

- (2) The report shall
  - (a) be in such form as the Chief Procurement Officer requires; and
  - (b) include
    - (i) the final price paid for the goods, works or services and an explanation of any differences between that price and the original contract price;
    - (ii) information on the conformance of the goods, works or services with the statement of requirements and an explanation of any concerns in relation to quality;
    - (iii) the time taken for completion of performance under the contract and an explanation of any differences between that time and the delivery or completion schedule in the contract; and



- (iv) such other information as the Chief Procurement Officer may require; and
- (c) be submitted, in the case of a procurement contract the duration of which is
  - (i) less than a year, at the end of the quarter in which performance under the contract is completed; and
  - (ii) a year or more, at least annually.
- (3) The Chief Procurement Officer may, in addition to the report referred to in subsection (1), require such other reports from the entity as may be necessary for the performance of his functions.
- (4) Nothing in this section prevents a procuring entity from submitting a report to the Chief Procurement Officer, at any other time, on the performance of a supplier.

#### **Cancellation of procurement**

- 41.(1)** A procuring entity may cancel a procurement
- (a) prior to the acceptance of a successful tender; or
  - (b) where a successful tender is accepted, in the circumstances set out in section 37(2).
- (2) A procuring entity shall not cancel a procurement without the approval of the relevant tenders committee.
- (3) Where a procuring entity cancels a procurement
- (a) no tenders shall be opened after the decision to cancel the procurement is taken;
  - (b) any tenders that remain unopened at the time the decision to cancel the procurement is taken shall be returned to the suppliers who presented them; and

- (c) the entity shall promptly
  - (i) communicate to any supplier who presented a tender, the decision of the entity to cancel the procurement; and
  - (ii) issue a notice of the cancellation of the procurement in the same manner and place as the original information regarding the procurement proceedings.

*Requests for Quotations*

**Requests for quotations**

**42.(1)** Where a procuring entity intends to conduct procurement by means of a request for quotations, the entity shall request written quotations from a shortlist of suppliers.

- (2) The entity, in developing a shortlist,
  - (a) shall select from the Suppliers Register, as many suppliers as practicable but at least 3; and
  - (b) shall, in order to ensure effective competition and fair and equal opportunities to all suppliers
    - (i) implement a rotation of suppliers on successive shortlists; and
    - (ii) not include
      - (A) suppliers who are not expected to satisfy fully any eligibility or qualification requirements;
      - (B) where there are suppliers that are practically owned by the same person, more than one such supplier.
- (3) A supplier shall not be permitted to
  - (a) give more than one quotation; or
  - (b) change his quotation after the deadline for presenting quotations.

(4) Notwithstanding subsections (1) and (2), where a procuring entity intends to conduct procurement by means of a request for quotations, the entity may, instead of requesting quotations from a shortlist of suppliers from the Suppliers Register, publish the request to enable all interested suppliers to submit quotations.

**Solicitation documents for requests for quotations**

**43.(1)** A procuring entity shall, in order to request quotations, prepare and issue a solicitation document in the form of the standard document, if any, issued or approved by the Director for the purpose.

- (2) A solicitation document referred to in subsection (1) shall include
- (a) information on the management of the procurement proceedings and the applicable laws;
  - (b) a description of the subject matter of the procurement in the form of a statement of requirements;
  - (c) instructions on the preparation and presentation of quotations, including any documents required to be submitted with the quotation and the procedure, place and deadline for presenting quotations;
  - (d) a statement as to whether elements, other than the cost of the goods or services, such as any applicable transportation and insurance charges or customs duties and taxes, are to be included in the price;
  - (e) the criteria and procedures for evaluating quotations;
  - (f) the principal terms and conditions and proposed form of the procurement contract; and
  - (g) notice of the right to challenge decisions or actions of a procuring entity that are allegedly not in compliance with this Act.

(3) Section 20 applies in respect of solicitation documents referred to in this section, with such modifications and adaptations as may be necessary, as that

section applies in respect of solicitation documents referred to in that section except that any role to be performed by a tenders committee or a chairman of a tenders committee pursuant to that section shall be performed by the procuring entity in respect of a request for quotations.

### **Meetings with suppliers and presentation of quotations**

**44.(1)** Sections 22, 23 and 24 apply to the presentation of quotations and any meetings with suppliers prior to the presentation of quotations, with such modifications and adaptations as may be necessary, as those sections apply to the presentation of tenders and meetings with suppliers prior to the presentation of tenders.

(2) Notwithstanding subsection (1),

- (a) no public opening of quotations is required but all quotations shall be opened and recorded by a procuring entity immediately after the deadline for presenting quotations; and
- (b) any role to be performed by a tenders committee or a chairman of a tenders committee pursuant to sections 23 and 24 shall be performed by the procuring entity in respect of quotations.

### **Negotiations on quotations prohibited**

**45.** No negotiations shall take place between a procuring entity and a supplier with respect to a quotation presented by the supplier.

### **Evaluation of quotations, determination of successful quotations, procurement contracts, supplier performance and cancellation of procurement**

**46.** Sections 28, 29, 30, 32, 35, 37, 38, 39, 40 and 41 apply to procurement by means of a request for quotations, with such modifications and adaptations as may be necessary, as those sections apply to procurement by means of open tendering except that any role to be performed by a tenders committee or a

chairman of a tenders committee pursuant to those sections shall be performed by the procuring entity in respect of quotations.

*Single-Source Procurement*

**Criteria for single-source procurement**

**47.(1)** Subject to subsection (2) and section 48(1), a procuring entity may engage in single-source procurement where

- (a) the goods or services are available only from a particular supplier or a particular supplier has exclusive rights in respect of the goods or services, so that no reasonable alternative or substitute exists, and the use of any other method of procurement would therefore not be possible;
- (b) the entity, having procured goods or services from a supplier, determines that additional goods or services must be procured from the supplier for reasons of standardisation or because of the need for compatibility with existing goods or services, taking into account
  - (i) the effectiveness of the original procurement in meeting the needs of the entity;
  - (ii) the limited size of the proposed procurement in relation to the original procurement;
  - (iii) the reasonableness of the price; and
  - (iv) the unsuitability of alternatives to the goods or services;
- (c) owing to a catastrophic event, there is an extremely urgent need for the goods, works or services and engaging in any other method of procurement would be impractical because of the time involved in using the method; or

(d) the entity determines, in the interest of national security or public health, that the use of any other method of procurement is not appropriate.

(2) Where a procuring entity engages in single-source procurement for reasons of urgency in accordance with subsection (1)(c), the entity shall limit the procurement contract to the quantity of goods or services or the extent of works required to deal with the catastrophic event.

### **Permission to engage in single-source procurement**

**48.(1)** A procuring entity shall, before engaging in single-source procurement

(a) confirm, where relevant, that the goods or services are not available under arrangements for the procurement of common items; and

(b) seek the approval of

(i) the Director, where the estimated value of the procurement contract exceeds the relevant threshold specified in section 16(1)(a); or

(ii) the Chief Procurement Officer, where the estimated value of the procurement contract exceeds \$50 000 but does not exceed the relevant threshold specified in section 16(1)(a).

(2) A procuring entity shall, in the case set out in subsection (1)(b)(i), submit a request for permission to engage in single-source procurement to the Chief Procurement Officer for submission to the Director; and the Director may, on the advice of the Chief Procurement Officer, grant permission to the entity to engage in single-source procurement where any of the circumstances set out in section 47(1) exists.

(3) The Chief Procurement Officer may, in the case set out in subsection (1)(b)(ii), grant permission to a procuring entity to engage in single-source procurement where any of the circumstances set out in section 47(1) exists.

**Solicitation documents for single-source procurement**

**49.(1)** A procuring entity shall, in order to solicit a proposal or price quotation pursuant to single-source procurement, prepare and issue a solicitation document in the form of the standard document, if any, issued or approved by the Director for the purpose.

(2) The solicitation document shall include

- (a) a description of the subject matter of the procurement in the form of a statement of requirements; and
- (b) the principal terms and conditions and proposed form of the procurement contract.

(3) Notwithstanding subsection (1), where a procuring entity undertakes single-source procurement on the ground set out in section 47(1)(c), the entity may engage in negotiations with a supplier without the issue of a solicitation document.

**Evaluation of single-source submission**

**50.(1)** Where a procuring entity receives a submission pursuant to single-source procurement, the submission shall be evaluated to determine whether

- (a) the submission
  - (i) meets the requirements of the entity, including any technical needs, as defined by the statement of requirements, and any requirement for urgent delivery or completion;
  - (ii) offers value for money, based on prices previously obtained for similar procurement contracts or on an analysis of the cost of each component, taking into account the circumstances and value of the procurement contract;

- (b) the supplier accepts the contractual terms and conditions proposed by the entity or offers other terms and conditions which are acceptable to the entity; and
  - (c) negotiations with the supplier are necessary.
- (2) Section 28(1) to (5) apply to single-source procurement, with such modifications and adaptations as may be necessary, as those provisions apply to procurement by means of open tendering.

**Negotiations for single-source procurement**

- 51.(1)** Where negotiations with a supplier are necessary in relation to single-source procurement, a procuring entity shall prepare a plan for the negotiations.
- (2) The plan shall specify the issues to be negotiated and objectives to be achieved and shall, to the extent possible, quantify the objectives and set maximum and minimum negotiation parameters.
- (3) A procuring entity shall
- (a) prepare minutes of any negotiations held; and
  - (b) obtain the written agreement of the supplier that the minutes are a true and accurate record of the negotiations.
- (4) A procuring entity shall not commit itself to a proposed agreement arising out of negotiations unless the entity obtains the approval of the person who, pursuant to section 48, granted the entity permission to engage in single-source procurement.

**Procurement contracts, supplier performance and cancellation in relation to single-source procurement**

**52.** Sections 37(1), 38(3), 39, 40 and 41 apply to single-source procurement, with such modifications and adaptations as may be necessary, as those sections apply to procurement by means of open tendering except that any role to be performed by a tenders committee pursuant to section 41 shall be



performed by the person who, pursuant to section 48, granted the procuring entity permission to engage in single-source procurement.

#### *Framework Agreements*

#### **Framework agreements**

**53.(1)** A procuring entity may engage in procurement through such framework agreements, whether open or closed and whether in respect of common items or otherwise, as are executed by the Chief Procurement Officer.

(2) The Chief Procurement Officer shall, upon the execution of a framework agreement, publish a notice of the agreement, specifying whether the agreement is an open framework agreement or a closed framework agreement, the names of the suppliers involved and the goods or services to be supplied.

(3) The Chief Procurement Officer shall, at least twice yearly, publish a cumulative list of all framework agreements awarded in the year.

#### *Procurement of Services of Individual Consultants*

#### **Procurement of services of individual consultants**

**54.** Notwithstanding section 16(1) and (2), where a procuring entity intends to procure the services of an individual consultant, the entity shall do so in accordance sections 55 to 59.

#### **Solicitation in relation to individual consultants**

**55.(1)** A procuring entity shall, in order to procure the services of an individual consultant, publish a notice inviting consultants to express interest in the assignment.

(2) The notice shall include

- (a) the principal terms and conditions of the procurement contract;
- (b) any key technical, eligibility or qualification requirements; and

- (c) the procedure, place and deadline for expressing interest.
- (3) Notwithstanding subsection (1), a procuring entity need not publish a notice where
  - (a) there is an urgent need for the services to be procured and
    - (i) the circumstances giving rise to the urgency were neither foreseeable by the entity nor the result of dilatory conduct on the part of the entity; and
    - (ii) publication would be impractical;
  - (b) the services required are a continuation of services already provided by a consultant and the entity determines that the services must be procured from the same consultant for reasons of continuity, use of experience acquired or continued professional liability; or
  - (c) the entity determines, in the interest of national security or public health, that publication is not appropriate.
- (4) A procuring entity may, where it does not publish a notice referred to in subsection (1), directly invite at least 3 consultants to express interest in the assignment.

**Solicitation document not required in respect of individual consultants**

- 56.(1)** A procuring entity is not required to prepare a solicitation document for the procurement of the services of an individual consultant but shall make the terms of reference for the assignment available to all interested consultants on request or to all consultants invited to express interest.
- (2) Terms of reference shall clearly state the skills, qualifications and experience required and the basis for evaluation.
  - (3) No tender security shall be requested for the procurement of the services of an individual consultant.

**Presentation of submissions by individual consultants and evaluation of submissions**

**57.(1)** A submission from an individual consultant shall include his curriculum vitae and a proposed fee rate which may be requested as separately sealed technical and financial submissions, respectively.

(2) Evaluation of submissions from individual consultants

- (a) shall be based on the skills, qualifications and experience of the consultants, as stated in the terms of reference;
- (b) may take into account references;
- (c) may include interviews to assess further the skills, qualifications and experience of the consultants; and
- (d) shall rank consultants according to their skills, qualifications and experience.

(3) Section 28(1) to (5) apply to the procurement of the services of an individual consultant, with such modifications and adaptations as may be necessary, as those provisions apply to procurement by means of open tendering.

**Negotiations with individual consultants**

**58.** A procuring entity may negotiate fees and the terms and conditions of the procurement contract with the consultant ranked first in the evaluation and, where negotiations fail, may negotiate with the consultant ranked next after him.

**Procurement contracts, supplier performance and cancellation in relation to services of individual consultants**

**59.** Sections 37, 38, 39, 40 and 41 apply to procurement of the services of individual consultants, with such modifications and adaptations as may be necessary, as those sections apply to procurement by means of open tendering except that any role to be performed by a tenders committee pursuant to section 41 shall be performed by the procuring entity.

## PART V

## GENERAL RULES REGARDING PROCUREMENT

**Description of subject matter of procurement**

**60.(1)** A procuring entity shall set out in the pre-qualification document, if any, and in the solicitation document, a description of the subject matter of the procurement in the form of a statement of requirements.

(2) The statement of requirements

(a) shall

(i) include the minimum requirements that submissions must meet in order to be considered responsive and the manner in which the minimum requirements are to be applied;

(ii) set out the relevant technical, quality and performance characteristics of the subject matter of the procurement; and

(iii) to the extent practicable, be objective, functional and generic;

(b) may include specifications, plans, drawings, designs, testing and test methods, packaging, marking, labelling, conformity certification and symbols and terminology; and

(c) shall not include a requirement for, or reference to, a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement, and provided that words such as “or equivalent” are included.

**Standardisation of trade terms and conditions etc.**

- 61.** A procuring entity shall, in formulating
- (a) the terms and conditions of a procurement and procurement contract and other relevant aspects of a pre-qualification document, if any, and a solicitation document, use standardised trade terms and standardised conditions, where available; and
  - (b) the description of the subject matter of the procurement to be included in the pre-qualification document, if any, and in the solicitation document, use standardised features, requirements, symbols and terminology relating to the technical, quality and performance characteristics of the goods, works or services to be procured, where available.

**Publication of notices**

- 62.(1)** A notice to be published pursuant to this Act
- (a) shall be published
    - (i) at least once in one daily newspaper with nationwide circulation in Barbados; and
    - (ii) on such government websites as the entity may consider appropriate; and
  - (b) may, notwithstanding a requirement for the notice to be published in a particular manner and place, be also published in such media as the entity may consider appropriate.
- (2) Where foreign participation is required for sufficient competition or where so required by an international agreement, the notice shall also be published
- (a) in media of wide regional or international circulation;
  - (b) on widely read internet sites; or

- (c) in such publication as may be required by the agreement.
- (3) Where a procuring entity believes that it is necessary to ensure wide competition, the entity may, in addition to the publication required by subsections (1) and (2), after the date of publication of an invitation to tender, send a copy of the notice directly to
- (a) suppliers who are registered in the Suppliers Register, past suppliers or any other identified, potential suppliers;
  - (b) professional or industry associations; and
  - (c) embassies of Barbados in countries, suppliers from which are likely to participate or foreign embassies of such countries in Barbados or both.

### **Corrections to published information**

**63.** Where information published by a procuring entity to invite the participation of suppliers in pre-qualification or other procurement proceedings is discovered to be, or becomes, materially inaccurate for any reason, the entity shall correct the information and publish the corrected information in the same manner and place in which the original information was published.

### **Communications**

**64.(1)** Any document, notification, decision or any other information generated in the course of a procurement and communicated, including anything communicated in connection with proceedings for an application for reconsideration under section 76 or an appeal to the Tribunal or in the course of a meeting or forming part of the procurement record, shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(2) Direct solicitation and any communication of information between suppliers and a procuring entity referred to in section 26(2) and (3), 30(1) and (2) or 71(1)(a) may be made by means that do not provide a record of the content

of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that

- (a) provides a record of the content of the information; and
  - (b) is accessible so as to be usable for subsequent reference.
- (3) All documents and communications shall be in English.
- (4) A procuring entity shall, where it first solicits the participation of suppliers in particular procurement proceedings, specify
  - (a) the means to be used to
    - (i) communicate information by or on behalf of the entity to a supplier or to the public or by a supplier to the entity or to another person acting on behalf of the entity;
    - (ii) satisfy any requirement for information to be in writing or for a signature; and
    - (iii) hold any meeting of suppliers; and
  - (b) in relation to any procurement involving information that a procuring entity considers to be secret, where the entity considers it necessary, any measures and requirements needed to ensure that the information is kept confidential.
- (5) A procuring entity may use only those means of communication that are in common use by suppliers in the context of the particular procurement.
- (6) In any meeting held with suppliers, a procuring entity shall use only those means that ensure that suppliers can fully and contemporaneously participate in the meeting.
- (7) A procuring entity shall implement appropriate measures to secure the authenticity, integrity and confidentiality of information concerning procurement proceedings.

(8) Where a procuring entity requires the approval or permission of a tenders committee, a chairman of a tenders committee, the Director, the Chief Procurement Officer or any other person in order to make a determination or pursue a course of action, the entity shall not, unless the approval or permission is granted, communicate the determination or the decision to pursue the course of action to any supplier or to the public at large.

(9) In this section, “direct solicitation” means solicitation addressed directly to one supplier or a restricted number of suppliers but does not include solicitation addressed to a limited number of suppliers following pre-qualification proceedings.

## PART VI

### REGISTRATION, ELIGIBILITY AND QUALIFICATION

#### **Suppliers Register**

**65.(1)** The Chief Procurement Officer shall establish and maintain a register to be called the Suppliers Register.

(2) The Suppliers Register shall

- (a) include in respect of every supplier registered pursuant to section 66
  - (i) the name, address and other contact information of the supplier;
  - (ii) the unique registration number assigned to the supplier pursuant to section 66(4);
  - (iii) the date of registration;
  - (iv) any documentary evidence regarding the legal capacity of the supplier to enter into a procurement contract;
  - (v) any other information available as to the eligibility of the supplier to participate in public procurement;



- (vi) a statement as to whether the supplier is registered as a supplier of goods, services or works or a combination of the three;
  - (vii) any information available as to the qualifications of the supplier to supply the goods, services or works he proposes to supply;
  - (viii) a record of the current and past procurement contracts of the supplier, if any, and of his performance under the contracts; and
  - (ix) such other information as the Chief Procurement Officer may consider appropriate; and
- (b) be reviewed and updated at least once every 6 months.
- (3) The Chief Procurement Officer shall, at least once every 6 months, publicise the existence of the Suppliers Register and publish
- (a) the procedure for applying for registration;
  - (b) the criteria to be satisfied for entry in the register and the documentary evidence to be submitted; and
  - (c) the period for which registration is valid and any requirement for updating an entry in the register or for renewing registration.
- (4) The entry of the name of a supplier in the Suppliers Register shall not be construed as an indication that the supplier is suitable to participate in any particular procurement.

### **Suppliers to be registered**

- 66.(1)** A procuring entity shall not enter into a procurement contract with a supplier unless the supplier is registered under this section.
- (2) A person may, in such form as the Chief Procurement Officer may require, apply to the Chief Procurement Officer for registration as a supplier.

- (3) The Chief Procurement Officer shall, within 30 days of receipt of an application for registration, notify the supplier in writing of
  - (a) the approval of his application and the inclusion of his name in the Suppliers Register; or
  - (b) the rejection of his application and the reason for the rejection.
- (4) The Chief Procurement Officer shall issue a unique registration number to every supplier who is registered.
- (5) Registration under this section is valid for 3 years and may be renewed, upon application to the Chief Procurement Officer, for further periods of 3 years.
- (6) The Chief Procurement Officer shall, within 20 days of receipt of an application for renewal of registration, notify the supplier in writing of
  - (a) the renewal of his registration; or
  - (b) the rejection of his application and the reason for the rejection.
- (7) The Chief Procurement Officer may refuse to register a supplier or to renew the registration of a supplier where the supplier is or becomes ineligible to participate in public procurement.
- (8) The Chief Procurement Officer shall not refuse to register a supplier or to renew the registration of a supplier unless he gives the supplier a reasonable opportunity to be heard on why registration or renewal of registration should not be refused.

**Changes affecting registration**

**67.(1)** Where a material change in the circumstances of a supplier renders the information submitted to the Chief Procurement Officer for the purpose of registration in the Suppliers Register misleading, inaccurate or incomplete, the supplier shall, as soon as practicable and in any event within 14 days of the change, notify the Chief Procurement Officer in writing of the change.

(2) In subsection (1), “material change” includes a change that would render a supplier ineligible to participate in public procurement and a change of the name under which, or the address at which, the supplier conducts business.

(3) The Chief Procurement Officer shall

(a) upon receipt of a notification pursuant to subsection (1); or

(b) where he is otherwise satisfied that any information in the Suppliers Register is misleading, inaccurate or incomplete,

make such alteration to the register as may be necessary to ensure that the register is not misleading and that it is accurate and complete.

(4) The Chief Procurement Officer shall, before making an alteration to the Suppliers Register pursuant to subsection (3)(b), notify the supplier involved of his intention to make the alteration.

(5) The Chief Procurement Officer shall promptly notify in writing a supplier in respect of whom an alteration is made under subsection (3), of the fact of the alteration and the nature of it.

### **Eligibility of suppliers to participate in public procurement**

**68.(1)** A supplier is eligible to participate in public procurement where

(a) he has the legal capacity to enter into a procurement contract;

(b) he is not insolvent, in receivership, bankrupt or being wound up;

(c) his affairs are not being administered by a person appointed by a court;  
and

(d) he is not the subject of legal proceedings for any of the matters referred to in paragraph(b)or(c).

(2) A supplier is ineligible to participate in public procurement where he, or in the case of a supplier that is a body corporate, any of its directors or officers,

within a period of 5 years prior to his application for registration or the initiation of procurement proceedings, as the case may be

- (a) knowingly or recklessly provided false information in a submission or any other document submitted to a procuring entity in connection with procurement proceedings or a procurement contract;
- (b) interfered with the participation of other suppliers in public procurement;
- (c) engaged in misconduct in relation to procurement proceedings or a procurement contract including
  - (i) corrupt practices;
  - (ii) fraudulent practices,
  - (iii) collusive practices;
  - (iv) coercive practices;
  - (v) knowingly underpricing submissions; and
  - (vi) breaches of confidentiality;
- (d) did not perform substantially, contractual obligations under a procurement contract, where the non-performance was not due to circumstances beyond his control;
- (e) refused to furnish a security for the performance of a procurement contract in accordance with the terms of the solicitation document;
- (f) was convicted of an offence under this Act or related to
  - (i) obtaining a procurement contract or sub-contract; or
  - (ii) dishonesty or professional activities;
- (g) was suspended, disbarred or disqualified by any professional body; or
- (h) was suspended or prohibited from participating in procurement by an international organisation or a foreign government, provided that the

Chief Procurement Officer verified that the proceedings of the international organisation or foreign government that led to the suspension or prohibition

- (i) were based on a fair, independent review of the facts of the case; and
- (ii) provided the supplier with the opportunity to be heard in his defence and to appeal to an independent body against the original decision.

(3) A foreign supplier shall be permitted to submit, as documentary evidence of eligibility to participate in public procurement

- (a) certified copies of equivalent documents from the relevant authority of the country in which the supplier is incorporated or otherwise organised; or
- (b) an official statement certifying that equivalent documentation is not issued in the country in which the supplier is incorporated or otherwise organised.

(4) The Director may, upon the recommendation of the Chief Procurement Officer, determine in accordance with this section that a supplier is ineligible to participate in public procurement but such a decision shall not be made unless

- (a) the Chief Procurement Officer conducts a thorough investigation of the facts of the case; and
- (b) the supplier receives reasonable notice, in writing, of the grounds for the decision and the details of the grounds, and is given a reasonable opportunity to be heard on the matter.

(5) A decision that a supplier is ineligible to participate in public procurement and the reason for the decision shall be promptly communicated to the supplier.

**Exclusion of supplier from particular procurement proceedings**

**69.**(1) A procuring entity shall, with the approval of the Director upon the recommendation of the Chief Procurement Officer, exclude a supplier from participation in procurement proceedings where the supplier

- (a) has a conflict of interest that is likely to impair the integrity of the procurement proceedings; or
- (b) is or becomes ineligible to participate in public procurement.

(2) A supplier shall not be excluded from participation in procurement proceedings unless

- (a) the Chief Procurement Officer conducts a thorough investigation of the facts of the case; and
- (b) the supplier receives reasonable notice, in writing, of the grounds for the proposed exclusion and the details of the grounds, and is given a reasonable opportunity to be heard on why he should not be excluded.

(3) A decision to exclude a supplier from participation in procurement proceedings and the reason for the exclusion shall be promptly communicated to the supplier.

**Removal from Suppliers Register**

**70.**(1) The Chief Procurement Officer may remove from the Suppliers Register, the name of a supplier who becomes ineligible to participate in public procurement.

(2) The Chief Procurement Officer shall not remove the name of a supplier from the Suppliers Register pursuant to subsection (1) unless he gives the supplier a reasonable opportunity to be heard on why his name should not be removed from the register.

(3) The Chief Procurement Officer shall promptly notify in writing a supplier whose name has been removed from the Suppliers Register of the fact of the removal and the reason for it.

### **Qualifications of suppliers**

**71.(1)** A procuring entity may, at any stage of procurement proceedings, including through pre-qualification proceedings, require a supplier to

- (a) meet such qualification criteria as the entity considers appropriate in the circumstances; and
  - (b) demonstrate that he has the capability and resources to perform the procurement contract effectively.
- (2) Qualification criteria may include
- (a) professional, technical and environmental qualifications;
  - (b) professional and technical competence;
  - (c) financial resources and equipment and other physical facilities;
  - (d) managerial capability, reliability and experience; and
  - (e) a sufficient number of personnel capable of discharging the obligations of the supplier under the procurement contract.
- (3) A procuring entity may, at any stage of procurement proceedings, verify the qualifications of a supplier.
- (4) A procuring entity shall
- (a) impose on or apply to a supplier, whether in pre-qualification proceedings or otherwise, no qualification criterion other than that set out in the pre-qualification notice or document, if any, or in the solicitation document;
  - (b) in determining whether to qualify a supplier, apply qualification criteria equally to all suppliers and evaluate the qualifications of each supplier in accordance with such criteria;

- (c) establish no qualification criterion, requirement or procedure that discriminates against or among suppliers or categories of suppliers unless the criterion is objectively justifiable.
- (5) Where a procuring entity assesses the qualifications of suppliers, the entity shall
- (a) promptly notify each supplier in writing of whether or not he qualified, and where the supplier did not qualify, inform the supplier, upon his request, of the reasons that he did not qualify; and
  - (b) supply to any person upon his request, the names of the suppliers who qualified.

### **Pre-qualification of suppliers**

**72.(1)** A procuring entity may engage in pre-qualification proceedings in order to identify, prior to solicitation, suppliers who are qualified to present submissions.

- (2) A procuring entity shall, in particular, consider engaging in pre-qualification proceedings where
- (a) the subject matter of the procurement is highly complex or specialised or requires detailed design or methodology;
  - (b) the cost of preparing a detailed submission would discourage competition; or
  - (c) the evaluation of a submission would necessarily be particularly detailed and the evaluation of a large number of submissions would therefore require excessive time and resources from the entity.
- (3) Where a procuring entity desires to have suppliers pre-qualify, the entity shall publish a notice, to be called a pre-qualification notice, inviting suppliers to submit applications to pre-qualify.



- (4) The pre-qualification notice shall include
  - (a) the principal terms and conditions of the procurement contract;
  - (b) whether a pre-qualification document is to be issued or whether applications to pre-qualify should be submitted to the entity;
  - (c) where no pre-qualification document is to be issued, the qualification criteria and the procedures to be used for ascertaining the qualifications of suppliers;
  - (d) whether tenders are to be solicited from all pre-qualified suppliers or only from a limited number of suppliers who best meet the qualification criteria;
  - (e) where tenders are to be solicited only from a limited number of suppliers, the maximum number of pre-qualified suppliers from whom tenders are to be solicited and the manner in which that number is to be selected; and
  - (f) the procedure, place and deadline for submitting applications to pre-qualify.
- (5) Where a pre-qualification document is to be issued, the entity shall
  - (a) prepare the document in the form of the standard document, if any, issued or approved by the Director for the purpose;
  - (b) include in the document
    - (i) instructions for preparing and submitting applications to pre-qualify; and
    - (ii) a clear statement of the qualification criteria and of any documentary evidence or information required to be submitted to demonstrate, and the procedures to be used to ascertain, the qualifications of suppliers; and
  - (c) supply the document to any supplier who requests it.

(6) Where a procuring entity engages in pre-qualification proceedings, only suppliers that the entity has pre-qualified are entitled to participate further in the procurement proceedings.

### **Clarification of pre-qualification notices and documents**

**73.(1)** Where a procuring entity receives, within a reasonable time prior to the deadline for the submission of applications to pre-qualify, a request from a supplier for clarification of a pre-qualification notice or a pre-qualification document, the entity shall

- (a) provide the clarification to the supplier; and
- (b) without identifying the source of the request, in the case of
  - (i) a pre-qualification notice, publish the clarification; or
  - (ii) a pre-qualification document, communicate the clarification to all other suppliers to whom the entity provided the document.

(2) A procuring entity shall provide a clarification referred to in subsection (1), whether by publication or otherwise, to all suppliers at the same time and within sufficient time to enable them to present their applications to pre-qualify before the deadline for submission.

(3) A procuring entity may, prior to the deadline for submitting applications to pre-qualify, and, where required pursuant to section 7, with the approval of the relevant tenders committee, whether on its own initiative or as a result of a request for clarification by a supplier, modify a pre-qualification notice or a pre-qualification document by issuing an addendum.

(4) The addendum shall

- (a) in the case of
  - (i) a pre-qualification notice, be published promptly; and

(ii) a pre-qualification document, be communicated promptly to the suppliers to whom the entity provided the pre-qualification document; and

(b) be binding on the suppliers.

(5) Where a procuring entity issues a clarification or modification of a pre-qualification notice or a pre-qualification document, the entity shall, prior to the deadline for presenting applications to pre-qualify, extend, or where required pursuant to section 7, request the relevant tenders committee to extend the deadline where necessary in order to afford suppliers sufficient time to take the clarification or modification into account in preparing their applications.

(6) The procuring entity, or where required pursuant to section 7, the relevant tenders committee may, in its absolute discretion, prior to a deadline for presenting applications to pre-qualify, extend the deadline where it is not possible for one or more suppliers to present their applications by the deadline because of any circumstance beyond their control.

(7) Notice of an extension of a deadline shall

(a) in the case of a pre-qualification notice, be published; and

(b) in the case of a pre-qualification document, be given to all suppliers to whom the entity provided the document.

(8) The functions of a tenders committee under this section shall be discharged by the chairman of the committee.

PART VII

CHALLENGE PROCEEDINGS

**Appeals to Tribunal in respect of registration, exclusion etc.**

**74.** A supplier may, upon payment of the prescribed fee, appeal to the Tribunal against a decision

- (a) to refuse to register him or renew his registration;
- (b) that he is ineligible to participate in public procurement;
- (c) to exclude him from participation in public procurement; or
- (d) to remove his name from the Suppliers Register.

**Procedure for appeal**

**75.(1)** An appeal under section 74 shall be

- (a) in writing; and
- (b) submitted within 14 days of receipt by the supplier of notice of a decision referred to in that section.

(2) The Tribunal shall, within 15 days of receipt of the appeal, determine whether to entertain or dismiss the appeal.

(3) The Tribunal may dismiss an appeal where it determines that the appeal

- (a) is manifestly without merit; or
- (b) was not submitted by the deadline set out in subsection (1)(b),

and a dismissal constitutes a decision on the appeal.

**Reconsideration of decision or action by procuring entity or tenders committee**

**76.(1)** A supplier who participates in procurement proceedings and alleges that he has suffered or is likely to suffer loss or injury because a decision or action of a procuring entity or tenders committee in relation to the proceedings does not comply with this Act may, upon payment of such fee as may be prescribed, apply to the entity or committee to reconsider the decision or action.

- (2) An application for reconsideration shall
  - (a) be in writing;
  - (b) include particulars of the decision or action that the supplier alleges does not comply with this Act; and
  - (c) where the application relates to
    - (i) the terms of solicitation or pre-qualification or a decision or action taken in pre-qualification proceedings, be submitted prior to the deadline for presenting submissions; or
    - (ii) any other decision or action taken in the procurement proceedings, be submitted within the standstill period, if any, or, where no standstill period is applied, prior to the execution of
      - (A) the procurement contract; or
      - (B) the framework agreement, where a framework agreement is involved.
- (3) A procuring entity or tenders committee shall
  - (a) within 5 days of receipt of an application for reconsideration
    - (i) publish a notice of the application; and
    - (ii) notify all participants in the procurement proceedings of the submission of the application and its substance; and

- (b) within 10 days of publication of the notice
    - (i) determine whether to entertain or dismiss the application and, where it determines to entertain the application, whether to suspend the procurement proceedings to which the application relates; and
    - (ii) notify the applicant and all other participants in the procurement proceedings of its decision to entertain or dismiss the application and where the application is
      - (A) to be entertained, of whether the procurement proceedings are suspended and if so, the duration of the suspension or, if not, the reason for the decision not to suspend the proceedings; or
      - (B) dismissed, the reason for the dismissal.
- (4) A procuring entity or tenders committee may dismiss an application for reconsideration where it determines that the application
- (a) is manifestly without merit; or
  - (b) was not submitted by the deadline set out in subsection (2)(c),
- and a dismissal constitutes a decision on the application.
- (5) Where a procuring entity or tenders committee determines to entertain an application for reconsideration, the entity or committee
- (a) may overturn, correct, vary or uphold any decision or action it took in the procurement proceedings to which the application relates or the entity may cancel the procurement; and
  - (b) shall, within 20 days of publication of the notice referred to in subsection (3)(a),
    - (i) issue its decision on the application; and

- (ii) communicate its decision to the applicant, all other participants in the proceedings for reconsideration and all other participants in the procurement proceedings.
- (6) A procuring entity or tenders committee shall give its decision and the reason for it, and state any action taken pursuant to it, in writing.

**Appeals to Tribunal in respect of reconsideration proceedings**

**77.(1)** A supplier who applies to a procuring entity or tenders committee for reconsideration of a decision or action may, upon payment of the prescribed fee, appeal to the Tribunal where

- (a) the entity or committee does not
    - (i) give notice to him in accordance with section 76(3)(b)(ii) and (6); or
    - (ii) communicate its decision to him in accordance with section 76(5) and (6); or
  - (b) he is dissatisfied with the decision of the entity or committee in respect of his application.
- (2) An appeal to the Tribunal shall
- (a) be in writing; and
  - (b) where
    - (i) it relates to a failure of a procuring entity or tenders committee to
      - (A) give notice to a supplier in accordance with section 76(3)(b)(ii) and (6); or
      - (B) communicate its decision to a supplier in accordance with section 76(5) and (6),

be submitted within 14 days after the notice should have been given or the decision should have been communicated to the supplier in accordance with section 76; or

- (ii) it is against a decision of a procuring entity or tenders committee in respect of an application for reconsideration, be submitted within 14 days of the communication to the supplier of the decision of the entity or committee.
- (3) Where a supplier appeals to the Tribunal
  - (a) the authority of the procuring entity or tenders committee to entertain his application ceases; and
  - (b) the entity or committee shall, upon receipt from the Tribunal of notice of the appeal, promptly provide the Tribunal with all documents relating to the procurement proceedings.
- (4) The Tribunal shall
  - (a) within 5 days of receipt of an appeal, publish a notice of the appeal; and
  - (b) within 10 days of publication of the notice,
    - (i) unless it decides that urgent public interest considerations require the procurement proceedings to continue, order the suspension of the proceedings where and for as long as it determines that a suspension is necessary to protect the interests of the appellant; and
    - (ii) notify the procuring entity, the tenders committee and all participants in the procurement proceedings to which the appeal relates of the appeal and its substance and its decision
      - (A) to suspend the proceedings and the duration of the suspension; or
      - (B) not to suspend the proceedings and the reason for its decision.
- (5) The Tribunal may order that any suspension imposed under subsection (4) be extended or lifted.



(6) The Tribunal may dismiss an appeal and order that any suspension imposed be lifted where it determines that the appeal

(a) is manifestly without merit; or

(b) was not submitted by the deadline set out in subsection (2)(b),

and a dismissal constitutes a decision on the appeal.

(7) The Tribunal shall within 20 days of publication of the notice referred to in subsection (4)(a)

(a) issue its decision on the appeal; and

(b) communicate its decision to the appellant, the procuring entity, the tenders committee and all other participants in the procurement proceedings.

### **Hearing of appeal**

**78.(1)** An appeal to the Tribunal shall be heard and determined by the chairman and not less than 2 members of the Tribunal selected by the chairman, and the chairman and the members so selected shall have all the powers of the Tribunal in relation to the appeal.

(2) In the event of a difference of opinion among members sitting together, the opinion of the majority shall prevail.

(3) The Tribunal may, if it thinks fit, receive oral or written evidence, and under oath or otherwise, but it is not bound by the rules of evidence in the *Evidence Act*, Cap. 121 and it may take into account opinion evidence and such facts as it considers relevant and material.

(4) The Tribunal shall allow every party to an appeal to appear in person or by representative, and, where the Tribunal receives oral evidence, to examine and cross-examine witnesses.

(5) Notwithstanding subsection (4), the Tribunal may proceed in the absence of a party who has been given reasonable notice in writing to attend.

- (6) The Tribunal shall, subject to section 81, receive evidence in public.
- (7) The Tribunal may issue summonses, make orders and give directions to such persons and in such manner as it thinks fit for the purpose of summoning witnesses, requiring the disclosure of documents or other evidence and requiring parties or witnesses to answer questions and, generally, for conducting its proceedings in a proper and orderly manner.
- (8) The Tribunal may report to the High Court the conduct of any person who disobeys any subpoena, order or direction properly issued under subsection (7), or says or does any other thing that would, if the Tribunal were a superior court of law, be contempt of court.
- (9) Where a report is made under subsection (8), the High Court shall hear the complaint and any defence, and may punish the person concerned in the same manner as if the person were guilty of contempt of the High Court.

### **Decisions by Tribunal**

- 79.(1)** In taking its decision on an appeal that it has entertained, the Tribunal may review the whole case in respect of law and fact, and the exercise of any discretion, and shall determine the case in accordance with its own judgment.
- (2) Without prejudice to the generality of subsection (1), the Tribunal may
    - (a) confirm a lawful decision;
    - (b) revise an unlawful decision or substitute its own decision for such a decision;
    - (c) overturn, wholly or in part, an unlawful act or decision, other than a decision that results in the execution of a procurement contract or framework agreement;
    - (d) prohibit any individual or entity from acting or deciding unlawfully or from following an unlawful procedure;

- (e) require any individual or entity that has acted or proceeded in an unlawful manner or that has reached an unlawful decision, to act or proceed in a lawful manner or reach a lawful decision;
  - (f) order that procurement proceedings be terminated; or
  - (g) dismiss the appeal.
- (3) The Tribunal shall give reasons for any decision it makes on a matter before it, including a decision to dismiss a matter, and shall state the decision and the reasons for it, in writing.
- (4) Nothing in this Part shall permit the Tribunal to interfere with a procurement contract or framework agreement that has been executed.
- (5) Decisions of the Tribunal shall be made available for public inspection.

#### **Costs**

**80.** The Tribunal shall not award costs to any party to an appeal other than sums in respect of the reasonable costs incurred in

- (a) the preparation of the submission relating to an application for reconsideration or the appeal; and
- (b) the obtaining of an expert report,

and any such award shall be at the discretion of the Tribunal.

#### **Disclosure in reconsideration and appeal proceedings**

**81.** No information shall be disclosed in proceedings under sections 74 to 79 and no public hearing shall be held under those sections where

- (a) the Tribunal is of the opinion that evidence may be disclosed relating to financial or other personal circumstances of any person and that the balance of advantage is in favour of preventing the disclosure of the evidence in public, having regard both to the public interest and the interest of the person concerned; or

- (b) to do so would prejudice national security, impede law enforcement, prejudice the legitimate, commercial interests of a supplier or impede fair competition.

### **Rights of participants in reconsideration and appeal proceedings**

**82.(1)** A supplier who is a party in procurement proceedings to which an application for reconsideration of a decision or action by a procuring entity or tenders committee or an appeal relates and the procuring entity, the tenders committee and any other governmental authority the interests of which are, or are likely to be, affected by the application or appeal have the right to

- (a) participate in the proceedings under sections 74 to 79;
  - (b) be present and represented at all hearings during the proceedings;
  - (c) be heard;
  - (d) present evidence, including from witnesses;
  - (e) request, subject to section 81, that any hearing should take place in public; and
  - (f) obtain, subject to section 81, access to the record of the proceedings.
- (2) A supplier who fails to participate in proceedings for a reconsideration or an appeal referred to in subsection (1) is barred from subsequently challenging the decisions or actions that are the subject matter of the application for reconsideration or the appeal.

### **Effect of an application for reconsideration or an appeal**

**83.(1)** A procuring entity shall not take any step that would result in the execution of a procurement contract or framework agreement where the entity receives, in respect of a decision or action taken in procurement proceedings related to the contract or agreement

- (a) an application for reconsideration within the time limits prescribed in section 76;

- (b) notice, from a tenders committee, of an application for reconsideration submitted to the committee within the time limits prescribed in section 76; or
  - (c) notice of an appeal before the Tribunal under section 77.
- (2) The prohibition referred to in subsection (1) shall expire on the fifteenth day after the decision of the procuring entity, tenders committee or Tribunal on the application for reconsideration or the appeal, as the case may be, is communicated to
  - (a) the applicant or appellant, as the case may be;
  - (b) the procuring entity, where applicable;
  - (c) all other participants in the proceedings for reconsideration or all parties to the appeal, as the case may be; and
  - (d) all other participants in the procurement proceedings to which the application or appeal relates.
- (3) A procuring entity may, at any time, apply to the Tribunal to authorise the entity to enter into a procurement contract or framework agreement on the ground that urgent public interest considerations so justify.
- (4) The decision of the Tribunal and the reason for the decision shall promptly be communicated to the persons referred to in paragraphs (a) to (d) of subsection (2).

### **Court proceedings**

- 84.(1)** A party to an appeal to the Tribunal may appeal from the decision of the Tribunal to the Court of Appeal.
- (2) In disposing of an appeal under this section, the Court of Appeal may
    - (a) confirm or vacate the determination;
    - (b) make an order referring the determination back to the Tribunal for re-determination in accordance with the directions of the court; or

- (c) make such other orders as it considers necessary.

## PART VIII

### MISCELLANEOUS

#### **Form of procurement contract**

**85.(1)** A procurement contract shall, subject to subsection (2), be a written agreement drawn up in a form approved by the Solicitor General.

(2) Where the estimated value of the procurement contract is less than \$50 000, the contract may be a purchase order in a form approved by the Director.

(3) All contract documents shall be in the form, and include the terms and conditions, included or indicated in the solicitation document, subject to any changes resulting from the acceptance of the successful submission or from negotiations.

(4) Where

- (a) the value of a contract exceeds the relevant threshold specified in section 16(1)(a); or

- (b) the contract includes terms and conditions other than those provided in the standard form approved by the Solicitor General,

the procuring entity shall, prior to executing the contract, ensure that the contract is approved by the Solicitor General or another legal officer nominated by the Solicitor General, or, in the case of a procuring entity that is a statutory body or a state-owned company, by such legal officer as the entity may approve for the purpose.

**Procurement record and contract management record**

**86.(1)** A procuring entity shall maintain for a period of no less than 7 years from the date of completion of performance under a procurement contract, a record of

- (a) the procurement proceedings; and
  - (b) the management of the procurement contract.
- (2) A procurement record shall include
- (a) any request to initiate the procurement proceedings and the consistency of the request with a procurement plan;
  - (b) where a procuring entity uses a method of procurement other than open tendering, a statement of the reasons and circumstances relied upon to justify the use of such other method and evidence of any permission granted for the use of the method;
  - (c) a copy of any notice published;
  - (d) any list of suppliers or organisations to whom an invitation to tender or other similar notice was sent directly;
  - (e) any shortlist of suppliers or list of pre-qualified suppliers used;
  - (f) a copy of any pre-qualification or solicitation document issued and any amendment to, or clarification of, such document;
  - (g) a record of the submissions received;
  - (h) a record of any opening of tenders;
  - (i) copies of all submissions evaluated and any clarification requested from a supplier and the response received;
  - (j) any evaluation report prepared, including in respect of applications for pre-qualification;
  - (k) minutes of any meeting held with suppliers;

- (l) a copy of the successful tender notice, or, where no standstill period was applied and no successful tender notice issued, a statement of the reasons and circumstances relied upon by the procuring entity in deciding, in accordance with section 34(5), not to apply a standstill period;
  - (m) any successful tender acceptance notice;
  - (n) any submissions to, and decisions of, a tenders committee;
  - (o) any decision of a procuring entity to reject a submission as abnormally low and the reason for the decision and, in particular, the concerns that led the entity to reject the submission and its reasons for holding such concerns, and all communications with the supplier in relation to the submission;
  - (p) any decision to cancel the procurement and the reason for the decision;
  - (q) any decision to exclude a supplier from the procurement proceedings and the reason for the decision; and
  - (r) in the case of an application for reconsideration or an appeal under Part VII, a copy of the application for reconsideration or appeal, as the case may be, and of all decisions taken in the relevant proceedings and the reasons for the decisions.
- (3) A contract management record shall include
- (a) the successful tender acceptance notice;
  - (b) a copy of the executed contract document and any agreed contract amendments;
  - (c) any variations issued under the contract or call-off orders issued under a framework agreement;
  - (d) all post-contract documentation relating to the fulfilment of contractual obligations including copies of guarantees;



- (e) minutes of any meetings related to the management of the contract, including contract progress or review meetings;
  - (f) all documentation evidencing deliveries of goods or completion certificates in relation to contracts for works or services;
  - (g) copies of test reports relating to any tests performed on the goods and works;
  - (h) copies of all invoices including supporting documentation and details of the actual payment authorised;
  - (i) details of any claims made or penalties imposed by the procuring entity in accordance with the contract; and
  - (j) all correspondence between the procuring entity and the supplier.
- (4) Procurement records and contract management records shall be accurately maintained and kept up to date and may be in electronic form.
- (5) Where procurement and contract management records are in electronic form, the procuring entity shall establish and maintain measures to safeguard the integrity and the reliability of the records.

### **Public procurement manuals, standard documents and instructions**

**87.** The Director may issue public procurement instructions and manuals to provide guidance on, and standard documents and forms for the implementation of, this Act.

### **Annual reports**

**88.(1)** The Chief Procurement Officer shall, at the end of a financial year, prepare a report on the operation and performance of the public procurement system for the year.

- (2) The report shall include
- (a) a figure representing the total value of contracts awarded by procuring entities and another figure representing the cost of the total value of procurement contract variances for the year;
  - (b) the number of unfulfilled contracts awarded;
  - (c) a summary of the procurement activities of each procuring entity that sets out
    - (i) the number of procurement contracts awarded;
    - (ii) the number of procurement contracts varied and the reason for the variance;
    - (iii) the quantum of the variances;
    - (iv) the number of unfulfilled procurement contracts and the quantum of cost incurred thereby;
    - (v) with respect to procurement for a project, a brief description of the project and the name of the supplier to whom the contract was awarded and the value, scope of works and expected deliverables of the project; and
    - (vi) any lessons learnt as a consequence of the management of the procurement contracts;
  - (d) details of changes implemented to ensure that current best practice for public procurement is observed;
  - (e) the names of any procuring entities that have failed to comply with this Act;
  - (f) an assessment of the overall operation and performance of the public procurement system;
  - (g) a summary of any issues to be resolved; and
  - (h) any recommendations requiring action on the part of a procuring entity.

- (3) The report need not include details of contracts valued at less than the relevant threshold specified in section 16(1)(a) other than the total number and value.
- (4) The Minister shall cause a report prepared pursuant to subsection (1) to be laid in Parliament within 4 months of the end of the financial year to which the report relates.

### **Confidentiality in procurement proceedings**

**89.(1)** A procuring entity shall not, unless in accordance with an order of the court, disclose any information related to its procurement proceedings or suppliers where to do so would prejudice national security, impede law enforcement, prejudice the legitimate, commercial interests of suppliers or impede fair competition.

(2) A procuring entity shall, unless it is required to provide or publish information in accordance with this Act or any rules made under this Act, treat applications to pre-qualify and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or to any other person not authorised to have access to the information.

(3) Subject to subsection (1), in procurement involving information that a procuring entity considers to be secret, a procuring entity may

- (a) impose on suppliers requirements aimed at protecting the information; and
- (b) require suppliers to ensure that their sub-contractors comply with such requirements.

(4) A procuring entity shall, subject to any other law to the contrary, keep confidential the commercial and proprietary information that comes into its possession in relation to procurement proceedings.

**Disclosure of interest**

**90.**(1) Where an officer or a member of a tenders committee or of the Tribunal is interested in any matter requiring the consideration and decision of the officer, committee or Tribunal, or is interested in any party to any such matter, the person so interested shall

- (a) disclose such interest as soon as practicable after he becomes aware of the matter; and
- (b) absent himself from, and refrain from participation in, the deliberations or decision-making process in relation to the matter.

(2) A disclosure of interest shall be recorded in the minutes of the meeting at which it is made or to which it relates or in the record of the hearing of the Tribunal to which it relates.

(3) Subsections (1) and (2) apply, with such modifications and adaptations as may be necessary, to advisers and technical specialists who provide advice to a tenders committee or the Tribunal and to staff who provide secretarial services to a tenders committee or the Tribunal.

**Protection from suit, victimisation etc.**

**91.**(1) No action shall be instituted against a member of the Tribunal in respect of the discharge or purported discharge, in good faith, of his functions under this Act.

(2) Notwithstanding any other law, a person shall not be discharged, demoted, suspended, threatened, harassed, financially prejudiced or otherwise discriminated against or victimised for making a report under section 92(1)(d).

(3) A person who is discharged, demoted, suspended, threatened, harassed, financially prejudiced or otherwise discriminated against or victimised for making a report under section 92(1)(d) shall, where applicable, be reinstated in his original office with no loss of benefit and without prejudice to any other legal recourse available to him.

(4) A person who discharges, demotes, suspends, threatens, harasses or in any manner discriminates against or victimises a person or acts so as to prejudice the livelihood of a person as a consequence of his making a report under section 92(1)(d) is guilty of an offence and is liable on summary conviction to a fine of \$100 000 or to imprisonment for 3 years or to both such fine and imprisonment.

### **Officers engaged in procurement activities**

**92.(1)** An officer who is engaged in the procurement activities of a procuring entity shall

- (a) have regard to the objectives specified in section 12 in relation to public procurement and otherwise comply with this Act;
  - (b) exercise any functions that he has in relation to public procurement
    - (i) diligently and with the degree of care and efficiency that a reasonable person would exercise in the circumstances; and
    - (ii) impartially to ensure that suppliers have fair and competitive access to opportunities in public procurement;
  - (c) keep confidential any information relating to public procurement that comes into his possession including any proprietary information of suppliers; and
  - (d) disclose to the Chief Procurement Officer any information in his possession concerning any act of impropriety or illegality in respect of such activities or any breach of this Act.
- (2) An officer who is engaged in the procurement activities of a procuring entity shall not participate as a supplier in such activities.
- (3) Where the Chief Procurement Officer or the Tribunal has reasonable cause to believe that there has been misconduct or a breach of this Act by an officer, the Chief Procurement Officer or Tribunal shall refer the matter to the appropriate authority for further investigation.

**Offences and penalties**

**93.(1)** A person who

- (a) without reasonable excuse, fails or refuses to give information, or produce any books, documents or records required under section 5(2) or section 78(7);
- (b) without reasonable excuse, refuses to answer a summons as required under section 78(7);
- (c) knowingly gives false or misleading information or evidence in purported compliance with a request or summons under section 5(2) or section 78(7);
- (d) assaults, resists or obstructs the Chief Procurement Officer or staff designated by him, in the exercise of their powers to access or require relevant information in accordance with section 5(2); or
- (e) contrary to this Act, interferes, with or exerts undue influence on, the Director or the Chief Procurement Officer or any officer appointed to assist the Director or the Chief Procurement Officer or on a procuring entity in the performance of the functions assigned to the person or entity or in the exercise of the powers granted under this Act,

is guilty of an offence and is liable on conviction on indictment to a fine of \$170 000 or to imprisonment for 7 years or to both such fine and imprisonment.

(2) Notwithstanding subsection (1), a person who fails or refuses to answer any question or make any statement that may incriminate him is not guilty of an offence under that subsection.

**Rules**

**94.** The Minister may make Rules for giving effect to this Act.

**Repeal and consequential changes**

**95.**(1) The *Financial Management and Audit (Supplies) Rules, 1971 (S.I. 1971 No. 47)* are repealed.

(2) The enactment set out in first column of the *Third Schedule* is amended to the extent set out opposite thereto in the second column.

**Transitional provisions**

**96.** This Act does not apply to procurement initiated before the commencement of this Act and such procurement shall be conducted and dealt with as if this Act had not commenced.

**Commencement**

**97.** This Act shall come into operation on a day to be fixed by Proclamation.

**FIRST SCHEDULE**

*(Section 7(4))*

**TENDERS COMMITTEES**

*Part I*

*General Tenders Committee*

**Composition of General Tenders Committee**

- 1.(1) The General Tenders Committee shall comprise *ex officio*
- (a) the Chief Procurement Officer;
  - (b) the Solicitor General;
  - (c) the Permanent Secretary in the Ministry responsible for Finance;
  - (d) the Chief Technical Officer in the Ministry responsible for Works;
  - (e) the Senior Mechanical Engineer in the Ministry responsible for Works;
  - (f) the Director of the Department of Commerce and Consumer Affairs;
  - (g) the Director of the Data Processing Department;
  - (h) the Manager of the Public Investment Unit;
  - (i) the Chief Executive Officer of Barbados Investment and Development Corporation; and
  - (j) the Chief Executive Officer of Barbados National Oil Company Limited.
- (2) A person listed in paragraph (1)(b), (c), (d), (f), (g), (h), (i) or (j) may nominate a senior officer to be a member of the committee in his place.



### **Chairman and Deputy Chairman**

2.(1) The Chief Procurement Officer shall be the Chairman of the General Tenders Committee.

(2) The committee shall, at its first meeting in a financial year, elect one of its members, other than the Solicitor General or his nominee, to be the Deputy Chairman of the committee.

(3) Where the Chairman is absent from a meeting of the committee, the Deputy Chairman shall preside over the meeting.

### **Quorum**

3. The quorum of the General Tenders Committee is 6 members including the Chairman or the Deputy Chairman.

### **Secretary**

4. The Chief Procurement Officer shall designate a public officer to be the secretary of the General Tenders Committee.

## *Part II*

### *Special Tenders Committee*

### **Composition of special tenders committee**

1. A special tenders committee shall comprise
  - (a) the members of the General Tenders Committee; and
  - (b) such other persons, not exceeding 5, as the Director may appoint with the approval of the Minister, having regard to the procurement concerned and the obligations of the Crown under the agreement for the loan to which the procurement relates.

**Chairman and Deputy Chairman of special tenders committee**

- 2.(1) The Chairman of the General Tenders Committee shall be the Chairman of a special tenders committee.
- (2) The Deputy Chairman of the General Tenders Committee shall be the Deputy Chairman of a special tenders committee.
- (3) Where the Chairman is absent from a meeting of the committee, the Deputy Chairman shall preside over the meeting.

**Quorum**

3. The quorum of a special tenders committee is two-thirds of its members including the Chairman or the Deputy Chairman.

**Term of office**

4. A member of a special tenders committee shall hold office for the duration of the procurement proceedings in respect of which the committee was established.

**Secretary**

5. The Chief Procurement Officer shall designate a public officer to be the secretary of a special tenders committee.

*Part III*

*Drug Tenders Committee*

**Composition**

1. The Drug Tenders Committee shall comprise
  - (a) *ex officio*
    - (i) the Director of the Drug Service;

- (ii) the Chief Procurement Officer or his nominee;
  - (iii) the Assistant Director of the Drug Service charged with responsibility for Supply and Inventory;
  - (iv) the Director of Medical Services of the Queen Elizabeth Hospital;
  - (v) the Hospital Pharmacist of the Queen Elizabeth Hospital;
  - (vi) the Chairman of the Drug Formulary Committee established by section 5 of the *Drug Service Act*, Cap. 40A or a member of that committee nominated by him; and
  - (vii) the Solicitor General or a legal officer nominated by the Solicitor General;
- (b) a pharmacist in actual private practice and not employed in the Public Service, nominated by the Barbados Pharmaceutical Society; and
  - (c) a medical practitioner in actual private practice and not employed in the Public Service, nominated by the most representative association of medical practitioners.

### **Chairman and Deputy Chairman of Drug Tenders Committee**

2.(1) The Director of the Drug Service shall be the Chairman of the Drug Tenders Committee and shall preside at meetings of the committee.

(2) The Assistant Director of the Drug Service charged with responsibility for Supply and Inventory shall be the Deputy Chairman of the committee and shall preside at any meeting from which the Chairman is absent.

### **Quorum**

3. The quorum of the Drug Tenders Committee is 6 members including the Chairman or Deputy Chairman.

**Term of office**

4. A member of the Drug Tenders Committee, other than an *ex officio* member, shall hold office for 3 years and is eligible for re-appointment.

**Secretary**

5. The Director of the Drug Service shall designate a public officer to be the secretary of the Drug Tenders Committee.

*Part IV*

*General Provisions*

**Meetings of tenders committees**

1.(1) A tenders committee shall meet as often as is necessary for the proper discharge of its functions under this Act.

(2) The Chairman, in consultation with the secretary of the committee, shall determine the times and places for meetings and convene meetings accordingly.

(3) A decision of a tenders committee shall be by a majority of votes, and where there is an equality of votes, the Chairman shall have a casting vote.

**Urgent decisions**

2.(1) A tenders committee may make a decision on an urgent matter by the circulation of the relevant papers among the members of the committee and the expression, in writing, of the views of the majority of the members.

(2) Notwithstanding sub-paragraph (1), a member is entitled to require that a decision be deferred until the matter is considered at a meeting of the committee.

**Observers and advisers**

- 3.(1) A tenders committee may
- (a) permit observers to attend a meeting of the committee; and
  - (b) co-opt advisers to assist the committee in the discharge of its functions.
- (2) Observers and advisers shall not vote and advisers shall only attend the part of the meeting on which their advice is required.

**Minutes**

- 4.(1) A tenders committee shall keep minutes of the proceedings of its meetings.
- (2) The minutes shall include
- (a) the names of the members present at the meeting;
  - (b) the names of any advisers or observers attending the meeting;
  - (c) any disclosure of interest;
  - (d) the key issues discussed in relation to evaluation reports, including any advice given or disagreement among the members; and
  - (e) where the recommendation of a procuring entity is rejected, the reason for the rejection.
- (3) Minutes and decisions of the committee shall be made available and distributed within 7 days of the meeting of the committee to which they relate.
- (4) Minutes shall be distributed to all members of the committee and decisions shall be transmitted to the relevant procuring entity.

**SECOND SCHEDULE**

*(Section 8)*

**PUBLIC PROCUREMENT TRIBUNAL**

**Composition**

**1.(1)** The Tribunal shall comprise 5 persons of high integrity appointed by the Minister as follows:

- (a)* an attorney-at-law of at least 10 years' standing or a person who has held high judicial office, who shall be the Chairman of the Tribunal; and
- (b)* 4 other persons each with 5 years' experience, at a senior level, in public procurement or a related field.

**(2)** In selecting persons to be members of the Tribunal, the Minister shall seek to establish a balance of relevant knowledge and experience among members to ensure that the Tribunal has both

- (a)* knowledge of any applicable public procurement laws, rules, proceedings and practices; and
- (b)* a range of technical knowledge relating to various types of procurement contracts.

**(3)** Members are entitled to such remuneration and allowances as the Minister determines.

**Term of office**

**2.** Subject to paragraphs 4 and 5, a member of the Tribunal shall hold office for not more than 5 years but is eligible for re-appointment.

### **Temporary absence**

3. Where a member of the Tribunal is temporarily absent or unable to act, the Minister may appoint a suitable person to act in the member's place.

### **Resignation**

4.(1) A member of the Tribunal, other than the Chairman, may resign his office by instrument in writing addressed to the Chairman, who shall forthwith cause the same to be forwarded to the Minister.

(2) The Chairman may resign his office by instrument in writing addressed to the Minister.

(3) A person shall cease to be a member of the Tribunal upon the date of receipt of the instrument by the Chairman under sub-paragraph (1) or the Minister under sub-paragraph (2), unless another date for his resignation is specified in the instrument.

### **Removal**

5. The Minister may remove a member of the Tribunal from office where the member

- (a) fails to disclose a conflict of interest in relation to a matter before the Tribunal;
- (b) fails, without reasonable excuse, to attend 3 consecutive meetings of the Tribunal;
- (c) has become bankrupt or has made an arrangement with his creditors;
- (d) is incapacitated by physical or mental illness;
- (e) engages in misconduct or has a conflict of interest as a result of engaging in paid employment that conflicts with the functions of the Tribunal; or
- (f) is otherwise unable or unfit to discharge the functions of a member.

**Publication of appointments etc.**

**6.** The names of all of the members of the Tribunal as first constituted and every change in the membership of the Tribunal shall be published in the *Official Gazette*.

**Seal**

**7.(1)** The seal of the Tribunal

- (a) shall be kept in the custody of the Chairman or such other member as the members may approve;
- (b) may be affixed to documents or instruments pursuant to a resolution of the Tribunal;
- (c) shall be affixed in the presence of the Chairman and the Secretary to the Tribunal; and
- (d) shall be authenticated by the signature of the Secretary to the Tribunal and the signature of the Chairman.

(2) All documents other than those required by law to be under seal may be signed under the hand of the Chairman or the Secretary.

**Specialists**

**8.** The Tribunal may engage specialists in technical disciplines to assist in its work where so required and may, in particular, where it determines it to be necessary in any case, consult any person having experience in any relevant field to assist it in dealing with a matter.

**Tribunal may regulate procedure**

**9.** Subject to this Act, the Tribunal may regulate its own procedure.



**THIRD SCHEDULE***(Section 95)***CONSEQUENTIAL AMENDMENTS**

| Column 1   | Column 2   |
|--|--|
| Enactments   | Amendments   |
| <i>Financial Management and Audit (Financial) Rules, 2011.</i> | <ol style="list-style-type: none"><li data-bbox="805 804 1393 863">1. In rule 2, delete the definitions of "Special Tenders Committee" and "Tenders Committee".</li><li data-bbox="805 890 1393 1010">2. In rules 80(7), 161(2)(a), 162(2), 195(1) and (2) and 230, delete the words "Chief Supply Officer" and substitute the words "Chief Procurement Officer".</li><li data-bbox="805 1037 1393 1096">3. Delete rules 204, 205, 218 to 227 and 231 to 239.</li><li data-bbox="805 1123 1393 1155">4. Delete the Second and Third Schedules.</li></ol> |

Read three times and passed the House of Assembly this  
day of \_\_\_\_\_, 2018.

**Speaker**

Read three times and passed the Senate this \_\_\_\_\_ day of  
, 2018.

**President**

## **PUBLIC PROCUREMENT BILL, 2018**

### **EXPLANATORY MEMORANDUM**

This Bill would regulate public procurement and in particular promote integrity, fairness, transparency, value for money and efficiency in public procurement.

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

- Clause 1:** provides the short title.
- Clause 2:** defines certain terms used in the Bill.
- Clause 3:** explains the scope of the Bill.

#### **PART II - ADMINISTRATION**

- Clause 4:** provides for the Chief Procurement Officer to be responsible for the management of public procurement.
- Clause 5:** sets out the functions of the Chief Procurement Officer.
- Clause 6:** sets out the functions of heads of procuring entities.
- Clause 7:** establishes several tenders committees, the composition and procedure of which is set out in the *First Schedule*.
- Clause 8:** establishes the Public Procurement Tribunal, the composition of which is set out in the *Second Schedule*.

#### **PART III - PLANNING AND INITIATION OF PROCUREMENT**

- Clause 9:** requires that procuring entities have annual procurement plans.

- Clause 10:** provides for procuring entities to publish advance notice of forthcoming procurement.
- Clause 11:** addresses the initiation of procurement.
- Clause 12:** provides for procurement to be conducted with certain objectives in mind.
- Clause 13:** sets out rules for estimating the value of procurement contracts.
- Clause 14:** provides for the procurement of common items.
- Clause 15:** allows for the use of agents in procurement.

#### PART IV - METHODS OF PROCUREMENT

- Clause 16:** explains the circumstances in which the various methods of procurement may be used.  
*Open Tendering and Restricted Tendering*
- Clause 17:** provides that open tendering must generally be used for procurement above certain thresholds.
- Clause 18:** allows for restricted tendering to be used in limited circumstances.
- Clause 19:** sets out the requirements for solicitation documents to be used in tendering.
- Clause 20:** provides for clarification and modification of invitations to tender and solicitation documents.
- Clause 21:** speaks to the use of tender securities.

- Clause 22:** provides for meetings with suppliers to be held prior to the presentation of tenders.
- Clause 23:** addresses deadlines for presenting tenders.
- Clause 24:** sets out the requirements for the presentation of tenders.
- Clause 25:** provides for the presentation of separately sealed technical and financial tenders.
- Clause 26:** addresses the validity of tenders and their modification and withdrawal.
- Clause 27:** provides for the opening of tenders.
- Clause 28:** requires the establishment of evaluation committees to evaluate tenders.
- Clause 29:** governs evaluation criteria and procedures to be used in evaluating tenders.
- Clause 30:** provides for the examination and evaluation of tenders.
- Clause 31:** addresses the separate opening, examination and evaluation of technical and financial tenders.
- Clause 32:** provides for the treatment of abnormally low tenders.
- Clause 33:** provides for the determination of the successful tender.
- Clause 34:** requires the issue of a successful tender notice to suppliers and provides for standstill periods.
- Clause 35:** requires that a successful tender acceptance notice be issued to a successful supplier.

- Clause 36:** defines the scope of negotiations that may be held with a successful supplier.
- Clause 37:** requires the execution of a procurement contract before performance is commenced.
- Clause 38:** requires a procuring entity to publish notice of the award of a procurement contract.
- Clause 39:** provides for the management of procurement contracts.
- Clause 40:** requires the preparation of reports on suppliers' performance.
- Clause 41:** speaks to when procurement may be cancelled.

*Requests for Quotations*

- Clause 42:** provides for the use of requests for quotations.
- Clause 43:** sets out the requirements for solicitation documents to be used in requests for quotations.
- Clause 44:** provides for meetings with suppliers to be held prior to the presentation of quotations.
- Clause 45:** prohibits negotiations on quotations.
- Clause 46:** provides for certain provisions related to open tendering, such as the provisions on evaluation and the determination of a successful supplier, to apply, with such modifications as may be necessary, to quotations.

*Single-Source Procurement*

- Clause 47:** speaks to the circumstances in which single-source procurement may be used.

- Clause 48:** requires procuring entities to seek permission to engage in single-source procurement.
- Clause 49:** sets out the requirements for solicitation documents to be used for single-source procurement.
- Clause 50:** speaks to the evaluation of single-source submissions.
- Clause 51:** allows for negotiations in single-source procurement.
- Clause 52:** provides for certain provisions related to open tendering to apply, with such modifications as may be necessary, to single-source procurement.

*Framework Agreements*

- Clause 53:** speaks to the use of framework agreements.

*Procurement of Services of Individual Consultants*

- Clause 54:** governs the procurement of the services of individual consultants.
- Clause 55:** provides for solicitation in relation to individual consultants.
- Clause 56:** stipulates that solicitation documents are not required in respect of individual consultants.
- Clause 57:** provides for the presentation of submissions by individual consultants and the evaluation of such submissions.
- Clause 58:** governs negotiations with individual consultants.
- Clause 59:** provides for certain provisions related to open tendering to apply, with such modifications as may be necessary, to procurement of the services of individual consultants.

PART V - GENERAL RULES REGARDING PROCUREMENT

- Clause 60:* sets out rules for describing the subject matter of the procurement.
- Clause 61:* provides for standard trade terms and conditions to be used in procurement.
- Clause 62:* governs the publication of notices.
- Clause 63:* provides for corrections to published information.
- Clause 64:* establishes rules for communication in procurement proceedings.

PART VI - REGISTRATION, ELIGIBILITY AND QUALIFICATION

- Clause 65:* provides for the establishment of the Suppliers Register.
- Clause 66:* requires suppliers to be registered.
- Clause 67:* requires a supplier to notify the Chief Procurement Officer of any change in his circumstances that may affect his registration.
- Clause 68:* speaks to the eligibility of suppliers to participate in public procurement.
- Clause 69:* empowers procuring entities to exclude suppliers from particular procurement proceedings in certain cases.
- Clause 70:* describes the circumstances in which a supplier's name may be removed from the Suppliers Register.
- Clause 71:* speaks to the qualifications of suppliers.
- Clause 72:* provides for the pre-qualification of suppliers.



**Clause 73:** provides for clarification of pre-qualification notices and documents.

#### PART VII - CHALLENGE PROCEEDINGS

**Clause 74:** provides for appeals to the Tribunal against decisions regarding, among other things, registration and exclusion from participation in procurement.

**Clause 75:** sets out the procedure for appeals.

**Clause 76:** enables suppliers to apply for reconsideration of decisions or actions by procuring entities or tenders committees.

**Clause 77:** provides for appeals to the Tribunal in respect of reconsideration proceedings.

**Clause 78:** governs the hearing of appeals by the Tribunal.

**Clause 79:** governs decisions by the Tribunal.

**Clause 80:** speaks to how the Tribunal may deal with costs.

**Clause 81:** prohibits certain types of disclosure in reconsideration and appeal proceedings.

**Clause 82:** sets out the rights of participants in reconsideration and appeal proceedings.

**Clause 83:** speaks to the effect of an application for reconsideration or an appeal.

**Clause 84:** provides for an appeal to the Court of Appeal from a decision of the Tribunal.

PART VIII - MISCELLANEOUS

- Clause 85:** speaks to the form of a procurement contract.
- Clause 86:** provides for the establishment of procurement records and contract management records.
- Clause 87:** empowers the Director to issue public procurement manuals, standard documents and instructions.
- Clause 88:** mandates the Chief Procurement Officer to prepare annual reports on the procurement system.
- Clause 89:** provides for confidentiality in procurement proceedings.
- Clause 90:** provides for officers engaged in procurement activities to disclose any interest in such activities.
- Clause 91:** protects persons from certain types of conduct.
- Clause 92:** imposes certain duties on officers engaged in procurement activities.
- Clause 93:** makes certain conduct an offence.
- Clause 94:** empowers the Minister to make Rules.
- Clause 95:** repeals the *Financial Management and Audit (Supplies) Rules, 1971* (S.I. 1971 No. 47) and provides for certain consequential changes to the *Financial Management and Audit (Financial) Rules, 2011* (S.I. 2011 No. 54).
- Clause 96:** makes transitional provision for procurement initiated before the commencement of the legislation.
- Clause 97:** provides for the legislation to commence on a date to be fixed by Proclamation.