



Tonga

**PUBLIC PROCUREMENT REGULATIONS
2010**



PUBLIC PROCUREMENT REGULATIONS 2010

Arrangement of Regulations

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PUBLIC PROCUREMENT REGULATIONS 2010

PUBLIC FINANCE MANAGEMENT ACT 2002

IN EXERCISE of the powers conferred by section 44 of the Public Finance Management Act 2002, the Minister for Finance makes the following Regulations:

PART 1 - PRELIMINARY

1 Short Title

These Regulations may be cited as the Public Procurement Regulations 2010.

2 Interpretation

In these Regulations, unless the context otherwise requires:

“**Act**” means the Public Finance Management Act 2002;

“**bid**” means, according to the type of procurement method being used, a bid, a proposal or a quotation submitted by a bidder in response to an invitation by a procuring entity;

“**bidder**” means a natural or legal person who submits a bid pursuant to solicitation by the relevant procuring entity;

“**consultant**” means the provider of intellectual and professional services for a specific project;

“**contractor**” means the provider for the construction of works;

“**days**” means calendar days;

“**framework contract**” means a contract between one or more procuring entities and one or more suppliers the purpose of which is to establish the terms governing orders for the supply of goods and related services or repair

and maintenance works to be placed during a given period, in particular with regard to price, and, where appropriate, the quantity or quantities envisaged;

“goods” means objects of every kind and description, including commodities, raw materials, products and equipment and objects in solid, liquid or gaseous form as well as services incidental to the supply of goods, if the value of these incidental services does not exceed that of the goods themselves;

“Head of a procuring entity” means the chief executive officer of a ministry or department;

“intellectual and professional services” means assignments performed by consultants with outputs of advisory, design and transfer of know-how nature.

“in writing” means communication in hand or machine written type and includes messages by facsimile or e-mail;

“officer” means any person employed in the service of the Government;

“procurement” means all activities that pertain to the solicitation and entering into a procurement contract by the Government for the supply of goods, works and services;

“procurement contract” means a formal agreement between Government and supplier, contractor or consultant resulting from procurement proceedings;

“procurement unit” means a unit established by a procuring entity, or the Central Procurement Unit, which is responsible for the procurement of the goods, works or services;

“procuring entity” means any Ministry, Department, Division or other unit of the Government or any subdivision thereof, engaging in procurement and which has been authorised by the Government Procurement Committee to act as a procuring entity;

“Secretary” unless the context requires otherwise, means the Secretary responsible for the Ministry for Finance;

“small procurement” means a procurement for goods, small works, repairs and maintenance under the request for quotation method;

“supplier” means the provider for the supply of goods and ancillary services, or for the provision of supply services;

“supply services” means supply of physical services, or other labour, time or effort; stand-alone service type contracts (such as security services, catering services and geological services);

“thresholds” means the financial limits set down in the procurement procedures, above or below which certain procurement proceedings may be applied;

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

any construction works such as railways, roads, highways, site preparation, excavation, installation of equipment and materials, decoration, as well as physical services incidental to works, if the value of those services does not exceed that of the works themselves.

3 Scope of the regulations

- (1) Subject to sub-regulation (2) and to the exemptions set out in regulation 4, these Regulations apply to all procurement carried out by Government.
- (2) Where these Regulations conflict with the procurement rules of a donor or funding agency, the application of which are mandatory pursuant to or under an obligation entered into by the Government, the requirements of those rules shall prevail, but in all other respects, procurement shall be governed by the provisions of these Regulations.

4 Exemptions

These Regulations do not apply to:

- (a) the procurement or acquisition of fiscal agency or depositary services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and Government bonds, notes and other securities;
- (b) arbitration and conciliation services;
- (c) public employment contracts; or
- (d) the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes, including food aid.

PART 2 – INSTITUTIONAL ARRANGEMENTS

5 Government Procurement Committee

- (1) There is hereby established a Government Procurement Committee, which has the object of advising the Government in regulating and monitoring public procurement in the Kingdom and on issues relating to public procurement in general.
- (2) The Government Procurement Committee shall be composed of the following:
 - (a) Minister for Finance (Chairman);
 - (b) Chief Secretary and Secretary to Cabinet;
 - (c) Secretary for Foreign Affairs;
 - (d) Solicitor General;

- (e) Commissioner of Revenue;
 - (f) Secretary for Finance; and
 - (g) representative of line Ministries (to be co-opted as appropriate).
- (3) The functions of the Government Procurement Committee shall be to:
- (a) formulate and propose policy, legislative and regulatory actions, revisions or amendments to existing legislation for the better implementation of public procurement in the Kingdom;
 - (b) approve the issuance of standard forms of contracts and standard bidding documents prepared by the Procurement Division for mandatory use by all procuring departments;
 - (c) initiate and approve the development by the Procurement Division of a procedure for the debarment and suspension of contractors and consultants who have neglected their obligations under a procurement contract, or provided false information with respect to their qualifications or official inducements referred to in these Regulations; and
 - (d) advise and approve the issuance of forms by the Procurement Division prescribing the content, format and the frequency or dates for submission of procurement reports to be submitted by procurement units.
- (4) In addition, for those procurements above the thresholds set out in regulation 7, the Government Procurement Committee shall, review the bidding process and issue a “Letter of No-objection” to the procuring entity, prior to the issuance of the Notification of Award.
- (5) Subject to this regulation, the Government Procurement Committee shall have such structures and organisation as the Minister may determine necessary for the efficient performance of its functions, which shall be set down in the Procurement Procedures.

6 Procurement Division

- (1) There is hereby established a Procurement Division under the overall direction of the Secretary, the functions for which are described in this regulation and detailed in the procurement proceedings.
- (2) The Head of the Procurement Division shall have such officers as are required for the efficient performance of the tasks of the Division, and may delegate the performance of his duties or the exercise of his powers to any officer that reports to him.
- (3) In addition to responsibility for the tasks outlined in sub-regulation (4), the Head of the Procurement Division shall be responsible for:
- (a) the day to day management of the affairs of the Division;

- (b) the administration, organisation and control of the officers of the Division;
 - (c) the management of funds, budget and other property of the Division; and
 - (d) the performance of such other functions as the Minister may determine.
- (4) In the performance of its tasks, the Procurement Division shall:
- (a) monitor compliance with these Regulations and propose any amendment to them or any new laws and regulations regarding public procurement which appear necessary in the light of international practices and experience gained in the course of the public procurement process in the Kingdom;
 - (b) issue guidelines and instructions regarding the interpretation and implementation of these Regulations and give, on request, advice and assistance to procuring entities without, however, diminishing the responsibility of a procuring entity and the Procurement Division shall not get involved in, or provide opinion on, any specific procurement or contract award decision;
 - (c) prepare standard documents to be used in connection with public procurement;
 - (d) present an annual report to the Minister regarding the overall functioning of the public procurement system, including recommendations on measures to be taken by Government to revise and improve procurement approval method and other measures to enhance the quality of procurement work;
 - (e) request and receive information or records from procuring entities to the extent appropriate to its information needs;
 - (f) develop a strategy for the use of electronic tools for procurement, including the development of a public procurement website with information relating to public procurement in the Kingdom, including information concerning the award of contracts exceeding a certain threshold determined by the Procurement Division;
 - (g) develop, promote and support training and professional development of officials and other persons engaged in public procurement, including their adherence to the highest ethical standards;
 - (h) establish and maintain secretariat support to the Government Procurement Committee;
 - (i) organise and provide secretariat and logistic support to the Review Panels;
 - (j) provide technical assistance in the field of public procurement through the dissemination of procurement technical guidance notes; and
 - (k) maintain and update a list of bidders and suppliers who, by reason of having seriously neglected their obligations under a public procurement contract, or having provided false information about their

qualifications, have been suspended or debarred under regulation 58 from participating in public procurement.

7 Thresholds and Approvals

- (1) The thresholds for methods of procurement, the authorisation levels for awards of contract and for the signing of contracts shall be set down in the procurement procedures.
- (2) Where the value of a proposed procurement does not exceed the threshold set down in the procurement procedures, the Head of a procuring entity shall be the approving authority and shall sign the contract.
- (3) Where the value of a proposed procurement exceeds the threshold set down in the procurement procedures, the Head of a procuring entity shall comment on the bid evaluation report and recommendation for award, and submit it together with all necessary documentation to the Government Procurement Committee for their “Letter of No Objection” prior to the procuring entity signing the Notification of Award letter and the contract.
- (4) The person authorised to approve recommendations of award of a contract shall give such approval within five days of receipt of the Bid Evaluation Report.
- (5) The person authorised to sign contracts on behalf of the Government shall do so within the time period specified in the Contract Documents.

8 Procuring Entities

- (1) Prior to carrying out any procurement, a procuring entity shall be authorised by the Government Procurement Committee.
- (2) In determining whether to grant such authorisation, the following criteria shall be considered:
 - (a) the expected volume and frequency of procurement requirements of the entity; and
 - (b) the capacity of the entity to conduct procurement, which may be measured by factors including the availability of officers trained and experienced in procurement, and the availability of information technology and communication facilities of the entity.

9 Procurement Units

- (1) A procurement unit shall be established in each authorised procuring entity to carry out procurement activities.

- (2) The head of the procuring entity shall decide the size, location, and structure of the procurement unit, taking into account its procurement requirements and the availability of trained and experienced officers.
- (3) In cases where the level of procurement activity does not justify the creation of a procurement unit, the head of the procuring entity may:
 - (a) nominate a single public officer to carry out the functions of a procurement unit; or
 - (b) apply the provisions of sub-regulation (4).
- (4) In those cases where the Head of a procuring entity decides that there is insufficient procurement capacity within the procurement unit, the procurement may be carried out by the Central Procurement Unit, established under regulation 10, on behalf of the procuring entity.
- (5) Procuring entities which directly purchase works, supplies or services from or through the Central Procurement Unit in accordance with sub-regulation (4) shall be deemed to have complied with these Regulations insofar as the Central Procurement Unit has complied with them.

10 Central Procurement Unit

- (1) A Central Procurement Unit shall be established to carry out any procurement if so requested under regulation 9(4) or for Government departments who have not been authorised as procuring entities.
- (2) The Central Procurement Unit shall provide details in the form of an Annual Procurement Plan of those major items of expenditure for procurements envisaged to be purchased in any financial year, and shall also provide details for ad-hoc procurements in the format as provided by the Procurement Division.
- (3) The Central Procurement Unit shall also organise the purchase of common-use items either under individual contract or framework contract arrangements on behalf of selected or all procuring entities.
- (4) The Central Procurement Unit shall follow the procurement procedures set down in regulation 11, bearing in mind the thresholds and approval set down in regulation 7.
- (5) The functions and detailed operational procedures of the Central Procurement Unit shall be set down in the procurement procedures.

PART 3 – PROCUREMENT PREPARATION AND PLANNING

11 Procurement preparation

- (1) A procurement unit shall only use those standard bidding documents produced and issued by the Procurement Division for procurement under these Regulations.
- (2) The general functions of procurement units shall include:
 - (a) planning of procurement;
 - (b) preparation of invitations to bid and of bidding documents;
 - (c) publication and distribution of invitations to bid;
 - (d) reception and safeguarding of bids; and
 - (e) administering and implementation of procurement contracts to the extent that is not carried out by end-user departments.
- (3) For contracts whose value does not exceed the thresholds set down in the procurement procedures the functions of procurement units shall, in addition to the functions included in sub-regulation (2), include:
 - (a) conducting the opening of bids;
 - (b) preparation of the evaluation report for the bids; and
 - (c) awarding contracts or purchase orders.
- (4) For contracts whose value exceeds the thresholds set down in the procurement procedures, the functions of procurement units shall, in addition to the functions included in sub-regulation (2), include:
 - (a) conducting the opening of bids;
 - (b) performance of secretariat services for the respective Bid Evaluation Committee.
 - (c) preparation of contract award recommendations for submission to the Government Procurement Committee; and
 - (d) issuing the Notification of Award letter and signing the contract.

12 Bid Evaluation Committees

- (1) Bid Evaluation Committees shall be appointed by the Head of the procuring entity for all contracts whose value exceeds the thresholds set down in the procurement procedures, and which shall be composed of a minimum of three members and a maximum of five members which shall include:
 - (a) the officer responsible for preparing the bidding document;
 - (b) the financial officer of the procuring entity; and
 - (c) other members to provide technical, legal or commercial expertise.
- (2) The duties of the Bid Evaluation Committees shall include:

- (a) receiving from the procurement unit the bid opening record and sealed bids;
- (b) evaluating bids and preparing the bid evaluation report and recommendations for award of a contract and submitting them to the approving authority as set down in regulation 7;
- (c) responding to any queries raised by the approving authority; and
- (d) any other functions specified under these Regulations.

13 Procurement competence

- (1) All procurement-related functions shall be carried out by persons trained and knowledgeable in procurement in accordance with the guidelines and qualification requirements established by the Procurement Division.
- (2) Subject to the provisions of these Regulations, a procurement unit shall be responsible for procurement with the funds at its disposal.

14 Planning procurements

- (1) Procuring entities shall plan procurement with a view to achieving maximum value for public expenditure so that it is carried out within available financial resources and other applicable limitations and at the most favourable time.
- (2) Where appropriate, procuring entities shall aggregate procurement requirements in order to achieve economies of scale.
- (3) Before commencing a procurement process, a procuring entity shall:
 - (a) inquire as to whether or not its requirements can be met by the transfer of goods from another department;
 - (b) ensure that an accurate estimate of the cost of the procurement including the cost of contingencies that might reasonably be expected to arise under a contract for the procurement has been prepared; and
 - (c) commit the amount of the estimate in accordance with the provisions of the approved Annual Estimates enacted in the applicable Appropriation Act.

15 Artificial division of procurements

A procuring entity shall not artificially divide an object of procurement with the intention of avoiding the financial thresholds set out in the procedures applied in these Regulations for the purposes of determining the appropriate procurement method.

16 Division into Lots

- (1) Notwithstanding the prohibition of regulation 15, procuring entities may divide a procurement requirement, which could be procured as a single contract, into a package, consisting of several lots which are to be bid together, where it is anticipated that the award of several separate contracts may result in the best overall value for the procuring entity.
- (2) A requirement shall not be divided into lots:
 - (a) for the sole purpose of avoiding thresholds;
 - (b) where the award of several separate contracts would create problems of compatibility or inter-changeability between items procured as separate lots, or would unduly strain contract administration resources;
 - (c) where the award of several separate contracts would invalidate or otherwise restrict any provider's warranty or liability; or
 - (d) where the award of several separate contracts would increase the costs of servicing, maintenance or similar requirements.
- (3) Where a requirement which could be procured as a single contract is divided into lots, the procuring entity shall:
 - (a) permit bidders to bid for a single lot, any combination of lots or all lots; and
 - (b) demonstrate, prior to contract award, that the recommended contract award or combination of contract awards offers the best overall value for the procuring entity.

17 Annual procurement plan

- (1) Procuring entities shall prepare a procurement plan for each fiscal year, containing at least the following information:
 - (a) a detailed breakdown of the goods, works and services required;
 - (b) a schedule of the delivery, implementation or completion dates for all goods, works and services required;
 - (c) an indication of which items can be aggregated for procurement as a single package or for procurement through any applicable arrangements for common-use items;
 - (d) an estimate of the value of each package of goods, works and services required and details of the budget available and sources of funding;
 - (e) an indication of the anticipated procurement method for each procurement requirement, including any need for pre-qualification, and the anticipated time for the complete procurement cycle, taking into account the applicable approval requirements;
 - (f) an indication of whether the goods, works or services will be procured by the Central Procurement Division; and

- (g) other details as may be relevant to any item in the plan.
- (2) Annual procurement planning shall be integrated with applicable budget processes and submitted to the Ministry of Finance as set out in the procurement procedures.
- (3) Procuring entities shall prepare a summary of this annual plan in accordance with the template provided by the Procurement Division and shall forward the completed template to the Procurement Division as set out in the procurement procedures for publication on the Procurement Division's website.

18 Specific procurement plan

- (1) The procuring entity shall prepare a specific procurement plan for each individual procurement requirement above the threshold set out in procurement procedures.
- (2) Procurement plans shall include:
 - (a) a description of the requirement, including the schedule required for delivery, implementation or completion of the goods, works or services and any division into lots;
 - (b) the estimated value of the requirement and, where applicable, individual lots;
 - (c) the proposed procurement method, in accordance with Part 4 or Part 8, and a justification for the use of any method other than competitive bidding or request for proposals for consultant services;
 - (d) an estimate of the time required for each stage in the procurement cycle, taking into account publication requirements and the applicable approval requirements;
 - (e) an indication of the resources required and available for management of the procurement process and contract administration; and
 - (f) any other relevant information.
- (3) Notwithstanding the provisions of sub-regulation (1), where the estimated value of the procurement requirement is such that the request for quotations method is permitted, no specific procurement plan shall be required.

PART 4 – METHODS OF PROCUREMENT

19 Selection of procurement method

- (1) Procuring entities shall select the most appropriate method of procurement for each requirement as part of the procurement planning process.
- (2) The choice of procurement method shall take into account:
 - (a) the estimated value of the procurement;

- (b) the potential sources for the procurement, notably the competitiveness of the national and international market for the goods, works or services and the likely interest of potential national and international bidders, given the size and nature of the requirement;
- (c) the nature of the goods, works or services required; and
- (d) the circumstances surrounding the procurement, such as the existence of an emergency need or of situations which might justify use of limited bidding.

20 Competitive Bidding Method

- (1) Public procurement of goods, works and services shall be undertaken by means of single stage competitive bidding, advertised in accordance with regulation 35, to which equal access shall be provided to all eligible and qualified bidders without discrimination.
- (2) Methods of procurement other than competitive bidding are permitted only in the circumstances identified in regulations 21 to 26.
- (3) When a method of procurement other than competitive bidding is used, the procuring entity shall include in the record of the procurement proceedings a written justification of the decision to utilise the procurement method, including the grounds for taking that decision.
- (4) Consultant services shall be procured by the request for proposals method in accordance with regulations 51 and 52.

21 Two stage Competitive Bidding Method

- (1) Competitive bidding may be held in two stages in the following cases:
 - (a) when it is not feasible to define fully the technical or contractual aspects of the procurement to elicit competitive bids; and
 - (b) when, because of the complex nature of the goods, works or services to be procured, the procuring entity wishes to consider various technical or contractual solutions, and to discuss with bidders about the relative merits of those variants before deciding on the final technical or contractual specifications.
- (2) In the first stage of the two stage competitive bidding method, the procuring entity may engage in discussions with any or all bidders whose proposals satisfy the conditions set forth in the bidding documents with a view to understanding the proposals or to indicate changes required to make them acceptable and to seek the bidder's willingness to make such changes, and minutes of these discussions shall form part of the procurement records.
- (3) At the end of the first stage, the procuring entity may:
 - (a) reject those bids which do not, and cannot be changed to meet the basic requirements, minimum performance, or required completion time or

- have any other weakness which makes the bid substantially non responsive; or
- (b) modify the technical specifications, evaluation criteria, and contract conditions, while seeking to maximize competition and articulate appropriate evaluation methodology.
- (4) In the second stage, the procuring entity shall invite bidders whose bids have not been rejected to submit final bids with prices responsive to the revised bidding documents.
 - (5) A bidder, not wishing to submit a final bid, may withdraw from the bidding proceedings without forfeiting any bid security that the bidder may have been required to provide, and the final bids shall be evaluated and compared in accordance with the criteria and methodology included in the revised documents.
 - (6) The procedures for the competitive bidding method apply to the two-stage competitive bidding method, except to the extent they are modified by this regulation.

22 International Procurement

- (1) When the estimated contract amount is higher than the value of the thresholds set down in the procurement procedures:
 - (a) any procurement notice shall be published in accordance with regulation 35;
 - (b) any invitation to bid, invitation to pre-qualify and bidding documents shall be in English;
 - (c) procuring entities shall allow sufficient time for the invitation to reach candidates and to enable them to prepare and submit applications to prequalify and bids in accordance with the instructions given in the bidding documents;
 - (d) bidders shall be permitted to express their bids, as well as any security documents to be presented by them, in their respective domestic currencies, or in a currency widely used in international trade and stated in the bidding documents;
 - (e) general and special conditions of contract shall be of a kind generally used in international trade; and
 - (f) technical specifications shall, to the extent compatible with national requirements, be based on international standards.
- (2) This regulation applies to competitive bidding, selective bidding and restricted bidding.

23 Selective Bidding Method

- (1) Selective bidding means competitive bidding preceded by pre-qualification and may be used, in the case of particularly high value of complex procurement with a view to identifying, prior to the submission of bids, those bidders that are qualified.
- (2) The requirements and criteria for assessing the qualifications of bidders in selective bidding shall be those referred to in regulations 29, 31 and 32.
- (3) In the pre-qualification stage the:
 - (a) procuring entity shall provide prequalification documents to all bidders responding to the invitation to prequalify;
 - (b) prequalification documents shall provide bidders with the information required to prepare and submit applications for prequalification; and
 - (c) procuring entity shall respond promptly to any request by a bidder for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify.
- (4) The procuring entity shall make a decision with respect to each application to prequalify and all bidders that have been prequalified shall be invited to submit bids in the procurement proceeding.
- (5) At any time prior to contract award, the procuring entity may require a bidder that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such bidder and the procuring entity shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.
- (6) In all other respects, the provisions of the competitive bidding method apply.

24 Restricted Bidding Method

- (1) Restricted bidding may be held in the following cases:
 - (a) when the goods, works or services are only available from a limited number of bidders; or
 - (b) when the time and cost of considering a large number of bids is disproportionate to the estimated value of the procurement which shall depend on the nature of the procurement.
- (2) In the case of restricted bidding, the procuring entity shall invite bids from:
 - (a) all potential bidders where restricted bidding is used in accordance with sub-regulation (1)(a); or
 - (b) sufficient bidders to ensure effective competition and, in any case at least three bidders, where restricted bidding is used in accordance with sub-regulation (1)(b).
- (3) In selecting bidders to be invited to bid, the procuring entity may use:

- (a) a registration system of supplier or contractors lists maintained in accordance with the procedure established by the Procurement Division;
 - (b) lists of pre-qualified bidders;
 - (c) its own knowledge of the market; or
 - (d) any other appropriate sources of information.
- (4) Where the procuring entity uses restricted bidding in accordance with sub-regulation (1)(b), it shall also publish a notice, in accordance with regulation 35 of these Regulations, which shall state:
- (a) the nature of the procurement requirement;
 - (b) that the procuring entity is using restricted bidding on the grounds enumerated in this regulation;
 - (c) the proposed bidders;
 - (d) that any potential bidder requiring information on the procurement requirement or wishing to participate in the procurement may contact the procuring entity; and
 - (e) the deadline for any such request.
- (5) In all other respects, the provisions of the competitive bidding method apply.

25 Limited Bidding Method

- (1) Procuring entities may use the limited bidding method in the following cases:
- (a) when no suitable bids have been submitted in response to a competitive or selective bidding procedure, on condition that the requirements of the initial bid are not substantially modified;
 - (b) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the contract may be performed only by a particular supplier and no reasonable alternative or substitute exists;
 - (c) for reasons of extreme urgency brought about by events not attributable to and unforeseen by the procuring entity, the products or services could not be obtained in time by means of competitive or selective bidding procedures;
 - (d) for additional deliveries of goods or services by the original supplier where a change of supplier would compel the procuring entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services procured under the initial procurement and such separation would cause significant inconvenience or substantial duplication of costs to the procuring entity;
 - (e) when a procuring entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development;

- (f) when additional services which were not included in the initial contract but which were within the objectives of the original bidding documents have, through unforeseen circumstances, become necessary to complete the services described therein. Provided that the total value of contracts awarded for the additional services shall not exceed 50 percent of the amount of the original contract;
 - (g) for new services consisting of the repetition of similar services which conform to a basic project for which an initial contract was awarded following an open or selective procurement method, and for which the procuring entity has indicated in the notice of intended procurement that a limited bidding method might be used in awarding contracts for such new services;
 - (h) for products purchased on a commodity market;
 - (i) for purchases made under exceptionally advantageous conditions which only arise in the very short term in the case of unusual disposals such as arising from liquidation, receivership or bankruptcy and not for routine purchases from regular suppliers; and
 - (j) for contracts below the threshold set down in the procurement procedures.
- (2) Under this method:
- (a) the procuring entity shall prepare a written description of its needs and any special requirements as to quality, quantity, terms and time of delivery;
 - (b) a bid shall be invited from either one, or where possible, more suppliers or contractors;
 - (c) where feasible, a time limit as may be given to the bidders to prepare and submit their bids or agreed by mutual agreement;
 - (d) the compliance of the offer or offers with the specifications, terms and conditions shall be considered; and
 - (e) negotiations to bring down the prices may be carried out if the prices offered are deemed to be excessive or substantially in excess of the prevailing market prices.

26 Request for Quotations Method

- (1) The request for quotations method may be used by any procuring entity for the procurement of goods and works:
- (a) where the procurement is for readily available commercially standard goods, not specially manufactured to the particular specifications of the procuring entity; and
 - (b) when the estimated value of the procurement of works or services does not exceed the threshold set down in the procurement procedures.

- (2) Under this method, quotations shall be requested in writing from as many bidders as practicable, but from at least three bidders, using the standard documents produced by the Procurement Division.
- (3) A request for quotations shall contain a clear statement of the requirements of the procuring entity as to quality, quantity, terms and time to delivery, as well as any other special requirements.
- (4) Bidders shall be given adequate time to prepare and submit their quotations, but each bidder shall be permitted only one quotation which may not be altered or negotiated.
- (5) A purchase order shall be placed with the bidder that provided the lowest-priced quotation meeting the delivery and other requirements of the procuring entity.
- (6) A purchase order shall include the:
 - (a) quoted price;
 - (b) contract number;
 - (c) name of the contractor or of the supplier;
 - (d) name of the officer of the contractor or of the supplier who signed the contract;
 - (e) terms; and
 - (f) date of delivery.

PART 5 – PROCUREMENT REQUIREMENTS AND CRITERIA

27 Object of procurement

- (1) The procuring entity's detailed requirements with respect to quality and quantity, including any certification, testing and test methods or other means for evaluating the conformity of the performance of the contract to these requirements shall be set out clearly in the bidding documents.
- (2) All relevant bidding and pre-qualification documents shall provide objective descriptive information that does not unnecessarily favour a particular bidder by stating the desired performance or output requirements of the object of the procurement wherever possible rather than design or descriptive characteristics.

28 Technical Specifications

- (1) Technical specifications shall include, where appropriate:
 - (a) the purpose and objectives of the object of procurement;
 - (b) a full description of the requirement;

- (c) a generic specification to an appropriate level of detail;
 - (d) a functional description of the requirements, including any environmental or safety features;
 - (e) performance parameters, including outputs, timescales and any indicators or criteria by which satisfactory performance can be judged;
 - (f) process and materials descriptions;
 - (g) dimensions, symbols, terminology language, packaging, marking and labelling requirements;
 - (h) inspection and testing requirements; and
 - (i) any applicable standards.
- (2) References to standards shall where possible be references to international standards or national standards incorporating international standards.
- (3) No requirement or reference is to be made in the technical specifications to a particular trademark or name, patent, design or type, specific original, producer or service provider, unless there is no other practical way of describing the procurement requirements, and words such as “or equivalent” are included in the specifications.

29 Eligibility and non-discrimination

Bidders shall not be excluded from participation in public procurement on the basis of nationality, race or any other criterion, not having to do with their qualifications or decisions taken against any bidder under regulations 31 to 33.

30 Form of communication

Communications between bidders and procuring entities shall be in writing.

31 Permitted Qualification criteria

- (1) Qualification criteria shall be limited to those criteria which are designed to demonstrate that a bidder possesses the necessary professional and technical qualifications and competence, financial resources, equipment and other physical facilities, managerial capability, experience in the procurement object, business reputation and personnel, to perform the contract.
- (2) Qualification criteria shall not be unduly restrictive or designed to reduce competition and shall be prepared for each procurement requirement, taking into account the size, complexity and technical requirements of the proposed contract.
- (3) The procuring entity shall clearly state the qualification criteria in all bidding documents and shall, where it deems fit, require bidders to provide signed statements or documentary evidence to certify their eligibility.

- (4) The procuring entity shall not impose any requirement as to qualifications in the invitation to bid other than a requirement specified in this regulation.

32 Evidence of Qualification criteria

- (1) Subject to sub-regulation 31(2), the following evidence may be requested from bidders to satisfy the qualification criteria established in the bidding documents.
- (2) Evidence of the bidders' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the goods, works or services, including evidence of:
 - (a) experience and reliability;
 - (b) financial resources, equipment and other physical facilities;
 - (c) personnel;
 - (d) managerial capability;
 - (e) possession of the necessary professional and technical qualifications and competence; and
 - (f) subject to the right of the bidder to protect its intellectual property rights and trade secrets, possession of the requisite intellectual property rights or trade secrets.
- (3) Evidence of the bidder's legal capacity to perform the contract may be furnished by any of the following means, including evidence that:
 - (a) it has satisfied all the legal requirements to carry on business in the Kingdom and, if the bidder has its headquarters outside the Kingdom, of his entitlement to carry on business in that jurisdiction;
 - (b) the bidder is not insolvent, in bankruptcy, in receivership or under liquidation; and
 - (c) legal proceedings have not been taken and are not anticipated to be taken that would materially affect the ability or the legal capacity of the bidder to carry out the contract.
- (4) As applicable, evidence may be provided that the bidder is in good standing with the Government and has fulfilled its obligations, to pay taxes, levies, license fees and other fees or other similar amounts.
- (5) All bidders shall provide evidence of their integrity to the effect that the bidder and any director, officer, manager or supervisor of the bidder has not been, within a period of 3 years preceding the date of issuance of the invitation to bid:
 - (a) convicted of any criminal offence, whether in the Kingdom or elsewhere:
 - (i) relating to his professional conduct;

- (ii) relating to the making of false statements or misrepresentations as to his qualifications to enter into a procurement contract;
 - (iii) involving dishonesty; or
 - (iv) under anti-corruption legislation; or
- (b) suspended or disbarred by administrative or judicial proceedings from participating in procurements, whether in the Kingdom or elsewhere.

33 Disqualification

- (1) The procuring entity shall disqualify a bidder if it finds that the information submitted in a bid concerning its qualifications is false or misleading.
- (2) The procuring entity may disqualify a bidder if it finds that the information submitted in a bid concerning its qualifications is materially inaccurate or materially incomplete.

PART 6 – PROCUREMENT PROCEEDINGS

34 Invitations to bid

- (1) The Limited Bidding Method shall be conducted in accordance with regulation 25.
- (2) The Requests for Quotations Method shall be conducted in accordance with regulation 26.
- (3) In all other cases, bids shall be invited:
 - (a) through the publication of an announcement of bidding proceedings in the case of competitive bidding;
 - (b) from the list of pre-qualified bidders in the case selective bidding;
 - (c) from a shortlist of bidders in the case of restricted bidding; or
 - (d) through the publication of an announcement of bidding proceedings in the case of restricted bidding pursuant to regulation 24(1)(b).

35 Publication of procurement notices

- (1) The notice of invitation to bid or to pre-qualify, as the case may be, shall be:
 - (a) published in at least one national newspaper which shall be of wide enough circulation to reach sufficient bidders to ensure effective competition;
 - (b) broadcast over the radio or television, on the stations and programmes and at a time most likely to target potential bidders; and

- (c) to the extent feasible, published on the internet, including any website established by the Procurement Division.
- (2) Where international competitive bidding is used, the notice shall also be placed in at least two English language newspapers or other printed media with adequate circulation to attract foreign competition or on widely read internet websites.
- (3) Where the procuring entity considers it is necessary to ensure wide competition, it may send the notice directly to potential bidders after the date of publication of the notice. The procuring entity shall keep a record of any bidders to whom the notice is sent directly, which shall form part of the procurement record.
- (4) The invitation to bid or, as the case may be, the invitation to prequalify shall include information regarding:
 - (a) identity and address of the procuring entity and the contact details of the person from whom further information can be obtained;
 - (b) nature and time-frame of the procurement, including the place of delivery of goods or services, and the location of any works;
 - (c) manner of obtaining and the price of the bidding documents, or, if applicable, the prequalification documents;
 - (d) place and deadline for submission of bids, or of applications to prequalify; and
 - (e) such other matters as may be prescribed in the standard forms issued by the Procurement Division.

36 Minimum bidding periods

- (1) The bidding documents shall be ready for distribution prior to the publication of announcement of the invitation.
- (2) The bidding period shall start on the date of the first publication of the announcement and shall finish on the date of the bid submission deadline.
- (3) The minimum bidding period shall be:
 - (a) 30 days for competitive bidding (regulation 20);
 - (b) 45 days for international competitive bidding (regulation 22);
 - (c) 20 days for selective and restricted bidding (regulations 23 and 24);
 - (d) 30 days for selective bidding, where the bidding is international; and
 - (e) 30 days for restricted bidding under regulation 24(1)(b), where the bidding is international.
- (4) In selective bidding, bidders shall be given a minimum of 30 days following a notice to pre-qualify to submit their pre-qualification applications.

- (5) In determining the appropriate bidding period for each requirement, the procuring entity shall take into account, in addition to the minimum bidding period:
 - (a) the time required for preparation of bids, taking into account the level of detail required and the complexity of bids;
 - (b) any need for bidders to submit authenticated legal documents or similar documents as part of their bids and the time required to obtain such documents;
 - (c) the location of potential bidders and the time required to obtain the bidding document and for the delivery and submission of bids to the procuring entity; and
 - (d) any restrictions relating to the time the goods, works or services are required.

37 Bidding documents

- (1) A procuring entity shall use standard bidding documents as may be prescribed including any manuals or guidelines pertaining thereto and issued by the Procurement Division.
- (2) The procuring entity shall provide, in an expeditious and non discriminatory manner, the bidding documents to all potential bidders that respond to the invitation to bid or, in the case of selective bidding, to all bidders that have been prequalified, and the price that may be charged for the bidding documents shall reflect only the cost of printing and distributing the documents.
- (3) The bidding documents shall provide bidders with all the information that they require in order to submit bids that are responsive to the needs of the procuring entity. In particular, the bidding documents shall inform bidders concerning:
 - (a) the nature and time frame of the procurement, including, but not limited to the contractual terms of the procurement, and the manner of entry into force of the contract;
 - (b) in all cases other than selective bidding, bidder qualification requirements and the documentation required to satisfy those requirements which will require the bidder to show that it possesses the necessary professional and technical qualifications and competence, financial resources, equipment and other physical facilities, managerial capability, experience in the procurement object, business reputation and personnel, to perform the contract as set out in the prescribed regulations and standard bidding documents;
 - (c) information as to site visits and pre-bid conferences;
 - (d) instructions for preparation and submission of bids, including the deadline for submission of bids, time and place of bid opening;

- (e) components to be reflected in the price, the currency or currencies in which the bid price may be stated, and the currency and related exchange rate to be used for comparison of bids;
 - (f) the criteria and methodology for evaluation of bids and the selection of the successful bidder, which shall all be quantified in monetary terms or expressed in the form of pass or fail requirements, if possible, or, where not possible, by relative weights and when considering evaluation criteria, the procuring entity shall consider only the following:
 - (i) the bid price; and
 - (ii) the cost of operating, maintaining and repairing the goods, or works, the time for delivery of the goods, completion of works or provision of the services, the functional characteristics of the goods or works, the terms of payment and of guarantees in respect of the goods, works or services;
 - (g) the preference, if any, for domestic goods and contractors as the Procurement Division may prescribe;
 - (h) any grouping of goods, works or services into lots and packages and the manner of evaluation of the lots and packages;
 - (i) whether alternatives to the technical or contractual specifications would be considered and, if so, how those alternatives would be evaluated;
 - (j) where suppliers are permitted to submit bids for only a portion of the goods, works or services to be procured, a description of the portion or portions for which bids may be submitted;
 - (k) the required validity period of bids;
 - (l) the amount and acceptable forms of any required bid, performance or other security;
 - (m) the conditions of contract which will be entered into with the successful bidder;
 - (n) a notice of conflict-of-interest restrictions and anti-fraud and corruption rules;
 - (o) the manner in which bidders may obtain review of actions, omissions and decisions of the procurement unit; and
 - (p) such other matters as may be required in regulations, manuals and standard forms as may be prescribed.
- (4) For the purposes of subsequent communications, the procuring entity shall make a record of the name, postal address, telephone and fax number and email address of all persons to whom an invitation to bid is issued and shall file a copy of it in the procurement records.

38 Alternative bids

- (1) Alternative bids shall not be permitted, except where specifically indicated in the bidding document.
- (2) The procuring entity may permit alternative bids where it is anticipated that bidders may be able to offer goods, works or services which do not conform precisely to the description of requirements but which meet the objectives of the procurement in an alternative manner.
- (3) Alternative bids may be permitted in areas of rapidly changing technology or where a need could be satisfied in a number of different ways and the procuring entity wishes to encourage cost efficient and technically innovative approaches by bidders.
- (4) Where alternative bids are permitted, the bidding documents shall state that the alternative bid does not need to conform precisely to the description of requirements, but shall:
 - (a) meet the objectives or performance requirements prescribed in the description of requirements;
 - (b) be substantially within any delivery or completion schedule, budget and other performance parameters stated in the bidding documents; and
 - (c) clearly state the benefits of the alternative bid over any solution which conforms precisely to the description of requirements, in terms of technical performance, price, operating costs or any other benefit.

39 Domestic preference

- (1) Where so indicated in the bidding document and strictly in accordance with any rules or schemes for domestic preference issued by the Procurement Division through circulars, a margin of preference may be applied to eligible bids.
- (2) Any rules or schemes issued under sub-regulation (1) shall clearly state the:
 - (a) eligibility for the margin of preference, in terms of ownership, location of bidder or production facilities, origin of labour, raw material or components, extent of sub-contracting or association with local partners or any other relevant factor;
 - (b) documentation required as evidence of eligibility for the margin of preference; and
 - (c) percentage of the margin of preference and the manner in which it will be applied during the evaluation.
- (3) The percentage of preference in rules or schemes issued by the Procurement Division shall be between five and ten percent. The Procurement Division may review these percentages annually.

40 Cancellation of procurement proceedings or Rejection of Bids

- (1) The cancellation of procurement proceedings shall be avoided whenever possible, but is permitted where there is written finding that:
 - (a) the procurement need has ceased to exist or changed significantly;
 - (b) insufficient funding is available for the procurement;
 - (c) there is a significant change in the required technical details, bidding conditions, conditions of contract or other details, such that the recommencement of procurement proceedings is necessary;
 - (d) insufficient, or no responsive bids are received;
 - (e) there is evidence of collusion among bidders; or
 - (f) it is otherwise in the public interest.
- (2) If so specified in the bidding documents or in a request for proposals or a request for quotation a procuring entity, after obtaining the approval of the Head of a procuring entity, may reject all bids, proposals or quotations at any time prior to their acceptance.
- (3) Such grounds for rejection are justified when the bids, proposals or quotations submitted are not substantially responsive, or where there is evidence of lack of competition.
- (4) A procuring entity shall upon request by the bidder communicate the grounds for rejecting a bid.
- (5) A procuring entity shall incur no liability towards bidders solely by virtue of its invoking this regulation.
- (6) Notice of the rejection shall be given promptly to all participating bidders.
- (7) If a procuring entity decides to annul the procurement proceedings before the bid submission deadline, all bids received shall be returned unopened to the bidders already submitting them.

41 Unsuccessful procurement

- (1) Where no responsive bids are received or procurement proceedings are otherwise unsuccessful, the procuring entity shall investigate the failed procurement proceedings and record in the procurement record the reasons why the procurement was unsuccessful and the course of action taken.
- (2) The investigation should consider all relevant issues, including whether:
 - (a) the bidding period was sufficient, considering the factors listed in regulation 37(3);
 - (b) the requirements of the bidding documents and the terms and conditions of the proposed contract were clear, non-discriminatory, proportionate, reasonable and not so excessive as to deter competition;

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

PART 7 – BID SUBMISSION, BID OPENING AND AWARD

42 Submission of bids

- (1) A bid shall be submitted in written form, duly signed and in a sealed envelope.
- (2) Bids received after the deadline for submission of bids shall be returned unopened.
- (3) Invitations for prequalification and bidding documents shall permit submission of applications to prequalify or bids by hand or mail or by courier at the option of the bidder.
- (4) Notwithstanding sub-regulation (3) and subject to any e-procurement policy laid down by the Procurement Division, the bidding documents may authorise other methods of submission of bids, such as by electronic mail, as long as the confidentiality and security of bids are assured, including the prevention of the opening and reading of bids by anyone until the opening of bids at the time set in accordance with regulation 45.

- (5) Bids shall remain valid for the period of time indicated in the bidding documents, but modification or withdrawal of a bid during the bid validity period is subject to forfeiture of the bid security.
- (6) The validity period of a bid may be deemed extended only on the basis of the agreement of the bidder concerned and a bidder that agrees to an extension of the validity period of its bid shall also obtain a corresponding extension of the bid security, if such a security was required.

43 Bid security

- (1) A procuring entity may require bid securities, when applicable, in order to deter irresponsible bids and encourage bidders to fulfil the conditions of their bids.
- (2) The bidding documents shall state any requirement for a bid security.
- (3) The value of any required bid security shall be expressed as a fixed amount, which shall be between two and five percent of the estimated value of the contract.
- (4) In determining the amount of bid security required, the procuring entity shall take into account the cost to bidders of obtaining a bid security, the estimated value of the contract and the risk of bidders failing to fulfil the conditions of their bids, and which shall be high enough to deter irresponsible bids, but not so high as to discourage competition.
- (5) The bidding documents shall state that bid securities shall be:
 - (a) in accordance with the format and wording provided in the bidding document;
 - (b) in a form acceptable to the procuring entity, which may be:
 - (i) a certified Bank cheque;
 - (ii) a bank guarantee; or
 - (iii) any alternative form acceptable to the procuring entity, including any forms permitted under schemes issued by the Procurement Division to facilitate access to securities by small enterprises; and
 - (c) valid for the period prescribed in the bidding document, which shall normally be 28 days beyond the expiry of the bid validity period.
- (6) A bid security may be forfeited by the procuring entity only in the event of:
 - (a) a modification or withdrawal of a bid after the deadline for submission of bids and during its period of validity;
 - (b) refusal by a bidder to accept a correction of an arithmetical error appearing on the face of the bid;
 - (c) failure by the successful bidder to sign a contract in accordance with the terms set forth in the bidding documents; or

- (d) failure by the successful bidder to provide a security for the performance of the contract if required to do so by the bidding documents.
- (7) The procuring entity shall release bid securities promptly to unsuccessful bidders upon expiry of the term of the security or formation of a contract with the successful bidder and submission of any required performance security, whichever is earlier.
- (8) The bid security of the successful bidder shall not be released, until any required performance security has been received.

44 Amendment or withdrawal of bid

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

45 Bid opening

- (1) Bids shall be opened by the procuring entity at the time and place indicated in the bidding documents, and the time of bid opening shall coincide with the deadline for submission of bids, or follow immediately thereafter, allowing a minimum time interval for logistical reasons.
- (2) Bidders or their representatives may attend the bid opening, where the name of the bidder, the total amount of each bid, any discounts or alternatives offered, and the presence or absence of any bid security, if required, and essential supporting documents shall be read out loud and recorded.
- (3) A copy of the record shall be made available to any bidder on request.
- (4) No decision regarding the disqualification or rejection of any bid shall be taken or announced in the bid opening session.
- (5) Following opening of the bids, and until the preliminary decision on award has been notified to the successful bidder, a bidder shall not make any unsolicited communication to the procurement unit or try in any way to influence the procuring entity’s examination and evaluation of the bids.

46 Confidentiality

Notwithstanding any law to the contrary, information relating to the content of pre-qualification applications, bids or to the examination, clarification, evaluation and comparison of bids shall not be disclosed to suppliers or contractors or to any other

person not involved officially in the examination, evaluation or comparison of bids or in the decision on which bid should be accepted.

47 Examination and evaluation of bids

- (1) Following the opening of bids, the procuring entity shall first examine the bids in order to determine whether the bids are complete, signed, whether required documents to establish legal validity and required bid security have been furnished and whether bids are substantially responsive to the technical specification and contract conditions set forth in the bidding documents.
- (2) Bids which are not complete, not signed, not accompanied by a bid security in the prescribed form, if one is required, or not accompanied by essential supporting documents such as business registration certificates, business licences and tax receipts, or are substantially non-responsive to the technical specifications or contract conditions or other critical requirements in the bidding documents, shall be rejected and excluded from further evaluation and comparison.
- (3) In selective bidding, a bid received from any entity other than the prequalified bidders shall be rejected and excluded.
- (4) Bids not excluded from consideration under sub-regulations (2) and (3), shall be evaluated in accordance with the criteria and methodology stated in the bidding documents.
- (5) The procuring entity may seek clarification in writing from any bidder to facilitate evaluation but shall neither ask or permit any bidder to change the price or any other aspect of the bid and if a bidder amends its bid in any manner, such a bid shall be rejected and its bid security forfeited.
- (6) In carrying out the evaluation, if there are minor deviations in any bid which did not merit rejection of the bid at the earlier stage, the cost of such minor deviation shall be ascertained, if possible, and the evaluated cost of such a bid shall then be compared to those of other bids to determine the lowest evaluated bid.
- (7) In selective bidding, the qualifications of the lowest evaluated bidder shall be verified again to take account of any change since the original prequalification.
- (8) In methods other than selective bidding, the qualifications of the lowest evaluated substantially responsive bidder shall be checked against the criteria specified in the bidding documents, if that bid fails, the same check shall be applied to the next ranked bid.

48 Prohibition of negotiation

- (1) Except as provided in sub-regulation (2)(b), there shall be no negotiation between the procuring entity and a supplier or contractor with respect to a bid submitted by the supplier or contractor.
- (2) If the lowest evaluated responsive bid exceeds the budget for the contract by a substantial margin, the procuring entity shall investigate the causes for the excessive cost and may:
 - (a) consider requesting new bids; or
 - (b) subject to approval by the Head of the procuring entity, negotiate a contract with the lowest evaluated bidder to try to obtain a satisfactory contract through a reduction in the scope which can be reflected in a reduction of the contract price.

49 Contract award

- (1) The contract shall be awarded to the bidder having submitted the lowest evaluated and substantially responsive bid which meets only those evaluation criteria as specified in the bidding documents.
- (2) Prior to the expiry of the period of bid validity, the procuring entity shall notify the successful bidder of the proposed award, which shall specify the time within which the contract shall be signed, subject to any intervening complaints filed in accordance with Part 10.
- (3) In the case of contracts awarded by way of competitive bidding and in the case of any contract with a value in excess of the thresholds set down in the procurement procedures, notice shall be given to the other bidders, specifying the name and address of the proposed successful bidder and the price of the contract, but the contract shall not be signed until at least 14 days have passed following the giving of that notice.
- (4) If the bidder whose bid has been accepted fails to sign a written contract, when required to do so, or fails to provide any required security for the performance of the contract within the time limit set out in sub-regulation (2), the procuring entity shall accept the next ranked bidder from among the remaining bids that are in force, but in selecting the next ranked bidder, the procuring entity shall comply with the provisions of this regulation, as well as with the notice requirements provided in sub-regulation (3).
- (5) Contracts shall be signed by the Head of a procuring entity or a person delegated by him, and shall come into effect as stated in the Contract Agreement.

50 Performance security

- (1) A procuring entity may request a performance security, where applicable, to secure the contractor's obligation to fulfil the contract and any requirement

for a performance security shall be set out in the bidding documents and contract.

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

PART 8 – PROCUREMENT AND CONSULTANT SERVICES

51 Request for proposals method

- (1) The request for proposals method shall be used for the procurement of intellectual and professional services.
- (2) For the purposes of procuring the services of a consultant, the procuring entity shall prepare a shortlist of three to six consulting firms, to the greatest extent feasible, comprising consultants of the same category, and similar capacity and business objectives, to which it shall provide the request for proposals for services, and the short-list shall be established from among those who have capacity to perform the required services, as demonstrated in their submissions.

- (3) When the estimated value of the procurement exceeds the threshold as set down in the procurement procedures, in order to establish the short-list, the procuring entity shall seek expressions of interest by publishing a notice in a local or international newspaper of wide circulation, and where appropriate, the notice may also be published in a relevant trade publication or technical or professional journal.
- (4) For assignments of a value lower than the threshold as set down in the public procedures, the short-list may be established from market knowledge or other sources of information but in the case of assignments which have an estimated value above that threshold, or are particularly complex, an advertisement shall also be utilized.
- (5) The request for proposals shall provide shortlisted bidders with the information necessary to enable them to participate in the procurement proceedings and to submit proposals that are responsive to the needs of the procuring entity including, in particular the:
 - (a) name and address of the procuring entity;
 - (b) nature, time frame and location of the services to be provided, terms of reference, required tasks and outputs;
 - (c) criteria to be used in evaluating and comparing proposals, and their relative weights as compared to price;
 - (d) contractual terms of the procurement, and the manner of entry into force of the contract;
 - (e) instructions for preparation and submission of proposals, and the place and deadline for submission of proposals;
 - (f) final selection procedures to be applied;
 - (g) notice of conflict-of-interest restrictions and anti-fraud and anti-corruption rules, including the grounds for potential debarment from future participation in procurement of goods, services or works that may result from the assignment under consideration; and
 - (h) such matters as may be prescribed in the standard bidding documents issued by the Procurement Division.
- (6) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

52 Methods of selection and conditions for use

- (1) The preferred methods of selection shall be:
 - (a) Quality and cost based selection (QCBS): This method uses a competitive process among short listed consultants that takes into account the quality of the proposal and the cost of the services in the selection of the successful consultant; or

- (b) Selection under fixed budget (SFB): This method shall be used when the assignment is simple and can be precisely defined, and when the budget is fixed.
- (2) The following methods shall only be used with the prior approval of the Head of a procuring entity:
- (a) Least cost selection (LCS): This method is appropriate for assignments of a standard or routine nature (financial audits, architectural and engineering design for non-complex works, etc.) where well established practices and standards exist, and in which the contract amount is small;
- (b) Selection amongst community service organisations (CSO): This method may be used where involvement and knowledge of community needs, local issues, and community participation are paramount in the preparation, implementation and operation of community development projects;
- (c) Single source selection (SSS): This method shall be used only in exceptional cases, such as:
- (i) for tasks as continuation of previous completed assignment;
 - (ii) where a rapid selection is essential (as in emergency);
 - (iii) for very small assignments;
 - (iv) when only one consultant is qualified or has experience of exceptional worth for assignment; or
 - (v) owing to a catastrophic event there is an emergent need of the services; or
- (d) Selection of individual consultants (SIC): This method shall be used when:
- (i) the qualification and experience of the individual are the paramount requirement;
 - (ii) teams of personnel are not required; and
 - (iii) no outside professional support is required.
- (3) The thresholds set down in the procurement procedures and steps for execution of the methods for selection of consultants shall be detailed in the procurement procedures issued by the Procurement Division.

PART 9 – TRANSPARENCY AND INTEGRITY

53 Bidder debriefing

- (1) A procuring entity shall, upon request, communicate promptly to a bidder the reason for the rejection of its application to pre-qualify, or of its bid.

- (2) Any debriefing shall be provided in writing, within a reasonable period of time of the receipt of the request.
- (3) The debriefing shall state at which stage of the evaluation the bid was rejected, provide brief details of any material deviation, reservation or omission leading to rejection of the bid or state that a bid was substantially responsive, but failed to offer the lowest evaluated price or highest score, as required.
- (4) The debriefing shall not provide details on any other bids, other than information that is publicly available from bid openings or published notices.

54 Contract award

The procuring entity shall promptly publish, and in any event within one month from award, a notice of all procurement contract awards in the same manner as for procurement notices under regulation 35.

55 Records and reports of procurement activities

- (1) The procuring entity shall maintain an individual record for each procurement requirement, which shall be marked with the relevant procurement reference number.
- (2) The record shall contain the originals and copies, where appropriate, of all information, documents and communications related to that procurement proceeding and shall also include at least the following:
 - (a) a description of the object of the procurement;
 - (b) a list of the participating bidders and their qualifications;
 - (c) bid prices;
 - (d) a summary of the evaluation of bids;
 - (e) summary of any review proceedings, and the related decisions;
 - (f) any requests for clarifications and any responses thereto;
 - (g) a statement of the reason for choice of a procurement method other than competitive bidding or request for proposals; and
 - (h) any other information required to be recorded under these Regulations.
- (3) The record shall be prepared and disclosed in a manner that avoids disclosure of proprietary commercial information.
- (4) The record shall, on request, be made available to any person after a bid has been accepted, unless any portion of the record is required to be disclosed earlier pursuant to law, or by order of a competent court or a duly appointed arbitrator.

- (5) Procurement records shall be kept for a minimum period of five years following completion or termination of the contract or cancellation of the procurement proceedings.
- (6) Procuring entities shall submit report summaries on their procurement activities to the Procurement Division in accordance with templates issued by the Procurement Division.

56 Conduct of procurement officers

- (1) Every officer responsible for any aspect of the procurement of a procuring entity, including the requisitioning, planning, preparing and conducting procurement proceedings and administering the implementation of procurement contracts, shall, as a procurement officer:
 - (a) ensure that each decision is based on adequate information in light of the circumstances, and is made in good faith, for a proper purpose in accordance with these Regulations and in the best interest of the Government;
 - (b) assure fair competitive access by contractors to procurement proceedings and contract awards;
 - (c) avoid circumstances in which he might personally benefit from a decision, either directly or indirectly through family and associates, from his official actions or that would give the appearance of the same;
 - (d) not commit corrupt or fraudulent acts, such as the solicitation or acceptance of bribes; or
 - (e) not reveal confidential information received in connection with procurement proceedings and bids, including bidders' proprietary information.

57 Offences by procurement officers

Every officer involved in procurement who breaches any provisions of these Regulations commits a disciplinary offence which shall be dealt with under sections 39 and 40 of the Public Finance Management Act 2002 and the Public Service (Disciplinary Procedure) Regulations 2003.

58 Suspensions and debarments

- (1) This regulation shall not come into force until such time as the Procurement Suspensions and Debarments Procedure has been prepared by the Government Procurement Committee and issued by the Procurement Division.
- (2) Any person wishing to respond or a bidder responding to an Invitation to Bid under regulation 34, or who is found to have committed an offence listed under regulation 32(5) or during the submission of a bid in accordance with

these Regulations may be suspended or debarred from future procurement opportunities invited under these Regulations.

- (3) After reasonable notice is given to the bidder involved, and a reasonable opportunity has been given to such bidder to be heard, the Government Procurement Committee may, for cause, suspend or debar a person, as prescribed in the Procurement Suspensions and Debarments Procedure.
- (4) A person may be suspended or debarred for any of the following:
 - (a) conviction for an offence involving dishonesty, obstruction of justice or a lack of honesty or business integrity;
 - (b) conviction for an offence involving corruption;
 - (c) conviction for engaging in anti-competitive practices, whether or not involving collusion; or
 - (d) deliberate neglect or failure without good cause to perform a contract in accordance with its terms of so serious a nature as to justify suspension or debarment.
- (5) A person may also be suspended or debarred for unethical conduct including:
 - (a) offering or making a payment or offer of employment, or offering or giving a gratuity or other reward, in connection with a procurement;
 - (b) offering to pay or paying a bribe whether in the form of a payment, gratuity, offer of employment or otherwise by or on behalf of a subcontractor under a contract to the prime contractor or a higher tier subcontractor or any person associated therewith, as an inducement for the award of a contract; and
 - (c) knowingly soliciting or obtaining confidential information, or attempting to obtain confidential information, in relation to a procurement for the purpose of obtaining an advantage over other persons who submit or might reasonably be expected to submit a bid, proposal, quotation or offer in relation to an emergency procurement.
- (6) A contract shall not be awarded to a person when he is suspended or debarred.

59 Independent procurement review

- (1) At the end of each fiscal year the Head of each procuring entity with a procurement volume more than the thresholds set down in the procurement procedures in that year, shall undertake post procurement review of its procurement operations using independent consultants.
- (2) The scope of the independent review shall cover compliance with these Regulations in addition to assessment of value for money considerations.
- (3) The independent review shall cover not less than the minimum number of contracts as specified in the thresholds set down in the procurement procedures.

- (4) The Procurement Division shall issue detailed guidelines for the performance of an independent review.
- (5) The independent review shall be completed within nine months following the end of the fiscal year.

PART 10 – COMPLAINTS AND APPEALS

60 Right to complain

- (1) This Part shall not come into force until such time as the Procurement Complaints and Appeals Procedure has been prepared by the Government Procurement Committee and issued by the Procurement Division.
- (2) Subject to sub-regulations (1), (5) and (6) a potential or actual bidder who claims to have suffered, or that is likely to suffer, loss or injury due to a breach of a duty imposed on a procuring entity by these Regulations, may seek review at any stage of the procurement proceedings.
- (3) An application for review shall not be entertained unless it identifies the specific act or omission alleged to contravene these Regulations and the bidding document.
- (4) Where an application for review concerns alleged improprieties in the solicitation of applications to prequalification or to solicitation of bids, which are apparent prior to bid opening, such applications shall be entertained only if submitted prior to bid opening. If alleged improprieties only come to light after bid opening, applications for review shall also be entertained by the procuring entities and follow the procedures prescribed.
- (5) If a procurement contract has not already entered into force the bidder shall submit its complaint in the following manner:
 - (a) a bidder shall submit its complaint for consideration through the review stage of the administrative authority as described under regulation 61; or
 - (b) where the bidder is still dissatisfied with the outcome of the complaint considered under regulation 61, or fails to receive a response within the time limit mentioned under regulation 61, the bidder may then submit the complaint to a Review Panel under regulation 63.
- (6) If a procurement contract has already entered into force, the bidder shall submit its complaint directly to a Review Panel in accordance with regulation 63.

61 Review by procuring entity

- (1) Prior to the entry into force of a contract, a complaint shall be made, in the first instance, in writing, to the Head of the procuring entity.
- (2) Pursuant to sub-regulation (1), the Head of the procuring entity shall not entertain the complaint unless it was submitted within 14 days of when the bidder submitting it became aware of the circumstances giving rise to the complaint or when the bidder should have become aware of those circumstances, whichever is earlier.
- (3) Unless the complaint is resolved by mutual agreement, the Head of the procuring entity shall suspend the procurement proceedings unless he is satisfied that urgent public interest considerations require the procurement to proceed and shall, within five days after submission of the complaint issue a written decision stating the reasons and, if the complaint is upheld, indicating the corrective measures to be taken.
- (4) If the Head of the procuring entity does not issue a decision within the 5 days stated in sub-regulation (3), or if the complainant is not satisfied with the decision the complainant may submit a complaint to a Review Panel under regulation 63.
- (5) Complaints under sub-regulation (4) shall not be heard unless submitted to a Review Panel within 10 days from the elapse of the time stated in sub-regulation (3) or from the date on which the procuring entity's decision was communicated to the complainant.

62 Review Panels

- (1) The Government Procurement Committee shall establish a List of Specialists for the purpose of reviewing a bidder's complaint with respect to any breach of its obligations under these Regulations. The Specialists shall be selected by open competition and on such terms and conditions, and operate under the rules of procedure, as prescribed in the Procurement Complaints and Appeals Procedure.
- (2) The List of Specialists shall be formed from a number, as specified in the thresholds set down in the procurement procedures, of:
 - (a) persons who have been legal professionals;
 - (b) persons who have been senior officers in the service of the Government with experience in the procurement area; and
 - (c) persons from a list of specialists with experience in the procurement area, provided by the Tonga Chamber of Commerce and Industry (TCCI).
- (3) The Specialists shall be grouped into a number of Review Panels each with a nominated Chairperson, both as approved by the Government Procurement Committee. Each panel shall have a minimum of three members, one from

each of the groups listed in sub-regulation (2) and up to two co-opted members on a case-by-case basis dependent upon the nature of the complaint. The Procurement Division shall maintain the List of Specialists and the List of Review Panels and it shall be made available to any interested person.

63 Appeal to a Review Panel

- (1) A person who is aggrieved by a decision of the Head of procuring entity made pursuant to regulation 61 may make an application to a Review Panel for review of that decision.
- (2) An application for review may be brought before a Review Panel in the following circumstances:
 - (a) in the form of an appeal by the complaining bidder against a decision by a Head of procuring entity, provided that the appeal is submitted within 10 days of the date of the decision;
 - (b) where the Head of procuring entity to whom a complaint is made pursuant to regulation 61 fails to render a decision within the required time frame, provided that the application for review is filed within 10 days of the expiry of the time for the decision referred to in regulation 61;
 - (c) in the case where the contract has already entered into force, any application for review submitted in the first instance to a Review Panel shall not be entertained unless it is submitted to a Review Panel within 10 days of when the bidder submitting it became aware of the circumstances giving rise to the complaint or of when that bidder should have become aware of those circumstances, whichever is earlier.
- (3) Within 7 days of receiving a complaint, the Procurement Division and the complainant shall select a Review Panel to hear the complaint in accordance with this regulation and shall fix a date for the commencement of its activities which shall be known as the date of selection.

64 Review Panel decisions

- (1) The Review Panel, selected pursuant to regulation 63(3), shall make a written decision, containing the reasons for the decision, within 10 days after the date of selection.
- (2) Such decision shall be binding on all the parties.
- (3) A complaint may be dismissed for:
 - (a) failure to comply with any of the requirements of regulation 63;
 - (b) setting forth only allegations that do not state a valid basis for a complaint, or that do not set forth a detailed legal and factual statement;

- (c) having been filed in an untimely manner, either at the initial level of review by the procuring entity or with respect to deadlines for filing of a complaint with the Review Panel; or
 - (d) concerning contract implementation or administration rather than contract award.
- (4) Unless a complaint is dismissed, the remedies that may be ordered by the Review Panel include:
 - (a) prohibiting the procuring entity from acting or deciding in an unauthorised manner or from following incorrect procedure;
 - (b) annulling in whole or in part any unauthorised act or decision of a procuring entity, other than any act or decision bringing the contract into force; or
 - (c) reversing a decision by the Head of procuring entity or substituting its own decision for such a decision, other than any decision bringing the contract into force.
- (5) The timely submission of a complaint in accordance with deadlines set in this regulation suspends the procurement proceedings until a decision on the complaint is issued by the Review Panel.
- (6) Notwithstanding sub-regulation (5), the Review Panel may, upon the application of the procuring entity, end the automatic suspension in sub-regulation (5) where the procuring entity satisfies the Review Panel that the continuation of the suspension would cause disproportionate harm to the public interest, the procuring entity or to other suppliers and contractors.
- (7) The lifting of the automatic suspension provided for in sub-regulation (6):
 - (a) allows the procuring entity to continue with the procurement procedure up to contract award; and
 - (b) but does not allow any contract to be concluded before the determination of the Review Panel.
- (8) The proceedings of the Review Panel shall be governed by the rules of procedure adopted in accordance with regulation 62(1) but shall, in all cases, ensure that all parties to the dispute are heard and given fair opportunity of making their case.

PART 11 – REPEALS AND SAVINGS

65 Repeals and savings

- (1) Rules, Regulations, Instructions or any other instruments, by whatever name they may be called, in force for or in connection with public procurement shall, so far as they are inconsistent with these Regulations upon their commencement, are repealed.

- (2) All proceedings for public procurement commenced immediately before the commencement of these Regulations shall, notwithstanding the repeal under sub-regulation (1), be disposed of in accordance with the provisions of those repealed Rules, Regulations, Instructions or any other instruments as if they have not been repealed.

Made at Nuku'alofa this 15th day of October 2010.

Minister of Finance