



ANGUILLA

A BILL FOR
**PUBLIC PROCUREMENT AND CONTRACT ADMINISTRATION
ACT, 2011**

Published by Authority

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I Assent

Governor

Date

ANGUILLA

A BILL FOR

PUBLIC PROCUREMENT AND CONTRACT ADMINISTRATION ACT, 2011

NO. /2011

[Gazetted

] [Commencement: Section 50]

An Act to reform the procurement and contract administration procedures of the Government and to provide for matters connected therewith and incidental thereto.

ENACTED by the Legislature of Anguilla

PART 1

PRELIMINARY

Interpretation

1. (1) In this Act, unless the context otherwise requires—

“Act” includes the regulations;

“advantage” includes an offer of employment;

“Board” means the Procurement Board established under section 33(1);

“Chief Procurement Officer” means the Chief Procurement Officer appointed under section 8(1);

“cohabitant” means a person who lives in a domestic relationship which is similar to the relationship between husband and wife;

“co-operative procurement agreement” means an agreement under which the Government agrees with one or more—

(a) other governments; or

(b) statutory bodies inside or outside Anguilla,

to procure goods or services through a central organization, such as the Eastern Caribbean Central Bank or a regional organization, using the procurement procedures of the central organization;

“emergency solicitation” means the solicitation procedure referred to in section 17;

“entity” includes a company, partnership or a joint venture;

“financial interest” includes a financial liability;

“goods” means tangible personal property and software, whether on a CD-ROM or other tangible medium or as a download from the internet or otherwise, and includes services incidental to the supply of those goods if the value of those services based on a breakdown of the estimate of the amount of the contract award does not exceed the value of the goods;

“large sole source solicitation” means the solicitation procedure referred to in section 15;

“Minister” means the Minister with responsibility for procurement;

“Ministry” means the Ministry with responsibility for procurement and related contract administration;

“partnership” includes a limited partnership;

“Permanent Secretary” means the Permanent Secretary to the Ministry and includes a public officer acting in the post of Permanent Secretary;

“person” means a corporation, individual, sole proprietorship, partnership or joint venture and includes its assigns and heirs, executors and administrators or other legal representatives;

“prescribed” means prescribed by regulation under section 41;

“procure” means acquire works, goods or services and includes acquisition by purchase, lease, rental or other similar arrangement;

“procurement” means a procurement made by the Government under this Act;

“procurement authority” means a procurement authority referred to in section 10;

“Procurement Unit” means the Procurement Unit established under section 7;

“public officer” has the meaning referred to in section 73 of the Constitution;

“regulation” means a regulation made under section 41;

“restricted procurements” means procurements established as restricted procurements by the Board under section 34(1)(c);

“services” means the supply of—

- (a) labour, time or effort, not involving furnishing a tangible end-product other than a report or goods or other tangible property produced or supplied incidental to the labour, time or effort but does not include the employment of a public officer;
- (b) insurance coverage or other similar services; or
- (c) electricity, telecommunications, water and other similar services and includes goods, products or other tangible property supplied in connection with electricity, telecommunications, water and other similar services,

but does not include specified professional services or other services exempted by regulation;

“small procurement” means a procurement referred to in section 19;

“small sole source solicitation” means the solicitation procedure referred to in section 16;

“solicitation by competitive quotations” means the solicitation procedure referred to in section 20;

“solicitation by competitive sealed bids” means the solicitation procedure referred to in section 13;

“solicitation by competitive sealed proposals” means the solicitation procedure referred to in section 14;

“specified professional services” means the professional services of—

- (a) an accountant;
- (b) an actuary;
- (c) a lawyer;
- (d) a land surveyor;
- (e) a physician;
- (f) a dentist; or
- (g) a prescribed professional other than an architect or engineer;

“spouse” does not include a person from whom a public officer is separated if all support obligations and family property have been dealt with by a separation agreement or a court order.

“standard solicitation documents” means—

- (a) documents approved by the Board under section 34(1)(a)(i); and
- (b) amendments to the documents referred to in paragraph (a) approved by the Board under section 34(1)(a)(ii);

“submission” means the response to a solicitation;

“two-envelope bidding process” means a competitive sealed bidding process in which two bids are submitted at the same time, the first envelope containing a technical bid and the second envelope containing a priced bid, on the understanding that the first envelopes submitted by the bidders will be opened and the bids evaluated before the second envelopes submitted by the bidders who have qualified are opened and evaluated;

“two-envelope proposal process” means a competitive sealed proposal process in which two proposals are submitted at the same time, the first envelope containing a technical proposal and the second envelope containing a priced proposal, on the understanding that the first envelopes submitted by the offerors will be opened and the proposals evaluated before the second envelopes submitted by the offerors who have qualified are opened and evaluated;

“two-stage bidding process” means a competitive sealed bidding process in which, in the first stage, bidders are invited to submit a bid based on an invitation for bids with unpriced technical specifications on the understanding that, at the second stage, an invitation for bids will be issued inviting prices only from those bidders who submitted bids and have qualified in the first stage;

“two-stage proposal process” means a competitive sealed proposal process in which, in the first stage, offerors are requested to submit a proposal based on a request for proposals with unpriced technical specifications on the understanding that, at the second stage, a request for proposals will be issued requesting prices only from those offerors who submitted proposals and have qualified in the first stage;

“works” means the construction, reconstruction, erection, installation, repair, renovation, extension or demolition of a building, structure or works and includes services such as mapping, drilling, soil testing, site preparation, excavation, demolition, maintenance and other similar activities furnished in connection therewith if the value of the works based on a breakdown of the estimate of the amount of the contract award does not exceed the value of the construction, reconstruction, erection, installation, repair, renovation, extension or demolition of the building, structure or works.

(2) The following are the members of a public officer’s family for the purposes of this Act—

- (a) his or her spouse or cohabitant;
- (b) his or her children and the children of his or her spouse or cohabitant;
- (c) his or her parents;
- (d) his or her brothers or sisters including half brothers and half sisters and brothers and sisters by adoption.

(3) A person has a financial interest in an entity if that person—

- (a) is a director, officer or employee of a company;

- (b) is a partner in a partnership or an employee of the partnership;
- (c) is a shareholder in a company;
- (d) is a trustee under a trust or an employee of the trust;
- (e) is a party to a joint venture;
- (f) is a creditor or debtor of a company, partnership or trust; or
- (g) possesses any other capacity provided by regulation,

other than a financial interest or class of financial interest excluded by regulation.

(4) A reference to an estimate of the amount of a contract award is a reference to the estimate of the contract award referred to in section 12(a).

(5) A reference to a breakdown of an estimate of the amount of a contract award is a reference to the breakdown referred to in section 12(b).

(6) If a term is defined in this Act or the regulations, other grammatical forms and cognates of the same term have corresponding meanings.

Delegation

2. (1) Subject to the provisions of this Act, a public officer who is not a member of the Board may delegate the performance of his or her duties under this Act to another public officer.

(2) When under or in relation to this Act a public officer delegates the performance of his or her duties or the exercise of his or her powers to any public officer, the delegate, in addition to the public officer making the delegation, is liable for the proper performance of the duty or the proper exercise of the power that is delegated.

Meaning of “confidential” in relation to solicitations for national defence and national security

3. A solicitation and the contract arising from it are confidential when—

- (a) the solicitation and contract are for a procurement made for the purpose of national defence or national security; and
- (b) the Governor, acting after consultation with the Executive Council, certifies in writing that the confidentiality of the solicitation and contract are necessary to protect the national interest.

Purposes of Act

4. The purposes of this Act and the regulations are to simplify, clarify and modernize procurement and to make procurement by the Government transparent and more particularly to—

- (a) require public competition in the procurement process except to the extent that the circumstances or size of the procurement make it impracticable;

- (b) foster and encourage broad participation in the procurement process by persons in Anguilla;
- (c) provide for increased public confidence in the Government procurement process by maintaining safeguards to ensure its fairness, openness and transparency;
- (d) ensure fair treatment of all persons who participate in the procurement process; and
- (e) ensure the best value is obtained for the procurement dollar.

Procurements exempt under the Act

5. (1) The following procurements maybe exempted from this Act—

- (a) a procurement made under a co-operative procurement agreement;
- (b) a procurement, the funding for which, or part of the funding for which, is furnished to the Government by another government or by an international or regional agency, whether the funding is by loan, donation or otherwise, on the condition or on the understanding that the procurement procedures of the other government or international or regional agency, or procurement procedures approved or agreed to, by the government or international or regional agency will be used.

(2) Subject to the regulations for the maintenance of procurement files, the following procurements are exempted from this Act—

- (a) banking services;
- (b) the procurement of fiscal agency or depository services or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
- (c) the procurement of media and media-related services such as the purchase of television or radio time or production capacity;
- (d) travel services and hotel accommodation;
- (e) works of art, objects of historical or cultural interest or performances of cultural interest;
- (f) the procurement of specified professional services; and
- (g) a procurement for casual hospitality or catering services in an amount not exceeding \$6,500 or such other amount as may be prescribed.

Artificial division of solicitations prohibited

6. (1) No solicitation shall be artificially divided, including artificially divided so as to be solicited—

- (a) as an exempt procurement under section 5(2)(g);

- (b) so as to avoid the effect of an amount prescribed under the regulations by any means including—
 - (i) 2 or more competitive quotations rather than a competitive sealed bid or competitive sealed proposal,
 - (ii) 2 or more small emergency solicitations rather than a large emergency solicitation, or
 - (iii) 2 or more small sole source solicitations rather than a large sole source solicitation.

(2) A procurement shall be considered to be artificially divided if its only or primary purpose is to achieve one of the objectives set out in subsection (1).

PART 2

ORGANIZATION OF GOVERNMENT PROCUREMENT

Establishment of Procurement Unit

7. There is established a Procurement Unit in the Ministry with responsibility for procurement.

Appointment of Chief Procurement Officer and staff

8. (1) There shall be appointed a Chief Procurement Officer who shall be the head of the Procurement Unit.

(2) There may be appointed a Deputy Chief Procurement Officer and such additional staff as are necessary for the due administration of this Act.

(3) The Chief Procurement Officer may, after consultation with the Permanent Secretary, delegate the performance of his or her duties or the exercise of his or her powers to any public officer who reports to him or her.

General duties and powers of Chief Procurement Officer

9. (1) In addition to his or her other duties and powers under this Act, the Chief Procurement Officer shall—

- (a) provide advice to departments, the Board, the Permanent Secretary, the Minister and any other relevant stakeholder on procurement policy and practice;
- (b) monitor the operation of this Act and the regulations and report thereon to the Board and the Minister;
- (c) foster the development of procurement professionals;
- (d) after consultation with procurement authorities and such other persons as the Chief Procurement Officer or the Board considers appropriate, prepare or cause to be prepared—

- (i) standard solicitation documents for the solicitation of works, goods and services or classes of works, goods or services in relation to procurements equal to or greater than the prescribed value, and in relation to procurements less than the prescribed value, and
 - (ii) amendments of general application to or replacements of standard solicitation documents or classes of standard documents, for submission to the Board for approval under section 34(1)(a);
- (e) after consultation with the Permanent Secretary, procurement authorities and other relevant stakeholders; develop and periodically update a procurement manual for use by all persons involved in the solicitation and award of contracts including procurement authorities, but such procurement manual shall not be operational unless approval is granted by the Board;
- (f) subject to the written approval of the Governor in Council, may enter into contracts with any government agency or other statutory body, other than a government agency referred to in paragraph (g), to procure or, with the consent of a procurement authority, to have a procurement authority procure, works, goods or services or a class or classes of works, goods or services on its behalf and may charge the fee agreed on for such services by the statutory body or prescribed by regulation;
- (g) when provided by regulation, shall—
- (i) procure or arrange for a procurement authority to procure, specified works, goods or services or a specified class or classes of works, goods or services on behalf of designated government agencies, and
 - (ii) require payment of fees by the designated government agency for the procurement services provided by or through the Procurement Unit; and
- (h) perform such other duties and exercise such other powers in relation to procurement as are assigned to him or her by the Board.

Procurement authorities

10. (1) Subject to subsections (2) and (3), the head of the department for which a procurement is to be made is the procurement authority responsible for that procurement.

(2) The head of a department, the Chief Procurement Officer or a public officer who heads part of a department designated by the Board under section 34(1)(c) in relation to a class of restricted procurements is the procurement authority responsible for that class of restricted procurements.

(3) When a procurement that is not within a class of restricted procurements under subsection (2) involves more than one procurement authority, the procurement authority that is appointed by the Board under section 34(1)(d) in relation to the procurement is the procurement authority.

(4) Notwithstanding that the Board has designated the head of a department, the Chief Procurement Officer or a public officer who heads part of a department as the procurement authority responsible for a class of restricted procurements, the head of a department, Chief

Procurement Officer or the chief official of a part of a department may, subject to the regulations and any directions of the Board, delegate in writing on an occasional basis the making of a particular restricted procurement to another procurement authority when it is necessary to avoid serious inconvenience to a department.

(5) A procurement authority may delegate his or her authority or part of his or her authority, other than the authority to make a restricted procurement, to any other procurement authority and, when he or she does so, shall, if the procurement authority or delegate is other than the Chief Procurement Officer, give notice in writing of that fact to the Chief Procurement Officer and the Board.

PART 3

SOLICITATION PROCEDURES AND AWARDS OF CONTRACTS

Division 1

Solicitation Procedures

Requirements for all procurements

11. All procurements shall be made in accordance with this Act.

Estimate of amount of contract award and breakdown

- 12.** Before commencing a solicitation, the procurement authority shall ensure that—
- (a) except where the regulations provide otherwise, an estimate of the amount of the contract award for the procurement has been prepared; and
 - (b) a breakdown of the estimate is made—
 - (i) in the case of a contract for works, between—
 - (aa) the construction, reconstruction, erection, installation, repair, renovation, extension or demolition of a building, structure or works, and
 - (bb) services such as mapping, drilling, soil testing, site preparation, excavation, demolition, maintenance and other similar activities furnished in connection therewith;
 - (ii) in the case of a contract for goods, between—
 - (aa) tangible personal property and software, and
 - (bb) services incidental to the supply of those goods.

Solicitations by competitive sealed bids to be default procedure

13. A procurement shall be made by soliciting competitive sealed bids unless the procurement authority, with the approval of the Chief Procurement Officer, determines that the procurement may be made by another solicitation procedure.

Solicitations by competitive sealed proposals

14. (1) A procurement may be made by soliciting competitive sealed proposals only when the procurement authority, with the approval of the Chief Procurement Officer, determines that it is not practicable or advantageous to make the procurement by soliciting competitive sealed bids.

(2) Whether a solicitation by competitive sealed bids is practicable relates to such factual circumstances as whether there is sufficient time or information to prepare an invitation for bids.

(3) Whether a solicitation by competitive sealed bids is advantageous relates to such matters as whether quality, availability or capability are overriding in relation to price.

Large sole source solicitations

15. A large sole source solicitation may be made by a procurement authority after complying with the requirements of the regulations respecting large sole source solicitations.

Small sole source solicitations

16. A small sole source solicitation may be made by a procurement authority when it is not reasonably practicable to make the small procurement except from a single source as determined by the Chief Procurement Officer.

Emergency solicitations

17. (1) An emergency solicitation may be made when the Board determines —

- (a) that there exists a threat to public health, welfare or safety by reason of an emergency condition and the procurement is for the purpose of eliminating or mitigating the threat; or
- (b) that—
 - (i) the procurement is urgently required in the public good, and
 - (ii) urgency justifies a less stringent competitive procedure than would otherwise apply;

and, in either case, the Board shall determine what competitive procedure in making the procurement, if any, is most appropriate in the circumstances.

(2) In making a determination under subsection (1), the Board shall have regard to the purposes of this Act as set out in section 4 and shall consider the relevant circumstances—

- (a) the time and resources required to prepare, or complete the preparation of, an invitation for bids or an invitation for proposals;
- (b) the time required to permit solicitation by competitive sealed bids or competitive sealed proposals;
- (c) in the case of a procurement referred to in subsection (1)(b)—
 - (i) the degree of urgency in making the procurement and the damage to, or additional damage to, the public good that would likely ensue from delaying

the procurement to permit the solicitation referred to in paragraph (b) to take place; and

- (ii) the time required if a less stringent competitive procedure were adopted and the damage to, or additional damage to, the public good that would likely ensue if that less stringent procedure was followed.

(3) An emergency solicitation may be a large emergency solicitation or a small emergency solicitation.

Solicitations equal to or exceeding the prescribed amount

18. (1) When the estimate of the amount of a contract award for a procurement is equal to or exceeds the prescribed amount, the solicitation for the procurement shall be made by competitive sealed bids or competitive sealed proposals or as an emergency solicitation or large sole source solicitation as determined by the procurement authority, with the approval of the Chief Procurement Officer.

(2) When a procurement is solicited by competitive sealed bids or competitive sealed proposals or as an emergency solicitation or large sole source solicitation even though the estimate of the amount of the contract award for the procurement is less than the prescribed amount, the solicitation is deemed to be a procurement by competitive sealed bids or competitive sealed proposals or as an emergency solicitation or large sole source solicitation.

Solicitations less than the prescribed amount

19. When—

- (a) the estimate of the amount of a contract award for a procurement is less than the prescribed amount; and

- (b) the procurement is other than a procurement to which 18(2) applies,

the solicitation for the procurement shall be made by competitive quotations or as a small emergency solicitation or small sole source solicitation as determined by the procurement authority, with the approval of the Chief Procurement Officer.

Competitive quotations to be default procedure for small procurements

20. A small procurement shall be made by soliciting competitive sealed bids or competitive sealed proposals unless the solicitation may be made as a small emergency solicitation or a small sole source solicitation.

Confidential procurements

21. When a solicitation procurement is confidential under section 3, the procurement authority may require the person or persons—

- (a) from whom it proposes to request competitive sealed bids, competitive sealed proposals or competitive quotations; or

- (b) with whom it proposes to a deal in relation to a procurement to be made by large emergency solicitation, large sole source solicitation, small emergency solicitation or small sole source solicitation;

to enter into a confidentiality agreement in respect of a solicitation as are provided for in the regulations or, in the absence of regulations, as the procurement authority considers appropriate.

Division 2

Notice of Competitive Sealed Bids or Proposals and Invitations to Prequalify and Opening of Bids, Requests for Proposals and Applications to Prequalify

Notice of invitation for bids requests for proposals or to prequalify

22. (1) Subject to subsection (2), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall, on the direction of the procurement authority, publish notice of an invitation for bids, request for proposals or invitation to prequalify for a solicitation by competitive sealed bids or competitive sealed proposals, in the manner specified by the regulations for a period as determined by the regulations before the day for the close of bids, proposals or applications to prequalify, as the case may be.

(2) Notwithstanding subsection (1)—

- (a) when applicants have been prequalified in respect of a solicitation by competitive sealed bids or competitive sealed proposals, the Chief Procurement Officer is required to give notice only to the applicants who prequalified;
- (b) in the second stage of a two-stage bidding process or two-stage proposal process, the Chief Procurement Officer is required to give notice only to the bidders or offerors who submitted bids or proposals and qualified in the first stage.

Opening bids, proposals and applications to prequalify

23. (1) Bids, proposals and applications to prequalify for a solicitation by competitive sealed bids or competitive sealed proposals shall be opened publicly—

- (a) by the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, on the day and at the time and place specified in the invitation for bids, request for proposals or invitation to prequalify, as the case may be; and
- (b) in the presence of at least one member of the Board or his or her designate and any other persons who wish to be present, including—
 - (i) any person who submitted a competitive sealed bid or a competitive sealed proposal or application to prequalify, and
 - (ii) any member of the public.

(2) In the case of bids referred to in subsection (1), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall read aloud—

- (a) the name and address of each bidder; and

- (b) the amount of his or her bid or, when there is more than one amount in the bid, each amount bid.

(3) In the case of proposals referred to in subsection (1), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—

- (a) read aloud the name and address of each offeror; and
- (b) refrain from disclosing any other information contained in the proposal.

(4) In the case of applications to prequalify for a solicitation by competitive sealed bids or competitive sealed proposals referred to in subsection (1), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—

- (a) read aloud the name and address of each applicant; and
- (b) refrain from disclosing any other information contained in the application.

(5) In the case of a two-stage bidding process or two-stage proposal process, the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—

- (a) in the first stage of a two-stage bidding or proposal process—
 - (i) read aloud only the name and address of each bidder or offeror, and
 - (ii) refrain from disclosing any other information contained in the bid or proposal;
- (b) in the second stage of a two-stage bidding process read aloud—
 - (i) the name and address of each bidder; and
 - (ii) the amount of the bid or, when there is more than one amount in the bid, each amount bid; and
- (c) in the second stage of a two-stage proposal process—
 - (i) read aloud the name and address of each offeror, and
 - (ii) refrain from disclosing any other information contained in the proposal.

(6) In the case of a two-envelope bidding process or two-envelope proposal process, the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—

- (a) when the first envelope is opened—
 - (i) read aloud the name and address of each bidder or offeror, and

- (ii) refrain from disclosing any other information contained in the bid or proposal;
- (b) in the second stage of a two-envelope bidding process read aloud—
 - (i) the name and address of each bidder; and
 - (ii) the amount of his or her bid or, when there is more than one amount in the bid, each amount bid; and
- (c) in the second stage of a two-stage proposal process—
 - (i) read aloud the name and address of each offeror, and
 - (ii) refrain from disclosing any other information contained in the proposal.

Notice of invitation for bids or proposals or to prequalify that is confidential

24. (1) Subject to subsections (2) and (3), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall, on the direction of the procurement authority, give notice of an invitation for bids or proposals or an invitation to prequalify for a solicitation by competitive sealed bids or competitive sealed proposals that is confidential under section 3—

- (a) in the manner specified by the regulations for the period determined under the regulations before the day for the close of bids or proposals or application to prequalify, as the case may be; and
- (b) to as many potential bidders, offerors or applicants as practicable who satisfy the requirements of the Chief Procurement Officer under subsection (2).

(2) When he or she considers it appropriate, the Chief Procurement Officer may require potential bidders, offerors or applicants for prequalification to enter into a confidentiality agreement in respect of a solicitation or application or to comply with such requirements in relation to confidentiality as are provided for in the regulations or, in the absence of regulations, as he or she considers appropriate.

(3) Notwithstanding subsection (1)—

- (a) when applicants have been prequalified in respect of a solicitation by competitive sealed bids or competitive sealed proposals, the Chief Procurement Officer is required to give notice only to the applicants who prequalified; and
- (b) in the second stage of a two-stage bidding process or two-stage proposal process, the Chief Procurement Officer is required to give notice only to the bidders or offerors who submitted bids or proposals and qualified in the first stage.

Opening bids, proposals and applications to prequalify that are confidential

25. (1) Bids, proposals or applications to prequalify by competitive sealed bids or competitive sealed proposals that are confidential under section 3 shall be opened in private—

- (a) by the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, on the day and at the time and place specified in the invitation for bids, the request for proposals or the invitation to prequalify, as the case may be; and
 - (b) in the presence of at least one member of the Board or his or her designate.
 - (2) An opening is in private if the only persons present or able to hear or see are—
 - (a) the Chief Procurement Officer and persons employed in the Procurement Unit and authorised by the Chief Procurement Officer to be present;
 - (b) the procurement authority or an authorised representative of the procurement authority; and
 - (c) any member of the Board or his or her designate and the secretary to the Board.
 - (3) In the case of bids referred to in subsection (1), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall read aloud—
 - (a) the name and address of each bidder; and
 - (b) the amount of the bid or, when there is more than one amount in the bid, each amount bid.
 - (4) In the case of proposals referred to in subsection (1), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—
 - (a) read aloud the name and address of each offeror; and
 - (b) refrain from disclosing any other information contained in the proposal.
 - (5) In the case of an application to prequalify for a solicitation by competitive sealed bids or competitive sealed proposals referred to in subsection (1), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—
 - (a) read aloud the name and address of each applicant; and
 - (b) refrain from disclosing any other information contained in the application.
 - (6) In the case of bids or proposals referred to in subsection (1) in a two-stage bidding process or two-stage proposal process the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—
 - (a) in the first stage of a two-stage bidding or proposal process—
 - (i) read aloud only the name and address of each bidder or offeror, and

- (ii) refrain from disclosing any other information contained in the bid or proposal;
- (b) in the second stage of a two-stage bidding process read aloud—
 - (i) the name and address of each bidder; and
 - (ii) the amount of the bid or, when there is more than one amount in the bid, each amount bid; and
- (c) in the second stage of a two-envelope proposal process—
 - (i) read aloud the name and address of each offeror, and
 - (ii) refrain from disclosing any other information contained in the proposal.

(7) In the case of bids or proposals referred to in subsection (1) in a two-envelope bidding process or two-envelope proposal process, the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—

- (a) when the first envelope is opened—
 - (i) read aloud the name and address of each bidder or offeror, and
 - (ii) refrain from disclosing any other information contained in the bid or proposal;
- (b) in the second stage of a two-envelope bidding process read aloud—
 - (i) the name and address of each bidder; and
 - (ii) the amount of his or her bid or, when there is more than one amount in the bid, each amount bid; and
- (c) in the second stage of a two-stage proposal process—
 - (i) read aloud the name and address of each offeror, and
 - (ii) refrain from disclosing any other information contained in the proposal.

Division 3

Award of Contract

Award of contract after competitive sealed bids

26. (1) A contract for a procurement that is awarded after a solicitation by competitive sealed bids shall be awarded by the Board to the bidder—

- (a) who is determined to be a responsible bidder and is determined not to be disqualified under the regulations; and

- (b) who—
 - (i) is determined to have submitted the lowest responsive evaluated bid; or
 - (ii) is determined to have submitted the lowest responsive evaluated proposal that meets the requirements of a local preference policy or a policy to set aside a procurement as an incentive to the development of local business when such policy is established by regulation and applied to the solicitation.

(2) For the purposes of paragraph (1)(b), “evaluated” means evaluated in accordance with objective evaluation criteria set out in the invitation for bids to determine if the works, goods or services meets the description of what is being procured.

Award of contract after competitive sealed proposals

27. (1) A contract for a procurement that is awarded after a solicitation by competitive sealed proposals shall be awarded by the Board to the offeror—

- (a) who is determined to be a responsible offeror and is determined not to be disqualified under the regulations; and
- (b) who—
 - (i) is determined to have submitted a proposal that is responsive and that, after being evaluated in accordance with the request for proposals, is capable of acceptance; or
 - (ii) is determined to have submitted the lowest responsive evaluated proposal that meets the requirements of a local preference policy or a policy to set aside a procurement as an incentive to the development of local business when such policy is established by regulation and applied to the solicitation; and
- (c) who is determined to have submitted the best and final offer that is determined to be most advantageous to the Government after—
 - (i) discussions with offerors whose proposals comply with paragraph (a) and (b), and
 - (ii) such offerors are given an opportunity to revise their proposals on a fair basis,

when and to the extent that such discussions with offerors, revision of proposals and submission of best and final offers are provided for in the request for proposals.

(2) For the purposes of subsection (1)(b), “evaluated” means evaluated in accordance with evaluation criteria set out in the request for proposals relating to the relative importance of such matters as quality, availability and capability in relation to price.

(3) No person conducting or privy to discussions with an offeror shall disclose any information derived from a proposal or discussions with any offeror to any other offeror directly or indirectly or to any other person except when that person needs to know to perform his or her functions.

(4) Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, revision of proposals and submission of best and final offers.

Award of contract after emergency solicitation

28. (1) The Board shall award a contract for an emergency solicitation referred to in section 17(1)(a) or (b) but where the Board considers that it is reasonable to do so, the Board may allow a procurement authority to award a small emergency solicitation.

(2) A contract for a procurement that is awarded after an emergency solicitation referred to in section 17(1)(a) or (b) shall be awarded by the Board to the person who is determined—

- (a) to be responsible and not to be disqualified under the regulations; and
- (b) to be the most appropriate, based on the results of the competitive procedure, if any, that the Board determined under section 13 to be most appropriate in the circumstances.

Award of contract after large sole source solicitation

29. A contract for a procurement that is awarded after a large sole source solicitation shall be on the best terms that can be negotiated in the circumstances and shall be awarded by the Board to the person who is determined not to be disqualified under the regulations.

Award of contract after solicitation by competitive quotations

30. (1) A contract for a small procurement that is awarded by the procurement authority after a solicitation by competitive quotations shall be awarded to the person who is determined—

- (a) to be responsible and not to be disqualified under the regulations; and
- (b) to have submitted the lowest responsive evaluated quotation.

(2) For the purposes of subsection (1), “evaluated” means evaluated in accordance with the evaluation criteria, if any, set out in the request for quotations.

Award of contract after small sole source solicitation

31. A contract for a small procurement that is awarded after a small sole source solicitation shall be on the best terms that can be negotiated in the circumstances and shall be awarded by the procurement authority to the person who is determined not to be disqualified by the regulations.

Award when small procurement contract equals or exceeds the prescribed amount

32. When a procurement is solicited in good faith by competitive quotations, as a small emergency solicitation or a small sole source solicitation and the amount of a proposed contract will be equal to or exceed the prescribed amount, the contract may be awarded by the Board as if it had been a solicitation by competitive sealed bids or competitive sealed proposals, a large emergency solicitation or a large sole source solicitation.

PART 4
PROCUREMENT BOARD

Procurement Board established

33. (1) The Procurement Board is established.

(2) The Board shall consist of 7 members appointed by the Governor in Council in the following manner—

- (a) 6 members shall be public officers; and
- (b) 1 member must be a private citizen.

(3) Schedule 1 has effect with regard to the constitution, operation and procedures of the Board.

Duties and powers of the Board

34. (1) Subject to this Act, the Board, in addition to any duties or powers assigned to it under this Act, has the authority over the administration of Government procurement and, without limitation, has authority to—

- (a) approve—
 - (i) standard solicitation documents for use in the solicitation of works, goods, services or a class or classes of works, goods, services or works to which they relate, or
 - (ii) amendments of general application to and replacements of standard solicitation documents;
- (b) approve a procurement manual and approve the amendment or replacement of the procurement manual;
- (c) for the purposes of section 10(2), establish classes of restricted procurements and designate the head of a department, the Chief Procurement Officer or the public officer who heads part of a department as the procurement authority in relation to each class of restricted procurements;
- (d) for the purposes of section 10(3), appoint one procurement authority when a procurement involves more than one procurement authority;
- (e) subject to the regulations, give directions referred to in section 10(4) respecting the delegation on an occasional basis of a restricted procurement or class of restricted procurements to another procurement authority;
- (f) approve each solicitation by competitive sealed bids or competitive sealed proposals and emergency or large sole source solicitation in advance of its issue;

- (g) make an award of contract under section 26, 27, 28, 29 or 32;
- (h) subject to this Act and the regulations, make policies in relation to any aspect of procurement and the administration of contracts, including policies in relation to matters requiring the approval of the Board such as—
 - (i) material changes to standard solicitation documents,
 - (ii) cancellation of solicitations; or
 - (iii) rejection of all submissions;
- (i) give directions to a procurement authority in respect of making any solicitation or administering a contract; and
- (j) perform the duties and exercise the powers conferred on the Board under the regulations;
- (k) provide advice that is requested by the Minister but such advice shall not contain information pertaining to the deliberations of the Board.

(2) A class of restricted procurement may be established on the basis of the type, value, solicitation method or any other characteristic of the procurement.

(3) Subject to Schedule 1, the Board may make rules governing its procedure.

PART 5

SUSPENSION AND DEBARMENT

Definition

35. In this Part—

“person” means a person who participates, seeks to participate, or has participated in, a procurement in Anguilla;

“appointed person” means a person appointed by the Board under section 37(1) to conduct proceedings for debarment or suspension.

Grounds of suspension or debarment

36. The Board may suspend or debar a person from public procurement if the Board is satisfied that a person has—

- (a) been convicted under the laws of any country involving corruption, theft, embezzlement, forgery, bribery, falsification or destruction of records or other similar offences that calls into serious question the honesty of the person;
- (b) in or in relation to a submission made in Anguilla, has provided false or misleading information or has failed to disclose material information respecting whether he or she is a responsible contractor;

- (c) violated the code of conduct as provided for under section 46; or
- (d) committed or been associated with any other conduct that any reasonable person considers would bring the administration of public procurement into disrepute.

Procedure for suspension or debarment

37. (1) Where the Board is satisfied that sufficient evidence exists to debar or suspend a person, the Board may instruct the Chief Procurement Officer or any appointed person to commence proceedings using the procedure under subsection (2).

(2) Proceedings for debarment or suspension must commence by serving a notice which sets out—

- (a) the grounds for suspension or debarment;
- (b) the terms of the proposed suspension or debarment;
- (c) the period of time from the date of service within which a written response or submissions may be made but such period of time must be no more than 28 days from the date of service; and
- (d) a statement indicating that the person has the right to—
 - (i) have an oral hearing before the Chief Procurement Officer or the appointed person; and
 - (ii) request the evidence on which the Board relies for the suspension or debarment of the person.

(3) The Chief Procurement Officer or the appointed person may extend the time under subsection (2)(c) for up to 14 more days after the expiration of the 28th day from the date of service.

(4) The Chief Procurement Officer or the appointed person must, on the request of the person, disclose the evidence on which the Board relies for the suspension or debarment.

(5) The Chief Procurement Officer or the appointed person must report their findings and recommendations to the Board in a manner and at a time which is determined by the Board but such reporting must take place after any procedure adopted under subsection (2) has concluded or if the person having been served does not respond within the specified time period.

(6) the Board may, in accordance with subsection (7), debar or suspend a person from being eligible to make any submission in relation to a solicitation issued, or from being awarded a contract, under this Act.

(7) The Board may—

- (a) suspend the person for a period of not more than three months, or
- (b) debar the person for a period of not more than three years;

(8) The Chief Procurement Officer must serve a written notice on the person—

- (a) setting out the Board's decision and the reasons for it; and
- (b) indicating that the person may appeal under section 38.

Appeal

38. (1) A person may appeal the decision of the Board by filing a notice of appeal of suspension or debarment in the High Court not later than 14 days after service of the notice of the decision of the Board referred to in section 37(6).

(2) A notice of appeal given under subsection (1) must set out—

- (a) the name of the appellant;
- (b) concisely the decision appealed against; and
- (c) concisely the grounds on which the appellant wishes to appeal against the decision.

(3) A person who files a notice of appeal under subsection (1) must immediately serve a copy of the notice of appeal on the Chairperson of the Board who must immediately on receipt of the notice deliver to the Permanent Secretary and the Attorney General—

- (a) a copy of the notice of appeal;
- (b) a copy of the decision appealed against;
- (c) the report of the findings of Chief Procurement Officer or the appointed person under section 37(5); and
- (d) all papers and documents submitted by the appellant to the Chief Procurement Officer and the Board during the tenure of the matter on appeal.

Order suspending effect of decision of the Board

39. (1) A person who has filed an appeal under section 38 may apply to the High Court to suspend the decision of the Board.

(2) The appellant must immediately serve the application filed under subsection (1) on the Chairperson of the Board who must immediately on receipt of the notice deliver a copy to the Permanent Secretary and the Attorney General.

(3) The High Court may order the suspension of the decision of the Board on such conditions as the High Court considers appropriate or may refuse to grant the order.

(4) The decision of the High Court under subsection (3) is final and binding and not subject to further appeal.

Order of High Court

40. (1) The High Court may make such orders on the hearing of the appeal, including an order for payment of costs on the appeal, as it considers appropriate.

(2) The decision of the High Court under subsection (1) is final and binding and not subject to further appeal.

PART 6

MISCELLANEOUS

Regulations

41. (1) The Governor in Council may make regulations for the better administration of this Act, including regulations—

- (a) prescribing anything that may be prescribed under this Act;
- (b) exempting services for the purposes of the definition of “services” in section 1;
- (c) providing for any other capacities for the purposes of section 1(3)(g);
- (d) excluding any financial interest or class of financial interest for the purposes of section 1(3);
- (e) exempting procurements for the purposes of section 5;
- (f) for the purposes of section 9(g) and notwithstanding any other Act or regulation—
 - (i) designating government agencies and other statutory bodies;
 - (ii) specifying works, goods or services or a class or classes of works, goods or services that are to be procured by the Chief Procurement Officer or by a procurement authority, on behalf of a designated government agency;
 - (iii) requiring the payment by the designated government agency of a fee for such services or any class of services and providing for the determination of such a fee; and
 - (iv) making any supplementary provision that the Governor in Council considers necessary in relation to regulations made under subparagraphs (i), (ii) and (iii);
- (g) establishing exceptions for the purpose of section 12(a);
- (h) before a solicitation or class of solicitation is issued, requiring a pre-clearance confirming that sufficient funds are available to make a procurement based on the solicitation;
- (i) specifying the manner in which notice of an invitation for bids, request for proposals or invitation to prequalify is to be given and for what period before the

day for the close of bids, proposals or applications to prequalify when they are confidential under section 3 and when they are not;

- (j) provide for requirements in relation to confidentiality under section 3;
- (k) respecting solicitations by competitive sealed bids, including defining or determining the meaning of “responsible” and “disqualified” in relation to “bidder” and the meaning of “lowest” and “responsive” in relation to a bid and further defining “evaluated”;
- (l) respecting solicitations by competitive sealed proposals, including defining or determining the meaning of “responsible” and “disqualified” in relation to “offeror” and the meaning of “responsive” in relation to a proposal and further defining “evaluated”;
- (m) respecting large emergency and small emergency solicitations, large sole source solicitations and small sole source solicitations including defining or determining the meaning of “disqualified”;
- (n) respecting solicitations by competitive quotations, including defining or determining the meaning of “responsible” and “disqualified” in relation to a person who submits a quotation and the meaning of “lowest” and “responsive” in relation to a quotation and further defining “evaluated”;
- (o) respecting the cancellation of a solicitation;
- (p) respecting the evaluation of solicitations;
- (q) respecting the award of contracts;
- (r) respecting the rejection of submissions;
- (s) respecting the course of action to be taken in the event that an award of contract cannot be made or an award of contract is made and the person to whom it is made fails to furnish a performance security or execute a formal or other agreement;
- (t) respecting formal agreements and determining when and what type of formal agreement is necessary;
- (u) respecting the application of the rules relating to procurement when a contract of procurement is breached, frustrated or any other similar situation arises;
- (v) respecting the maintenance of procurement files;
- (w) establishing a local preference policy for the award of contracts for goods, services or works or classes of goods, services or works;
- (x) establishing a policy for setting aside procurement or classes of procurement for local businesses as an incentive to the development of local business;

- (y) respecting contract administration including the role of the Board and public officers therein;
- (z) respecting generally the confidentiality of solicitations, invitations to prequalify, awards of contract, particulars of contract performance and other information and documents;
- (aa) respecting the procedure to be followed before the Board and the High Court on appeal in relation to a suspension or debarment of bidders, offerors and other persons who have participated or propose to participate in procurement;
- (ab) amending or replacing Schedule 1 or 2;
- (ac) defining any term used but not defined in the Act;
- (ad) respecting the establishment and governance of stores.

(2) No provision of a regulation shall amend the Act, except to the extent expressly permitted in subsection (1).

Regulations to be laid before the House of Assembly

42. (1) All regulations must be laid before the House of Assembly as soon as they are made and, if within 21 days beginning with the day on which such regulations are laid, the House of Assembly resolves that the regulations be annulled, they shall cease to have effect but without prejudice to anything previously done thereunder or to the making of new regulations.

(2) In determining the period of 21 days specified in subsection (1), no account shall be taken of any time during which the House of Assembly is dissolved or prorogued.

Procurement Policy Advisory Committee

43. (1) The Governor in Council may, after consultation with the Board, appoint a Procurement Policy Advisory Committee.

(2) The Chief Procurement Officer is an *ex officio* member of any Procurement Policy Advisory Committee appointed under subsection (1).

(3) The Policy Advisory Committee will be responsible for developing any policy position in relation to matters determined by the Governor in Council.

(4) The Procurement Policy Advisory Committee may conduct its affairs using the procedure of the Board under Schedule 1 to the Act.

(5) The Governor in Council may remunerate the members of the Policy Advisory Committee for carrying out their duties assigned under subsection (3).

Procurement Ombudsman

44. (1) The Minister may request that the Governor in Council appoint a Procurement Ombudsman to investigate any complaint made in relation to an award of contract.

(2) The terms of the appointment shall be determined by the Governor in Council.

(3) A Procurement Ombudsman must only be appointed to investigate a complaint that arises after the award of a contract.

(4) The following persons are disqualified from being appointed as Procurement Ombudsman—

- (a) a member of the House of Assembly;
- (b) a person who is an undischarged bankrupt;
- (c) a person who has been convicted of an indictable offence or an offence involving dishonesty.

Investigating a complaint

45. (1) A person may file a complaint only after the award of the contract to which the complaint relates.

(2) In conducting an investigation, the Procurement Ombudsman may—

- (a) review and assess the policies and practices of the procurement unit, any procurement authority and the Board;
- (b) request from the procurement unit, any procurement authority or the Board all documents that the Procurement Ombudsman considers relevant towards conducting the investigation; and
- (c) conduct interviews with all persons deemed relevant to the matter.

(3) In performing his or her duties or exercising his or her powers, the Procurement Ombudsman shall not be subject to the direction or control of any person or authority.

(4) The Procurement Ombudsman must, within the appointed period, provide the Governor in Council with his or her findings and any recommendations.

(5) The Procurement Ombudsman shall not in respect of a complaint recommend the cancellation of a contract award to which the complaint relates.

Development of a code of conduct

46. (1) The Minister may develop a code of conduct which defines the ethical standards of persons participating in procurement.

(2) A Code of Conduct under subsection (1) becomes operational on the approval of the Governor in Council.

Immunity

47. (1) No action for damages may be commenced against—

- (a) the Board;

- (b) any member of the Procurement Policy Advisory Committee or any other member of a committee established under this Act;
- (c) a public officer;
- (d) an agent of the Government; or
- (e) the Procurement Ombudsman;

for anything done or not done by that person in good faith while performing that person's functions under this Act.

(2) Subsection (1) does not, by reason of section 4(1) and (4) of the Crown Proceedings Act, relieve the Crown of liability in respect of a tort committed by any person referred to in subsection (1) to which the Crown would otherwise be subject and the Crown is liable under that Act for any such tort in a like manner as if subsection (1) had not been enacted.

Limitation on court proceedings

48. In proceedings under this Act or the regulations in relation to a solicitation or the evaluation or award of contract or the decision not to award a contract, no court shall have the power to order any remedy other than an award of damages to a person who made, sought to make, or would have wished to make, a submission if a contract in relation to which the damages arose has been entered into.

Citation

49. This Act may be cited as the Public Procurement and Contract Administration Act, 2011.

Commencement

50. This Act or any provision of this Act shall come into force on a date appointed by the Governor by notice published in the *Gazette*.

Transitional Provisions

51. (1) The Governor in Council may make regulations providing for any transitional matter arising as a consequence of the coming into force of this Act or a provision of this Act and may make the regulations retroactive to the day this Act comes into force or, if all of the provisions of this Act do not come into force on the same day, to any day after this Act comes into force.

(2) This Act does not apply to procurement conducted by the government prior to commencement.

SCHEDULE 1

(section 33(1))

**CONSTITUTION, OPERATION AND PROCEDURES
OF THE PROCUREMENT BOARD****CONSTITUTION AND OPERATION OF THE BOARD****Qualification and appointment of Board members**

1. (1) The members of the Board shall be chosen from among persons experienced or having knowledge in public administration; finance, accounting; engineering; law, management, building and construction technology and policy studies.

(2) Each member shall be appointed for a term not exceeding 2 years.

(3) A previous appointment as a member does not affect a person's eligibility to be re-appointed as a member.

(4) A notice of the appointment of a member shall be published without delay in the Gazette after the appointment.

(5) The Board is deemed to be properly constituted notwithstanding that there is a vacancy on the Board or a defect in the appointment of a member, other than a disqualification referred to in subsection (7).

(6) The Permanent Secretary may appoint a person who has the requisite qualification to act in the place of a member who is —

(a) absent from Anguilla; or

(b) unable to act.

(7) A person is disqualified from being appointed and from remaining a member if the person—

(a) is under the age of 18 years;

(b) is a member of the House of Assembly;

(c) is an undischarged bankrupt;

(d) is of unsound mind;

(e) has been convicted of an offence involving fraud, corruption or dishonesty, whether in Anguilla or outside; or

(f) has breached any code of conduct under this Act.

Chairperson, deputy chairperson, interim chairperson and secretary

3. (1) The Governor in Council shall appoint the chairperson, deputy chairperson and secretary from among any public officer of the Board.

(2) In the absence of the chairperson and the deputy chairperson the remaining members shall select an interim chairperson from among the public officers and the interim chairperson shall discharge the duties and exercise the powers of the chairperson at a meeting.

(5) In the event of a tie vote, the chairperson has a second vote.

Quorum

4. A quorum of the Board is a majority of the members.

Decision of the Board

5. A decision of the majority of the members is a decision of the Board.

Board may hold meeting by signing resolution

6. (1) When all members of the Board sign a resolution, a meeting of the Board relative to the resolution is deemed to have been held.

(2) The secretary shall insert the resolution in the minutes.

Electronic meetings

7. The Board may hold a meeting using a method of communication that permits all the members participating to communicate with each other simultaneously, if all the members participating consent to holding the meeting in that way.

Remuneration, expenses and allowances of members

8. (1) The members shall be paid such remuneration as may be determined by the Governor in Council.

(2) The Board may—

- (a) reimburse the reasonable expenses of members; or
- (b) establish allowances for the reimbursement of reasonable expenses of members, incurred in the course of the carrying out of their responsibilities as members.

Resignation and removal of members

9. (1) A member may at any time resign by giving written notice to the Minister and a resignation is effective upon receipt of the notice by the Minister.

(2) The Governor in Council may, by written notice, remove a member from office if the Governor in Council is satisfied that—

- (a) the member has, without the consent of the Board, been absent from 3 or more consecutive meetings of the Board;
- (b) the member has an interest that is likely to affect prejudicially the exercise and performance of his or her responsibilities as a member;
- (d) the member is unable or unfit to carry out his or her responsibilities as a member; or
- (c) it is in the public interest to do so.

(3) If a member resigns, is removed from his or her office or his or her office is vacated by death prior to the expiry of the term for which he or she has been appointed, the Governor in Council may appoint a new member to replace him or her.

(4) An appointment of a member under subsection (3) may be for the unexpired period of the term of office of the member in whose place he or she is appointed.

PROCEDURES OF THE BOARD

Frequency, place, day and time of Board meetings

10. (1) The Board shall meet as often as may be necessary to perform its duties and exercise its powers in an expeditious manner.

(2) A meeting of the Board shall be held on the days and at the times that the chairperson may determine.

Notice of Board meeting

11. (1) The chairperson shall cause written notice of the place, day, time and agenda of a Board meeting to be given to each member not less than 72 hours before the time the meeting is to be held.

(2) Notice shall be given to a member—

- (a) handing a copy to the member or designate;
- (b) leaving a copy with an adult at the office, place of business or place of residence of the member or designate;
- (c) emailing or faxing a copy to the member or designate at the member's or designate's email address or fax number; or
- (d) any other means approved by resolution of the Board.

Waiver of notice

12. A member may in writing waive notice of a meeting.

Decision of chairperson

13. The decision of the chairperson, deputy chairperson or interim chairperson presiding at a meeting is final on the following matters—

- (a) the agenda for a meeting;
- (b) the conduct of the meeting; and
- (c) the procedure for handling motions.

Committees

14. (1) The Board may appoint committees to give advice to the Board.

(2) The Board shall appoint a member as chairperson of the committee.

- (3) A committee may include persons other than members of the Board.
- (4) Sections 3 to 12 apply, with the necessary changes, to a subcommittee.

Disclosure of financial interest

15. When a member of the Board or a committee—

- (a) has any financial interest, or a financial interest in an entity that has a financial interest; or
- (b) has a family member who has a financial interest; or a financial interest in an entity that has a financial interest,

in any matter to be considered at a meeting of the Board or a committee and is in attendance at a meeting of the Board or a committee at which the matter is to be discussed; shall before that matter is considered by the Board or committee—

- (c) disclose the nature of the financial interest to the Board or committee;
- (d) withdraw from any meeting while the matter is being considered; and
- (e) refrain from expressing any view or taking part in any vote concerning the matter.

Secretary to the Board

16. (1) The secretary shall provide administrative support to the Board, including—

- (a) preparing the agenda for each meeting of the Board and giving notice of meetings that include the agenda, the day, time and place of the meeting and the minutes of the previous meeting to members or designates and to affected public officers and others whose attendance is necessary or advisable;
- (b) taking accurate minutes of each meeting of the Board, including—
 - (i) attendance by members;
 - (ii) any waiver of notice by a member;
 - (iii) whether a meeting referred to in section 7 was held and whether all members participating in the meeting consented to it;
 - (iv) each resolution moved, the members present and voting for and against it or abstaining from voting on it and whether the resolution was passed or defeated; and
 - (v) each disclosure made under section 14 and particulars of whether the member of the Board or committee withdrew from the meeting while the matter was being considered;
- (c) inserting any resolution referred to in section 6 in the minutes;
- (d) providing copies of minutes to members and to affected public officers;
- (e) preparing the correspondence of the Board; and
- (f) carrying out such other tasks in relation to procurement as are assigned to him or her by the Board or the regulations.

(2) The secretary shall table for approval a copy of the minutes of a meeting at the next meeting of the Board.

SCHEDULE 2

(section 52)

CONSEQUENTIAL AMENDMENTS

Financial Administration and Audit Act, R.S.A. c F27	Extent of Amendment
section 6(1)(b)	delete the words "procurement and"
section 7(1)(b)	delete the words "procurement and"
section 8(2)(b)	delete the words "procurement and"
section 8(3)(g)	delete the words "procurement and"
section 9(2)(b)	delete the words "procurement and"
section 68	delete paragraph g

OBJECTS AND REASONS

This Bill reforms the law relating to procurement of works, goods and services to comply with generally accepted international standards of Government procurement (particularly 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services), which, among other things, require public competition wherever reasonably possible and award of contract based on fair competition. The general purposes of the Act are set out in section 4. (See comments on that provision below.)

Part 1: Preliminary

Section 1 defines the key terms relevant to the scope of procurements, namely, “works”, “goods” and “services”. Each of these definitions recognizes that a procurement is rarely a procurement that is purely works or purely the acquisition of goods or purely services. Those categories overlap. To ensure the integrity of the classification system in this situation, a solicitation or contract for works, for example, if based on a breakdown of the estimate of costs, the services component furnished in connection with the works does not exceed the value of works component. A similar distinction is made in the definitions of “goods”. By its very nature in a procurement of “services” goods furnished in connection with the services must not exceed the value of the services.

Section 1 also defines the key forms of solicitations. Solicitations are divided into two classes, large procurements, which are equal to or greater than an amount prescribed by regulation and small procurements, which are less than the prescribed limit. The solicitation and award procedures for large procurement and small are different. The procedure for small procurements is much less formal and rigid in keeping with the large number and smaller amounts involved. Large procurements are divided into four types depending on the procedure, namely, solicitations by competitive sealed bids, solicitations by competitive sealed proposals, large emergency solicitations and small sole source solicitations. Small solicitations are divided into three types, solicitations by competitive quotations, small emergency solicitations and small sole source solicitations. Certain refinements of large procurements are also identified, namely, “two-stage bidding process”, “two-stage proposal process”, “two-envelope bidding process” and “two-envelope proposal process” which vary the standard procedures for competitive sealed bids and competitive sealed proposals.

Under section 3 solicitations for the purpose of national defence or national security, as determined by the Governor, acting after consultation with Executive Council, are confidential. Confidential procurements form an important exception to the public character of solicitations under the Act.

Section 4 sets out the purposes of the Act and regulations, which are to increase transparency in government procurement and more particularly, to depoliticize government procurement, to increase the public’s confidence in the integrity of the procurement process, to ensure fair and equitable treatment of persons participating in the procurement process and to get the best value for the government’s procurement dollar. In practice, some trade-offs in these objectives will obviously be necessary.

Section 5 provides for certain exemptions. Anguilla purchases drugs under an agreement with the Eastern Caribbean Bank whereby several countries in the Caribbean pool their purchasing power. Such a pooling agreement is called “co-operative procurement agreement” and is exempted from the Act under section 5(1)(a). Section 5(1)(b) recognizes that funding agencies may wish to determine the procurement process that will be used and accordingly exempts such procurements

from the Act. Section 5(2) lists a number of other exemptions. The exemption of specified professional services, which are defined in section 1, should be particularly noted.

Section 6 is an anti-avoidance provision. It forbids the artificial division of procurements so as to get around financial limits on exemptions and the restrictive procedures applicable to large procurements.

Part 2: Organization of Government Procurement

Part 2 provides for the establishment of a Procurement Unit in the Ministry with responsibility for procurement; the appointment of a Chief Procurement Officer as its head, and the appointment of other staff (section 8).

Section 9 sets out the general duties and powers of the Chief Procurement Officer, which include providing advice, fostering the development of procurement professionals, developing standard form documents (for various classes of works, goods or services) and a procurement manual (both in consultation with stakeholders) and maintaining lists of potential contractors. In addition, the Chief Procurement Officer is given the power to purchase on behalf of a government agency or other statutory body when it desires him or her to do so. When there are regulations compelling a particular government agency to use the services of the Procurement Unit, that government agency must use those services.

Section 10 identifies procurement authorities. The default procurement authority is the department head (section 10(1)). The exceptions are as follows—

(1) *Restricted Procurements:* The head of a department, the Chief Procurement Officer or a public officer who heads part of a department designated by the Board under section 34(1)(c) in relation to a class of restricted procurements is the procurement authority responsible for that class of restricted procurements. An example would be designating the head of the Information Technology Department as the procurement authority for computers and peripherals, software programs (other than bespoke software), scanners, fax machines, computer cabling and related equipment. It is anticipated, for example, that the Board will restrict certain solicitations so that classes of procurements will be consolidated into larger units and will be assigned to the area of government with expertise in making such procurements. Typically, the Chief Procurement Officer will consolidate into a small number of contracts the high volume low cost procurements such as office supplies and paper, cleaning supplies, paper towels and toilet paper, which are labour intensive to procure a bit at a time and where there is little advantage in terms of savings unless they are bought in bulk. Departments are typically forbidden to procure such items themselves. Other procurements that are restricted are office furniture, vehicles, vehicle parts, tires, building supplies and related goods. If the supply contracts (often referred to as “standing orders”) are appropriately set up for the foregoing procurements, such consolidation and centralization of procurements need not lead to the accumulation of inventories that are expensive to administer and are often accompanied by costly loss, unexplained disappearance or obsolescence of, or damage to, goods. Typical modern contracts for these sorts of items provide that the supplier warehouses the goods and delivers them to specified delivery points just in time for their use. Indeed, the supplier who is responsible for warehousing goods and delivering them on an as required basis should be the rule. Only items very difficult to obtain locally that may be required on short notice should be in government stores.

One further matter should be noted. It is possible for the Board to make it so most procurements are restricted procurements and to designate the Chief Procurement Officer as the procurement

authority (for all procurements not otherwise designated as restricted procurements), thereby centralizing the procurement function.

(2) *Procurements by Two or More Departments:* When a procurement that is not within a class of restricted procurements involves more than one procurement authority, the procurement authority appointed by the Board under section 34(1)(d) in relation to the procurement is the procurement authority.

Section 10(4) permits a procurement authority responsible for restricted procurements to delegate a particular restricted procurement by delegating in writing on an occasional basis the making of a restricted procurement to another procurement authority when it is necessary to avoid serious inconvenience to a department.

Section 10(5) permits inter-delegation by procurement authorities.

The Bill is designed to make the Chief Procurement Officer and his or her staff in the Procurement Unit the public face of the solicitation process (issue of notices of solicitation, opening readings and recording of submissions).

Part 3: Procurement Procedures and Award of Contracts

Division 1: Solicitation Procedures

This Division sets out the possible solicitation procedures and when they can be used. All procurements are required to be made in accordance with the Act (section 11).

Section 12 provides that an estimate of the amount of a contract award for each procurement shall be made (except when a procurement is exempted by the regulations) and that a breakdown of the estimate be made of certain costs relevant to determining whether a contract is a contract for construction or the supply of goods.

In the following comments, each solicitation procedure and its matching award procedure are commented on together, even though the latter provisions occur later in the Bill.

Section 20 provides that solicitation of a procurement by competitive sealed bids is the default procedure that *must* be used unless one of the other procedures set out in Division 1 is more appropriate. (Note that the Bill uses the more precise term “solicitation by competitive sealed bids” instead of the term “tendering”.)

The corresponding award provision is section 26, which provides that, if a contract is awarded after a solicitation by competitive sealed bids, the contract must be awarded to the bidder who is determined by the Board to be the responsible bidder and determined not to be disqualified and who submits the lowest responsive evaluated bid or, when a local preference policy or when a policy to set aside the procurement as an incentive to the development of local business established by regulation applies to the solicitation established by regulation applies to the solicitation, to the responsible bidder who submits the lowest responsive evaluated bid that meets the requirements of the policy.

A qualified bidder is one who has the resources to perform the contract and is in good standing with the Government.

A responsive bid is one that offers what the bid documents request and conforms in all material respects with those documents. If the bid documents request a car of a certain kind and the bidder offers a truck, the bid is non-responsive and must be rejected.

Whether a bidder is responsible and his bid is responsive are usually quite straightforward. In competitive sealed bids, the successful bidder will be determined primarily on amount bid after the all bids have been evaluated in accordance with evaluation criteria set out in the bid documents. These criteria must be objective. If there are no evaluation criteria in the bid documents, then the price will determine the successful bidder. That often happens in the case of construction.

The evaluation criteria for procuring goods is often more complicated. Consider the procurement of vehicles. It is common knowledge that matters such as fuel consumption, maintenance costs for the life of the vehicle and life span of vehicles vary greatly. They are also objective in the sense that vehicles are routinely tested to determine such matters. Assume that the Government wants to purchase a passenger vehicle of a particular description and one bidder offers a Toyota for \$22,000 and another offers a Dodge for \$20,000. The Dodge is not necessarily the cheapest. The cheapest will be determined after the evaluation criteria, fuel consumption, the life cycle maintenance costs and life span, are factored in.

Solicitations by competitive sealed proposals and award of contract

Under section 14(1), a solicitation by competitive sealed proposals can be made if the procurement authority, with the approval of the Chief Procurement Officer, determines that it is not either practicable or advantageous to make the procurement by soliciting competitive sealed bids. A solicitation by competitive sealed proposals will normally be for a procurement that is equal to or exceeds the prescribed amount.

In order to determine whether solicitation by competitive sealed proposals is practicable, section 14(2) sets out the criteria, which includes the question of whether there is insufficient time or information to prepare solicitation documents for competitive sealed bids. If there is not sufficient time or information, then competitive sealed proposals is the appropriate procedure. In order to determine whether solicitation by competitive sealed bids is advantageous, section 14(3) sets out the criteria, which includes the question as to whether quality, availability or capability is overriding in relation to price.

To take an extreme example, assume that the Government wants someone to design a particular structure. If there is no one available in-house to design the project specifications, then preparing solicitation documents for competitive sealed bids is not practicable. Note that, in a solicitation by competitive sealed proposals, the Government is in effect asking the offerors to do much of the work normally done by the Government in preparing the specifications and contract documents. Likewise, the services of an architect or engineer who has just graduated would be cheaper in terms of dollars, but an engineer with extensive experience would probably be cheaper in the long run. In other words, capability would be overriding in relation to price and solicitation by competitive sealed bids would not be advantageous. In this example, because it is neither practicable nor advantageous to solicit the design services by competitive sealed bids, solicitation by competitive sealed proposals is permitted.

The evaluation and award of contracts following solicitation by competitive sealed proposals are also different from the other forms of solicitation. Since each proposal will be different, how the proposals are to be evaluated needs to be set out in the request for proposals so that all the offerors' proposals will be fairly treated. Section 27 deals with the award of a contract following

a request for competitive sealed proposals. To be considered, an offeror, like a bidder in relation to a solicitation by competitive sealed bids, must be qualified and must submit a responsive proposal. The similarity stops there. The request for proposals must set out “evaluation criteria” relating to the relative importance of such factors as quality, availability, capability and price (see section 27(2)). The persons charged with doing the evaluation must scrupulously observe those criteria in the evaluation process. That process may also permit negotiations, the opportunity to revise proposals and to submit best and final offers (section 27(2) and (3)). To prevent an auction of the contract (and therefore unfairness to the offerors), section 27(3) requires that dealings with one offeror may not be disclosed to any other offeror and section (4) requires offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, revision of proposals and submission of best and final offers.

Large emergency solicitations and award of contract

Solicitations by competitive sealed bids and competitive sealed proposals require time to prepare solicitation documents, issue notices, allow bidders to prepare their bids or offerors to prepare their proposals and so on. When a procurement is required urgently because of an emergency situation, the emergency solicitation procedure may be used.

It will be noted that determining that a solicitation is an emergency solicitation does not necessarily eliminate the need for competition. Rather, it permits the adjustment of the level of competition to the circumstances.

The first type of emergency, which may be described as a “true emergency”, is set out in section 17(1)(a) and permits the Board to determine that there exists a threat to public health, welfare or safety by reason of an emergency condition and that the procurement is for the purpose of eliminating or mitigating the threat. The solicitation must be conducted with such competition as is practicable in the circumstances in the opinion of the Board.

The second type of emergency is set out in section 17(1)(b) and permits Board to determine whether—

- the procurement is urgently required in the public good,
- that urgency justifies a less stringent competitive procedure than would otherwise apply, and

the appropriate competition for the solicitation in the circumstances.

The Board needs to consider the circumstances that are set out in section 17(2) in making those determinations.

Under section 28, the Board may award a contract for an emergency procurement to the person who is determined by the Board to be responsible and not to be disqualified under the regulations and who is determined to be the most appropriate, based on the results of the competitive procedure, if any, that the Board determined under section 17.

Large sole source solicitations and award of contract

Under section 15, the procurement authority is authorized to make a large sole source solicitation when it complies with the regulations. Under section 29, the Board may award a contract for a large sole source procurement on the best terms that can be negotiated with the potential contractor in the circumstances if the potential contractor is determined not to be disqualified under the regulations.

Solicitations less than the prescribed amount

Section 19 provides that, when—

- (a) the estimate of the amount of a contract award for a procurement is less than the prescribed amount; and
- (b) the procurement is other than a procurement to which 18(2) applies,

the solicitation for the procurement shall be made by competitive quotations or as a small emergency solicitation or small sole source solicitation.

Competitive quotations and award of contract

Section 20 provides that a solicitation by competitive quotations is the default procedure for small procurements. The procedure for competitive quotations will be set out in the regulations.

Small sole source solicitations and award of contract

Under section 16, the procurement authority is authorized to make a small sole source solicitation when it is not reasonably practicable to make the small procurement except from a single source as determined by the Chief Procurement Officer. It will be noted that this provision does not parallel that for large sole source procurements.

Section 32 provides that a contract for a small procurement that is awarded after a small sole source solicitation shall be on the best terms that can be negotiated in the circumstances and shall be awarded by the procurement authority to the person who is determined not to be disqualified by the regulations.

Division 2: Notice of Competitive Sealed Bids or Proposals and Invitations to Prequalify and Opening of Bids, Proposals and Applications

This Division deals with the two cornerstones of a modern public procurement system, namely—

- the requirement that notices of competitive sealed bids and competitive sealed proposals and of invitations to prequalify for either of them are published so that all members of the public can participate in the procurement process; and
- the requirement that bids and proposals be opened in public and that relevant information be read out to all in attendance at the opening.

The Bill makes an exception to both of these principles when the solicitation is confidential. Confidentiality is limited to solicitations for national defence or national security that the Governor certifies in writing need to be confidential (section 3).

The following is a summary of the provisions for notices of non-confidential solicitations by competitive sealed bids or competitive sealed proposals or invitations to prequalify.

There are two exceptions—

- when applicants have been prequalified after an invitation to prequalify, notice of the solicitation is required to be given only to those who prequalified (section 22(2)(a));
- when, **in the second stage of a** two-stage bidding process or two-stage proposal process, notice of the solicitation is required to be given only to the bidders or offerors who submitted bids or proposals in the first stage and have qualified at that stage (section 22(2)(b)).

Section 23 provides for the opening of bids, proposals and applications to prequalify. Note that the information that may be read out is different for bids, proposals and applications to prequalify. For example, reading out amounts in proposals is forbidden. Since negotiations may occur with offerors, reading out amounts proposed would undermine the duty to treat each offeror fairly. The provision also deals with the opening of bids and proposals in a two-stage bidding process or two-stage proposal process and in a two-envelope bidding process or two-envelope proposal process.

Section 24 and 25 parallel sections 22 and 23 but provide different rules for notices of confidential solicitations competitive sealed bids, competitive sealed proposals and invitations to prequalify and for opening of confidential solicitations and notices to prequalify. These solicitations will be by selective bidding. Section 25 also deals with the opening of bids and proposals in a confidential two-stage bidding process or two-stage proposal process and in a confidential two-envelope bidding process or two-envelope proposal process.

Part 4: Procurement Board

Under section 33 the Procurement Board is established and consists of 7 members appointed by the Governor in Council in the following manner—

- (a) 6 members shall be public officers; and
- (b) 1 member must be a private citizen.

Schedule 1 of the Act sets out the constitution, operation and procedures of the Board.

Part 5: suspension and debarment

Under section 36, a person may be suspended or debarred from being eligible to respond to any solicitation issued, or from being awarded a contract, by the government—

- (a) if the person has been convicted of involving corruption, theft, embezzlement, forgery, bribery, falsification or destruction of records or other similar offences that calls into serious question the honesty of the person;
- (b) if the person, in or in relation to a submission made in Anguilla, has provided false or misleading information or has failed to disclose material information respecting whether he or she is a responsible contractor;
- (c) if the person has violated the ethical standards under prescribed under the Act (ethical standards of persons participating in procurement);
- (d) on any ground prescribed by regulation.

Section 37 deals with the proceedings for suspension or debarment from the procurement process and section 38 deals with any appeal against a suspension or debarment.

Part 6: deals with miscellaneous provisions which are nonetheless very important to the Act. Section 41 enumerates the regulation-making powers that complement the Act.

Section 43 allows for the Governor in Council to appoint a Procurement Policy Advisory Committee after consultation with the Board.

Section 44 allows for the appointment of a Procurement Ombudsman to investigate any complaint that arises after the award of a contract.

Section 46 allows for the Minister to develop a code of conduct which defines the ethical standards of persons participating in procurement.

Section 47 is one of the most important provisions in the Bill. It limits any claim under the Act to a claim for damages and thereby prevents the courts using their powers to interfere with or set aside an award of contract once it is made.
