



*Tonga*

**PUBLIC PROCUREMENT REGULATIONS  
2015**





## PUBLIC PROCUREMENT REGULATIONS 2015

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# **PUBLIC PROCUREMENT REGULATIONS 2015**

## **PUBLIC MANAGEMENT FINANCE ACT 2002**

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*The Minister of Finance , in exercise of the powers conferred by section 44 of the Public Finance Management Act 2002, makes the following Regulations —*

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### **PART 1 – PRELIMINARY**

#### **1 Short Title**

This Regulation may be cited as the Public Procurement Regulations 2015.

#### **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 contracting entity;

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

“**CEO**” unless the context requires otherwise, means the Chief Executive Officer responsible for finance;

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

“**consultant**” means the provider of consultancy services;

“**contracting entity**” means any Ministry, Department, Division, agency or other unit of the Government or any subdivision thereof, engaging in procurement as well as the Central Procurement Unit; this shall include public enterprises and statutory bodies, as applicable;

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

“**days**” means calendar days unless otherwise indicated;

“**framework contract**” means a contract between one or more contracting entities and one or more contractors, suppliers, service providers or consultants 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;

“**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 and decisions made for the supply of goods, works, services and consultancy services; the supply of goods shall include all contracts having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of such goods;

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

“**Procurement Division**” is the body established in accordance with Regulation 8;



“**procurement unit**” means a unit established by a contracting entity which is responsible for the procurement of the goods, works, services or consultancy services;

“**purchase order**” means a simplified document which is used in a request for quotations procedure to place the order for the goods, works, services or consultancy services procured and which incorporates the terms and conditions of contract.

“**public employment contract**” means a contract for any length of time (short-term, long-term, part-time or full-time) between the Government and an employee under which the employee is engaged, including on the terms and conditions of employment which govern public servants, is entitled to be paid annual, sick or other leave, benefits from pension rights or superannuation payments and otherwise works in accordance with the instructions issued by the employer.

“**public enterprise**” means an entity falling within the definition of the Public Enterprises Act 2002;

“**security**” means the money, bank guarantee or other financial security that the bidder provides to secure his obligations in the procurement proceedings and in fulfilling its obligations. The contracting entity cannot claim any property right over it unless the bidder defaults on those obligations;

“**supplier**” means the provider for the supply of goods and/or services;

“**services**” means supply of non-consultancy, namely 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 above or below which certain procurement proceedings may be applied;

“**TOR**” means terms of reference;

“**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 contracting entities.

- (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.
- (3) Public enterprises and statutory bodies may adopt their own rules and procedures governing their procurement provided that those rules and procedures are consistent with these Regulations.
- (4) Where public enterprises and statutory bodies have adopted or adopt such rules and procedures, they shall be forwarded to the Government Procurement Committee within six months of the entry into force of these Regulations or immediately upon the adoption of the said rules and procedures and the Government Procurement Committee shall decide on their consistency with these Regulations within two months of receipt.
- (5) Where public enterprises and statutory bodies do not adopt or have not adopted their own rules and procedures which are consistent with these Regulations, they shall be subject to these Regulations at the end of the twelve months following their entry into force.

#### **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, including statutory appointments;
- (d) the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes, including food aid;
- (e) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property;
- (f) the supply of military equipment; works, supplies and services directly related to military equipment; or works and services for specifically military purposes;
- (g) contracts when they are declared to be secret, when their performance shall be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the

Kingdom of Tonga or when the protection of the essential interests of the Kingdom so requires.

## **PART 2 – INSTITUTIONAL ARRANGEMENTS**

### **5 Establishment of the 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 responsible for finance (Chairperson);
  - (b) CEO responsible for finance (Deputy Chairperson);
  - (c) Chief Secretary and Secretary to Cabinet;
  - (d) Solicitor General; and
  - (e) CEO responsible for revenue and customs.
- (3) The Procurement Division shall provide secretariat services to the Government Procurement Committee and shall, in addition to the responsibilities assigned to it under these Regulations, provide administrative support to the Government Procurement Committee and more particularly:
  - (a) give notice of meetings of the Government Procurement Committee;
  - (b) take accurate minutes of meetings of the Government Procurement Committee and provide copies to members of the Government Procurement Committee and to affected procurement officers;
  - (c) keep records of the business of the Government Procurement Committee;
  - (d) prepare the correspondence of the Government Procurement Committee; and
  - (e) carry out such other tasks in relation to procurement as are assigned by these Regulations or the Government Procurement Committee.

## **6 Operation of the Government Procurement Committee**

- (1) The Government Procurement Committee shall meet for the dispatch of business at such time and place as the Chairperson may decide but shall meet at least once every month.
- (2) At any meeting of the Government Procurement Committee where he or she is present, the Chairperson shall preside and, in his or her absence, the Deputy Chairperson shall exercise the functions of the Chairperson.
- (3) The quorum at a meeting of the Government Procurement Committee shall be three.
- (4) Each member shall have one vote but in the case of an equality of votes, the Chairperson shall have a casting vote.
- (5) Notwithstanding sub-regulation 6(1), the Minister may request the Government Procurement Committee to convene an urgent meeting to deal with a matter of national importance and requires urgent attention.
- (6) The Government Procurement Committee may at any time co-opt any person to provide special or additional technical knowledge or advise or otherwise assist the Government Procurement Committee at any of its meetings but the person co-opted shall not vote on any matter for decision by the Government Procurement Committee.
- (7) All acts, matters or things authorized or required to be done by the Government Procurement Committee shall be decided at a meeting where a quorum is present and the decision is supported by the votes of at least three members, including the Chairperson.
- (8) Any proposal circulated among all members and agreed to in writing by at least 3 members, including the Chairperson shall be of the same force or effect as a decision made at a duly constituted meeting of the Government Procurement Committee and shall be incorporated in the minutes of the next succeeding meeting of the Government Procurement Committee.
- (9) The Government Procurement Committee shall cause minutes of all its meetings to be taken by the secretary to the Committee and signed by the Chairperson and kept in the proper form as a public document.
- (10) The Government Procurement Committee may, for the discharge of its functions appoint staff and committees of the Government Procurement Committee comprising members of the Government Procurement Committee or non members or both and may assign to them functions as the Government Procurement Committee may determine, save and except that a committee comprised entirely of non-members may only advise the Government Procurement Committee.

- (11) Subject to these Regulations, the Government Procurement Committee shall regulate its meetings and procedure as it thinks fit.
- (12) A member of the Government Procurement Committee who has any interest, direct or indirect, in any matter to be considered by the Government Procurement Committee, shall disclose the nature of his interest to the Government Procurement Committee and such disclosure shall be recorded in the minutes of the Government Procurement Committee and such member shall not take part in any deliberation or decision of the Government Procurement Committee relating to that matter, and a member who contravenes this sub-section shall be guilty of misconduct and liable to be removed from the Government Procurement Committee. The Government Procurement Committee, without the disclosing member, may determine in writing that the disclosure does not disqualify the member from sitting on a particular matter.

## 7 Functions of the Government Procurement Committee

- (1) 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, on the advice of the Procurement Division, the consistency with these Regulations of procurement rules and procedures adopted by public enterprises and statutory bodies;
  - (c) issue standard forms of contracts and standard bidding documents prepared by the Procurement Division for mandatory use by all procurement units;
  - (d) maintain and make public on its website a list of contractors, suppliers, service providers and consultants debarred in accordance with Part 10; and
  - (e) 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.
- (2) In addition, for those procurements with a value exceeding \$100,000, the Government Procurement Committee shall review the bidding process and issue a **“Letter of No-objection”** to the contracting entity, prior to the issuance of the Notification of Award. In so doing, the Government Procurement Committee shall review the compliance of the contract award procedure leading to that decision with these Regulations

but, to the extent that the Government Procurement Committee does not accept the recommendation of the Evaluation Committee, it shall do so only on the basis of written reasons.

- (3) 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.

## **8 Procurement Division**

- (1) There is hereby established a Procurement Division under the overall direction of the CEO.
- (2) The Head of the Procurement Division shall have such officers as are required for the efficient performance of the tasks of the Division.
- (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) for all contracts where the estimated contract value exceeds \$7,500 but remains below \$ 10,000, receive, review and endorse the procurement proposal submitted by the procurement unit of the contracting entity within 3 working days of receipt, subject to the timely submission by the Procurement Unit of the contracting entity of any additional information required.
  - (b) 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;
  - (c) with the approval of the GPC, issue manuals, technical guidelines and instructions necessary to implement these Regulations and give, on request, advice and assistance to contracting entities without, however, diminishing the responsibility of a contracting entity and the Procurement Division shall not get involved in, or

- provide opinion on, any specific procurement or contract award decision;
- (d) prepare standard documents and templates to be used in connection with public procurement;
  - (e) 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;
  - (f) prepare appropriate templates for contracting entities for maintaining records and preparing reports and establishing a reporting mechanism enabling it to monitor procurement system performance;
  - (g) 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;
  - (h) ensure the publication on such website of such documents as are required to be published by the contracting entities under these Regulations including, but not limited to, annual and proposed procurement plans, procurement notices, contract award notices and lists of debarred contractors, suppliers, service providers and consultants;
  - (i) 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;
  - (j) establish and maintain secretariat support to the Government Procurement Committee;
  - (k) organise and provide secretariat and logistical support to the Independent Expert appointed pursuant to Part 11;
  - (l) arrange for the compilation and publication of the decisions of the Independent Expert in an appropriate format; and
  - (m) provide to the Government Procurement Committee an opinion on the consistency with these Regulations of any procurement rules and procedures submitted by public enterprises and statutory bodies to the Committee for approval under Regulation 3(4).

## 9 Procurement Units

- (1) A procurement unit shall be established in each contracting entity to carry out procurement activities.
- (2) The head of the contracting 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 contracting 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 contracting entity decides that there is insufficient procurement capacity within the procurement unit, all procurement may be carried out by the Central Procurement Unit, established under regulation 10, on behalf of the contracting entity.
- (5) Contracting 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 Evaluation Committee

- (1) Evaluation Committees shall be appointed by the Head of the contracting entity for all contracts whose value exceeds \$ 7,500. In addition to the obligatory membership of a representative of the appropriate Procurement Unit (either of the Procurement Unit or of the contracting entity or the Central Procurement Unit), the Evaluation Committee shall be composed of a minimum of three further members which shall include:
  - (a) the officer responsible for preparing the requirement/technical specification;
  - (b) the financial officer of the contracting entity; and
  - (c) other members to provide technical, legal or commercial expertise, as appropriate.
- (2) The representative of the appropriate Procurement Unit shall be a non-voting member.
- (3) The Evaluation Committee shall include skills, knowledge and experience relevant to the procurement requirement, which may include:
  - (a) technical skills relevant to the procurement requirement;



- (b) end user representation;
  - (c) procurement and contracting skills;
  - (d) financial management or analysis skills; or
  - (e) legal expertise.
- (4) Members of the Evaluation Committee shall sign a declaration of impartiality and confidentiality.

## **11 Establishment of Central Procurement Unit**

- (1) A Central Procurement Unit shall be established under the direction of the Procurement Division:
- (a) to carry out any procurement if so requested under regulation 9(4);
  - (b) to carry out the procurement on behalf of all contracting entities where the estimated value of the proposed procurement contract exceeds \$ 10,000;
  - (c) to carry out centrally, the procurement of common use items for the benefit of all contracting entities .
- (2) Where not provided by contracting entities, 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 provided by the Procurement Division.
- (3) In exercising its functions under sub-regulation (1)(c), the Central Procurement Unit shall organise the purchase of common- use items either under individual contract or framework contract arrangements on behalf of selected or all contracting entities .
- (4) When conducting procurement under this section, the Central Procurement Unit shall follow the procurement procedures set down in these Regulations.

## **PART 3 – RESPONSIBILITIES AND APPROVALS**

### **12 Contracting Entity**

- (1) Subject to the provisions of these Regulations, the Head of the contracting entity shall be responsible for procurement with the funds at its disposal.

- (2) In particular, the Head of the contracting entity shall:
  - (a) approve the annual procurement plan and ensure its dispatch to the Procurement Division in accordance with the provisions of regulation 18(3);
  - (b) approve procurement proposal and ensure its dispatch to the Procurement Division in accordance with the provisions of regulation 19(3);
  - (c) approve the bid evaluation report and contract award recommendation;
  - (d) issue the letter of award to the successful bidder and inform unsuccessful bidders of the result;
  - (e) sign the procurement contract only upon endorsement of the Procurement Division where required; and
  - (f) in respect of all procurement, satisfy himself that these Regulations have been respected.

### **13 Procurement Unit of Contracting Entity**

- (1) The procurement unit shall be responsible for
  - (a) overall procurement planning on behalf of the contracting entity and shall submit the annual procurement plan to the head of the contracting entity for approval;
  - (b) preparing, in cooperation with the end-user department(s) procurement proposals of the contracting entity in respect of each procurement in accordance with the templates issued by the Procurement Division;
  - (c) preparing the draft contract documents in accordance with the templates issued by the Procurement Division, seeking advice and guidance from the Central Procurement Unit where appropriate;
  - (d) ensuring the release of the performance security in accordance with the terms of the contract.
- (2) Where the estimated contract value exceeds \$ 7,500.00, the procurement unit shall forward the procurement proposal to the Central Procurement Unit and it shall be endorsed by the Head of the Procurement Division prior to placing a contract.
- (3) Where the estimated contract value does not exceed \$ 10,000, the procurement unit shall:
  - (a) prepare all requests for quotations and bidding documents in accordance with the templates issued by the Procurement Division;

- (b) publish and dispatch requests for quotation;
  - (c) receive and safeguard quotations;
  - (d) respond to requests for clarification from bidders;
  - (e) organize and record site visits, if any;
  - (f) prepare the evaluation report for the quotations for approval by the head of the contracting entity;
  - (g) administer and implement purchase orders and, in doing so, seek the assistance of the Central Procurement Unit where appropriate;
  - (h) seek the approval of the Central Procurement Unit for any proposed variations or amendments to the purchase order;
  - (i) maintain the procurement file with complete records; and
  - (j) keep a full record of all procurement carried out to be submitted in a summary report to the Procurement Division on a quarterly basis.
- (4) Where the estimated contract value exceeds \$ 10,000, the procurement unit shall submit the procurement proposal to the Central Procurement Unit which shall carry out the procurement process in close corporation with the Procurement Unit of the contracting entity.

#### **14 Operation of Central Procurement Unit**

- (1) For all contracts where the estimated contract value exceeds \$ 10,000, the central procurement unit shall:
- (a) based on the procurement proposal and other information provided by the Procurement Unit of the contracting entity, prepare all requests for quotations, invitations to bid and bidding documents in accordance with the templates issued by the Procurement Division;
  - (b) publish and dispatch requests for quotation and invitations to bid;
  - (c) receive and safeguard quotations, bids and applications to pre-qualify;
  - (d) respond to requests for clarification from bidders, seeking the assistance of the procurement unit of the contracting entity where appropriate;
  - (e) organize and record pre-bid meetings and/or site visits, if any, and seeking the assistance of the procurement unit of the contracting entity where appropriate;
  - (f) conduct the opening of bids;

- (g) prepare the evaluation report for the bids for approval by the head of the contracting entity;
  - (h) seek approval of the proceedings from the Procurement Division which shall be provided within ten working days, subject to the timely submission by the Central Procurement Unit of the contracting entity of any additional information required;
  - (i) publish the contract award notice;
  - (j) maintain complete records using appropriate tools provided by the Procurement Division.
- (2) Where the estimated contract value exceeds \$100,000, the central procurement unit shall, following approval of the bid evaluation report by the head of the contracting entity, submit the file to the Government Procurement Committee for approval.

## **15 Evaluation Committee**

The duties of the Evaluation Committee shall include

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

## **PART 4 – PROCUREMENT PREPARATION AND PLANNING**

### **16 Procurement preparation**

- (1) The contracting entity shall ensure that adequate funds are budgeted and allotted prior to initiating procurement proceedings including, but not limited to, any funds required for publication of notices.
- (2) Notwithstanding sub-regulation (1), a contracting entity may initiate procurement proceedings, up to, but not including contract award, prior to allotting the funds required, where this is necessary in order to meet the objectives of the procurement and comply with the procurement plan. In this case:

- (a) it shall obtain the prior written approval of the CEO Ministry of Finance and National Planning; and
  - (b) the fact that funds have not yet been allotted shall be clearly stated in the bidding documents which shall also indicate the expected source of funds and when they are expected to be allotted.
- (3) 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.
- (4) A procurement unit shall only use those standard bidding documents produced and issued by the Procurement Division for procurement under these Regulations.
- (5) Where a contracting entity initiates procurement proceedings for a multi-year contract, which will commit the contracting entity to make payments in subsequent fiscal years, the contracting entity shall:
  - (a) obtain the approval of the CEO Ministry of Finance and National Planning, prior to contract award;
  - (b) ensure that funds for the current fiscal year are budgeted and allotted; and
  - (c) ensure that funds for future fiscal years are included in budgets for subsequent fiscal years and reported to the Ministry of Finance, without prejudice to a reservation by the contracting entity in the contract of the right to cancel subsequent years of the contract in the event the necessary funding is not allocated in the budget.

## **17 Planning procurements**

- (1) Contracting 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, contracting entities shall aggregate procurement requirements in order to achieve economies of scale.
- (3) Before commencing a procurement process, a contracting 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.

## **18 Annual procurement plan**

- (1) Contracting 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, services or consultancy services will be procured by the Central Procurement Unit; 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 CEO Ministry of Finance and National Planning.
- (3) Contracting entities shall prepare the annual plan in accordance with the template provided by the Procurement Division and shall forward the completed template to the Procurement Division for publication, as appropriate, on the Procurement Division's website.

## **19 Procurement Proposal**

- (1) The contracting entity shall prepare a procurement plan in the form of a procurement proposal for each individual procurement requirement above \$ 7,500. The procurement proposal shall be prepared by the Central Procurement Unit for all contracts with an estimated value exceeding \$ 10,000.

- (2) The procurement proposal shall include all the information necessary to enable bidders to submit bids such as, as appropriate:
  - (a) a description of the requirement, including the schedule required for delivery, implementation or completion of the goods, works, services or consultancy 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 6 or Part 9, and a justification for the use of any method other than competitive bidding or request for proposals for consultant services;
  - (d) the source of funding; and
  - (e) any other relevant information.
- (3) Contracting entities shall prepare the procurement proposal in accordance with the template or templates provided by the Procurement Division and shall forward the completed template to the Procurement Division for publication, as appropriate, on the Procurement Division's website.

## **20 Estimated cost and artificial division of procurements**

- (1) The calculation of the estimated value of a procurement contract shall be based on the total amount payable as estimated by the contracting entity, including any form of option and any renewals of the contract.
- (2) This estimate shall be valid at the moment at which the procurement notice is sent, as provided for in Regulation 38, or, in cases where such notice is not required, at the moment at which the contracting entity commences the contract award procedure.
- (3) With regard to works contracts, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting entity.
- (4) With regard to services contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:
  - (a) insurance services: the premium payable and other forms of remuneration;
  - (b) design contracts: fees, commission payable and other forms of remuneration.

- (5) A contracting entity shall not artificially divide an object of procurement with the intention of avoiding the financial thresholds applied in these Regulations for the purposes of determining the appropriate procurement method.

## **21 Division into lots**

- (1) Notwithstanding the prohibition of regulation 20, contracting 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 contracting 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-(c)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 contracting 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 contracting entity.
- (4) The estimated value of a contract divided into lots shall be the total value of all the lots to be procured.

## **22 Centralized procurement of common use items**

- (1) The Central Procurement Unit may, pursuant to its responsibilities under regulation 11(3), organize the central procurement of common-use items on behalf of selected or all contracting entities.
- (2) In so doing, the Central Procurement Unit shall:
  - (a) compile and/or utilize lists of common-use items identified in sub-regulation (3);



- (b) prepare a consultation document to be despatched to each contracting entity not less than three months before the end of the fiscal year preceding the year in which the intended procurement will take place with a view to identifying the annual aggregated requirements for the centralization of procurement in accordance with sub-regulation (3);
  - (c) cause the contracting entities to provide an indication pursuant to regulation 18(1)(f) of the goods, works, services or consultancy services that fall within the categories of goods, works, services or consultancy services established by the Central Procurement Unit that may be procured by way of centralized procurement;
  - (d) finalize the procurement plan of the Central Procurement Unit for the centralized procurement of goods, works, services or consultancy services and distribute to the concerned contracting entities not later than one month before the deadline for the submission of annual procurement plans to the Ministry of Finance.
- (3) The Central Procurement Unit shall aggregate procurement requirements, where appropriate, in order to achieve economies of scale. In deciding where aggregation is appropriate, the Central Procurement Unit shall consider all relevant factors, including:
- (a) which items are of a similar nature and likely to attract the same potential bidders;
  - (b) when items will be ready for bidding and when delivery, implementation or completion is required;
  - (c) the optimum size and type of contract to attract the greatest and most responsive competition, taking into account the market structure for the items required;
  - (d) which items will be subject to the same bidding requirements and conditions of contract;
  - (e) the potential to realise savings in time or transaction costs or to facilitate contract administration by the contracting entity; and
  - (f) any other special factors related to the specific item.
- (4) Contracting entities which directly purchase works, goods and/or services from or through the Central Procurement Unit in accordance with sub-regulation (1) shall be deemed to have complied with these Regulations insofar as the Central Procurement Unit has complied with them.

## PART 5 – PROCUREMENT REQUIREMENTS AND QUALIFICATION CRITERIA

### 23 Determining the object of procurement

- (1) The contracting 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.
- (3) The statement of a contracting entity's requirements 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.
- (4) References to standards shall where possible be references to international standards or national standards incorporating international standards.
- (5) The description of goods shall include, where appropriate:
  - (a) a list of goods and the quantities required, including any incidental services or works, such as delivery, installation, commissioning, maintenance, repair, user training or the provision of after-sales services;

- (b) a delivery and completion schedule;
  - (c) specifications; and
  - (d) drawings.
- (6) The description of works shall include, where appropriate:
- (a) a description of the scope of the works, which may include, but not be limited to design, construction or installation of equipment;
  - (b) the purpose and objectives of the works;
  - (c) the duration or completion schedule for the works;
  - (d) details of the supervision requirements, working relationships and other administrative arrangements;
  - (e) drawings and/or design requirements;
  - (f) specifications and standards;
  - (g) bill of quantities or equivalent; and
  - (h) inspection and testing requirements.
- (7) The description of services shall include, where appropriate:
- (a) a background narrative to the required services;
  - (b) the objectives of the services and targets to be achieved;
  - (c) a list of specific tasks or duties;
  - (d) deliverables or outputs for the assignment;
  - (e) the role, qualifications or experience required for any key staff;
  - (f) management and reporting lines for the supplier, including administrative arrangements and reporting requirements;
  - (g) any facilities, services or resources to be provided by the contracting entity ;
  - (h) inspection or quality testing requirements or indicators of successful performance; and
  - (i) the duration or completion schedule.
- (8) The description of consultancy services to be procured under Part 9 shall include, where appropriate
- (a) terms of reference (TOR) defining the objectives, goals, and scope of the assignment;
  - (b) if the objectives include transfer of knowledge or training, these should be specifically outlined along with details of numbers of staff to be trained;
  - (c) background information, including a list of any existing relevant studies and basic data;

- (d) a list the services and surveys necessary to carry out the assignment;
- (e) the deliverables or expected outputs for the assignment;
- (f) the role, qualifications or experience required for any key staff;
- (g) the management and reporting lines for the service provider, including administrative arrangements and reporting requirements;
- (h) any facilities, services or resources to be provided by the contracting entity;
- (i) indicators of successful performance; and
- (j) the duration of the assignment in terms of man months and period of completion.

#### **24 Use of brand names**

No requirement or reference is to be made in the requirements 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.

#### **25 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 26 to 27, provided always that they are not nationals of a country with which commercial relations has been suspended and/or prohibited either

- (i) in accordance with international agreements to which the Kingdom of Tonga is a party or
- (ii) by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations.

#### **26 Permitted bidder 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 contracting 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 qualifications.
- (4) The contracting entity shall not impose any requirement as to qualifications in the invitation to bid other than a requirement specified in this regulation.

## **27 Evidence of Qualification criteria**

- (1) Subject to sub-regulation 26(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, including evidence of past performance;
  - (b) financial resources, equipment and other physical facilities;
  - (c) personnel;
  - (d) managerial capability;
  - (e) possession of the necessary professional and technical qualifications and competence;
  - (f) samples, descriptions and/or photographs;
  - (g) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards; and
  - (h) 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 not older than 6 months from the date of submission 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 have 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 their professional conduct;
    - (ii) relating to the making of false statements or misrepresentations as to his their qualifications to enter into a procurement contract;
    - (iii) involving dishonesty; or
    - (iv) under anti-corruption legislation; or
  - (b) or debarred by administrative or judicial proceedings from participating in procurements, whether in the Kingdom or elsewhere.

Bidders may be required to provide evidence of their integrity including, if appropriate, for any director or any person having powers of representation, decision or control in respect of the bidder, as specified in the bidding document.

- (6) In respect of sub-regulations (3) and (5), such evidence may comprise the production of
  - (a) documents issued by a competent judicial or administrative authority in the country of origin of the tenderer showing that

- these requirements have been met, including extracts from ‘judicial records’ where applicable, or
- (b) where the country in question does not issue such documents, of a declaration on oath or solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin of the tenderer.

## **PART 6 – METHODS OF PROCUREMENT**

### **28 Selection of procurement method**

- (1) Contracting 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.
- (3) Consultant services shall be procured by the request for proposals method in accordance with the provisions contained in Part 9 of these Regulations.

### **29 International Procurement**

- (1) When the estimated contract amount is higher than \$ 150,000 in the case of goods or services or higher than \$ 1,000,000 in the case of works:
  - (a) any procurement notice shall be published in accordance with regulation 38(2);
  - (b) contracting 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;

- (c) 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;
- (d) general and special conditions of contract shall be of a kind generally used in international trade; and
- (e) technical specifications shall, to the extent compatible with national requirements, be based on international standards.

This regulation applies to competitive bidding, selective bidding, restricted bidding and to the procurement of consultancy services under Part 9.

### **30 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 38 to which equal access shall be provided to all eligible and qualified bidders without discrimination.
- (2) The competitive bidding method shall be used for all contracts whose value is equal to or above:
  - (a) \$ 100,000 in the case of works; and
  - (b) \$ 50,000 in the case of goods and services.
- (3) Methods of procurement other than competitive bidding are permitted only in the circumstances identified in regulations 31 to 35.
- (4) When a method of procurement other than competitive bidding is used, the contracting 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.

### **31 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 contracting 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 contracting 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) the end of the first stage, the contracting 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 contracting 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.

## **32 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 25 to 27.
- (3) In the pre-qualification stage the:
  - (a) contracting 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) contracting entity shall in accordance with regulation 53 41 respond promptly to any request by a bidder for clarification of the prequalification documents that is received by the contracting entity within a reasonable time prior to the deadline for the submission of applications to prequalify.
- (4) The contracting 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 contracting 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 contracting 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 single stage competitive bidding method apply.

### **33 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 contracting 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 contracting 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 contracting entity uses restricted bidding in accordance with sub- regulation (1)(b), it shall also publish a notice, in accordance with regulation 38 of these Regulations, which shall state:
- (a) the name of the contracting entity and the nature of the procurement requirement;
  - (b) that the contracting entity is using restricted bidding on the grounds enumerated in this regulation; and
  - (c) the deadline for any requests to participate.
- (5) In all other respects, the provisions of the single stage competitive bidding method apply.

### **34 Limited Bidding Method**

- (1) Contracting entities may use the limited bidding method (or direct sourcing when only one bidder is available) 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 contracting 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 contracting entity to procure equipment or services not meeting requirements of inter- changeability 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 contracting entity;
  - (e) when a contracting 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 contracting 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 \$ 7,500.
- (2) Under this method:
- (a) the contracting 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 bidders;
  - (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.

### **35 Request for Quotations Method**

- (1) The request for quotations method may be used by any contracting 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 contracting entity; and
- (b) when the estimated value of the procurement is between :
  - (i) \$ 7,500 and \$ 100,000 in the case of works, and
  - (ii) \$ 7,500 and \$ 50,000 in the case of goods and services.
- (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) The written request for quotations shall contain a clear statement of the requirements of the contracting 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) Quotations shall be submitted in writing and may be submitted electronically.
- (6) A purchase order shall be placed with the bidder that provided the lowest- priced quotation meeting the delivery and other requirements of the contracting entity.
- (7) 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 7 – PROCUREMENT PROCEEDINGS

### 36 Form of communication

Communications between bidders and contracting entities shall be in writing and shall be in either the English or Tongan language.

**37 Invitations to bid**

- (1) The Limited Bidding Method shall be conducted in accordance with regulation 34.
- (2) The Requests for Quotations Method shall be conducted in accordance with regulation 35.
- (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 33(1)(b).

**38 Publication of procurement notices**

- (1) The notice of invitation to bid or to pre-qualify, as the case may be, shall be:

published in at least one national newspaper which shall be of wide enough circulation to reach

  - (a) 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 contracting 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 contracting 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 contracting entity and the contact details of the person from whom further information can be obtained;
- (b) description 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.

### **39 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) 10 days for Requests for Quotation (regulation 35);
  - (b) 30 days for competitive bidding (regulation 30);
  - (c) 45 days for international competitive bidding (regulation 29);
  - (d) 20 days for selective and restricted bidding (regulations 32 and 33);
  - (e) 30 days for selective bidding, where the bidding is international; and
  - (f) 30 days for restricted bidding under regulation 33(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 contracting 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 contracting entity; and
- (d) any restrictions relating to the time the goods, works or services are required.

#### **40 Bidding documents**

- (1) A contracting 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 contracting 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.
- (3) The price that may be charged for the bidding documents shall reflect only the cost of printing and distributing the documents and, where bidding documents are delivered by electronic means, they shall be free of charge.
- (4) 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 description 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) where not already determined through pre-qualification in the case of 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 (e)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 in accordance with the provisions of Regulation 56;
  - (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.
- (5) For the purposes of subsequent communications, the contracting entity shall make a record of the name, postal address, telephone and fax number and email address of all bidders to whom an invitation to bid is issued together with the details of the relevant contact person and shall file a copy of it in the procurement records.

#### **41 Clarifications**

- (1) Clarifications of the bidding documents may be requested in writing by any bidder up to 5 days prior to the deadline for the submission of bids.
- (2) The contracting entity shall respond promptly and in writing to any request by a bidder for clarification of the bidding documents and in any

event no later than 2 days prior to the deadline for the submission of bids or proposals.

- (3) Responses to requests for clarification shall be communicated simultaneously and in writing to all bidders participating in the procurement proceedings.
- (4) Contracting entities may make modifications to the bidding documents at any time prior to the deadline of the submission of bids.
- (5) If necessary to allow bidders to do so, the contracting entity shall extend the deadline for submission of bids so as to allow bidders an opportunity to take modifications into account in preparing their bids.

## **42 Alternative bids**

- (1) Alternative bids shall not be permitted, except where specifically indicated in the bidding document.
- (2) The contracting 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 contracting 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.

## **43 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 GPC

through instructions or otherwise, 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 GPC may review these percentages annually.

#### **44 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 contracting entity, after obtaining the approval of the Head of a contracting 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 contracting entity shall upon request by the bidder communicate the grounds for rejecting a bid.

- (5) A contracting 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 contracting 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.

#### **45 Unsuccessful procurement**

- (1) Where no responsive bids are received or procurement proceedings are otherwise unsuccessful, the contracting 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 39(5);
  - (b) the requirements of the bidding documents and the terms and conditions of the proposed contract were clear, non-discriminatory, proportionate, reasonable and not so excessive as to deter competition;
  - (c) 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 contracting 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 8 – BID SUBMISSION, BID OPENING, EVALUATION AND AWARD IN COMPETITIVE BIDDING**

### **46 Submission of bids or applications to pre-qualify**

- (1) A bid or application to pre-qualify, as the case may be, shall be submitted in writing, duly signed and in a sealed envelope.
- (2) Bids or applications 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.
- (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.

### **47 Bid security**

- (1) A contracting 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 maybe up to three percent of the estimated value of the contract.
- (4) In determining the amount of bid security required, the contracting 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 contracting entity, which may be:
    - (i) a certified Bank cheque;
    - (ii) a bank guarantee; or
    - (iii) any alternative form acceptable to the contracting 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 shall be forfeited by the bidder 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 contracting 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.

**48 Amendment or withdrawal of bid**

- (1) A bidder may amend or withdraw a bid by submitting a notice of amendment or withdrawal to the contracting 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 "Withdrawal of Bid" and shall comply with any additional directions, if any, in the invitation to bid.

**49 Bid opening**

- (1) Bids shall be opened by the contracting 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 contracting entity's examination and evaluation of the bids.

**50 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, contractors, service providers or consultants 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.

## 51 Examination and evaluation of bids

- (1) The purpose of bid evaluation process shall be to determine which of the bids received are responsive and thereafter compare the responsive bids against each other to select the best value for money bid in accordance with section 56.
- (2) Following the opening of bids, the contracting entity shall first examine the bids in order to determine whether the bids are complete and responsive to the requirements of the bidding documents. This preliminary examination will determine that:
  - (a) the bid has been submitted in the correct format;
  - (b) any required bid security has been submitted, in the correct form and amount and valid for at least the period required;
  - (c) the bid has been submitted without material reservations or deviations from the terms and conditions of the bidding document;
  - (d) the bid has been correctly signed and authorised;
  - (e) the correct number of copies of the bid have been submitted;
  - (f) the bid is valid for at least the period required;
  - (g) all key documents and information have been submitted;
  - (h) any required samples have been submitted; and
  - (i) the bid meets any other key requirements of the bidding document.
- (3) Bids are responsive where they are found to be ‘substantially responsive’.
- (4) Bids are substantially responsive where:
  - (a) the bidders fulfil the conditions of eligibility and qualification, if any laid down in the bidding documents;
  - (b) the bids comply with the terms and conditions set out in the bidding documents, and are complete with the required information and duly filled in forms prescribed in the bidding documents; and
  - (c) the bids respond to the terms, conditions and technical specifications detailed in the bidding documents without “material deviation or reservation”.
- (5) A material deviation or reservation is one:
  - (a) which affects in any substantial way the scope, quality or performance of the assignment under bid; or



- (b) which limits in any substantial way and inconsistently with the bidding documents, the contracting entity's rights or the bidder's obligations under the contract; or
  - (c) whose rectification would affect unfairly the competitive position of other bidders presenting responsive bids
- (6) Any deviations which are considered to be material deviations shall result in rejection of the bid and such bids shall not be subject to technical evaluation. Deviations which are considered to be non-material shall not result in rejection of the bid.
- (7) 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 clearance certificates as stipulated in the bidding documents, 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.
- (8) In selective bidding, a bid received from any entity other than the prequalified bidders shall be rejected and excluded.
- (9) 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.
- (10) The contracting entity may, in accordance with Regulation 41, 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.
- (11) 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.
- (12) In selective bidding, the qualifications of the lowest evaluated bidder shall be verified again to take account of any change since the original prequalification.

**52 Correction of Non-Conformities, Errors and Omissions**

- (1) Where a bid is substantially responsive, the contracting entity may waive, clarify or correct any non-conformity, error or omission, which does not constitute a material deviation.
- (2) The non-conformity, error or omission shall be quantified in monetary terms to the extent possible and taken into account in the financial evaluation and comparison of bids.
- (3) The contracting entity may correct purely arithmetical errors in bids in accordance with the procedure stated in the bidding document.
- (4) Bidders shall be notified of any arithmetic corrections and requested, in writing, to agree to the correction.
- (5) Any Bidder who does not accept the correction of an arithmetical error shall be rejected and its bid security may be forfeited.

**53 Clarification of bids**

- (1) The contracting entity may seek clarification from a bidder of its bid.
- (2) The request and the clarification shall only be in writing.
- (3) The request for clarification shall not seek and the bidder shall not be permitted to:
  - (a) amend its bid price, except to accept the correction of arithmetic errors;
  - (b) change the substance of the bid; or
  - (c) substantially alter anything which is a deciding factor in the evaluation.
- (4) Any clarification received which is not in response to a request from the contracting entity shall not be taken into account.
- (5) The failure of a bidder to reply to a request for clarification may result in the rejection of its bid.

**54 Disqualification**

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

## 55 Technical Responsiveness

- (1) The Evaluation Committee or Procurement Unit as the case may be shall assess technical responsiveness by comparing each bid to the technical requirements of the description of goods, works or services in the bidding document, to determine whether the bids are substantially responsive.
- (2) This assessment shall determine whether bids are, or are not, substantially responsive to the technical standard defined in the bidding document and shall not be used to assess the relative quality of bids or to award points in any way.
- (3) The factors taken into account shall be those indicated in the bidding document only and may include, but not be limited to:
  - (a) conformity to specifications, standards, drawings or terms of reference, without material deviation or reservation;
  - (b) satisfactory understanding of an assignment, as demonstrated by any methodology or design; or
  - (c) suitable staffing or arrangements for supervision or management of an assignment.
- (4) The assessment shall not take into account any requirements which were not included in the bidding documents.
- (5) Any material deviations shall result in rejection of the bid and such bids shall not be subject to further evaluation.
- (6) Non material deviations may be corrected in accordance with Regulation 52 or clarified in accordance with Regulation 53.

## 56 Evaluation of bids

- (1) Bids will be evaluated on the basis of best value for money. The criteria on which the contracting entities shall assess best value for money shall be either:
  - (a) the lowest evaluated price only, or
  - (b) a combination of price together with various award criteria linked to the subject-matter of the contract in question.
- (2) For the purposes of comparison, bid prices shall first be evaluated. The evaluated price for each bid shall be determined by:
  - (a) taking the bid price, as read out at the bid opening;
  - (b) correcting any arithmetic errors, in accordance with the methodology stated in the bidding document;

- (c) making adjustments for any non-material non-conformity, error or omission in accordance with regulation 52;
  - (d) converting all bids to a single currency, using the currency and the source and date of exchange rate indicated in the bidding document; and
  - (e) applying any margin of preference indicated in the bidding document, in accordance with regulation 43.
- (3) When applying Regulation 56(1)(a), bids shall be compared by ranking them according to their evaluated price and determining the bid with the lowest evaluated price.
- (4) When applying Regulation 56(1)(b), in addition to price the award criteria to be applied include:
- (a) quality, including technical merit, functional characteristics, accessibility, social or environmental characteristics and trading and its conditions;
  - (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
  - (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion;
  - (d) cost-effectiveness based on life-cycle costing including costs relating to acquisition, costs of use, such as consumption of energy and other resources, maintenance costs, and end of life costs such as collection and recycling costs.
- (5) Non-price award criteria shall whenever possible be quantified in monetary terms or expressed in the form of pass or fail requirements and set out in full in the procurement notice or in the bidding documents. Where it is not possible to quantify those criteria in such terms, the procurement notice or the bidding documents shall either
- (a) specify the relative weighting which it gives to each of the criteria chosen to determine the best value for money, expressed by providing for a range with an appropriate maximum spread, or
  - (b) specify the criteria in descending order of importance.

**57 Application of domestic preference**

- (1) Where a domestic preference is applied pursuant to regulation 43, responsive bids shall, for the purposes of comparison, be classified in one of the following two groups:
  - (a) Group A: bids exclusively offering goods manufactured in Tonga where the bidder establishes to the satisfaction of the contracting entity that labour, raw material, and components from within Tonga will account for 30 percent or more of the EXW price of the product offered; and
  - (b) Group B: bids offering goods manufactured abroad that have been already imported or that will be directly imported.
- (2) All evaluated bids in each group shall be compared to determine the lowest in each group. Such lowest evaluated bids shall be compared with each other and if, as a result of this comparison, a bid from Group A is the lowest, it shall be selected for the award.
- (3) If as a result of this comparison, the lowest evaluated bid is a bid from Group B, the lowest evaluated bid from Group B shall be further compared with the lowest evaluated bid from Group A after adding to the evaluated price of goods offered in the bid from Group B, for the purpose of this further comparison only, an amount equal to the stated domestic margin of preference to the CIP bid price. The lowest evaluated bid determined from this last comparison shall be selected.

**58 Prohibition of negotiation**

- (1) Except as provided in sub-regulation (2)(b), there shall be no negotiation between the contracting 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 contracting 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 contracting 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.

**59 Contract award**

- (1) The contract shall be awarded to the bidder having submitted the bid providing the best value for money in accordance with section 56.
- (2) Prior to the expiry of the period of bid validity, the contracting 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 11.
- (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 \$ 10,000, 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 prior to the time for contract signature, the contracting entity shall accept the next ranked bidder from among the remaining bids that are in force, but in selecting the next ranked bidder, the contracting 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 contracting entity or a person delegated by him, and shall come into effect only when any endorsement or approval, as the case may be, required by these Regulations has been obtained in writing. Failure to obtain such endorsement or approval renders the person signing the contract personally liable for all obligations arising there under.
- (6) Contracts shall come into effect as stated in the Contract Agreement which shall state that no contract subject to endorsement and or approval under these Regulations shall come into effect until such endorsement or approval has been obtained in writing. Contract Agreements shall further state that conclusion of contracts in the absence of such endorsement or approval or otherwise in contravention of these Regulations shall be signed in the personal capacity of the head of the contracting entity who shall remain personally liable for all obligations arising there under.

**60 Performance security**

- (1) A contracting 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, such security to be provided prior to contract signature.

- (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 contracting 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 contracting 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 contracting 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 contracting 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 9 – PROCUREMENT OF CONSULTANCY SERVICES**

### **61 Request for proposals method**

- (1) The request for proposals method shall be used for the procurement of consultancy services.

- (2) For the purposes of procuring the services of a consultant, the contracting entity shall :
  - (a) seek expressions of interest by publishing a notice in a local newspaper of wide circulation ; and
  - (b) prepare a shortlist of 3 to 6 consulting firms, to the greatest extent feasible, comprising consultants of the same category and similar capacity and business objectives and the short-list shall be established from among those who have capacity to perform the required services, as demonstrated in their expressions of interest.
- (3) When the estimated value of the procurement exceeds \$ 150,000, in order to establish the short-list, the contracting 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 \$ 50,000, the short-list may be established from market knowledge or other sources of information but in the case of particularly complex assignments, 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 contracting entity including, in particular the:
  - (a) name and address of the contracting 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 contracting entity only after completion of the technical evaluation.

## 62 Methods of selection and conditions for use

- (1) The preferred evaluation methods 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 contracting 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 small assignments of less than \$ 7,500;
    - (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.

### **63 Evaluation of Proposals**

- (1) In respect of Quality and Cost Based Selection (QCBS), the evaluation of proposals shall be carried out in two stages: first the quality, and then the cost. Evaluators of technical proposals shall not have access to the financial proposals until the technical evaluation is concluded.
- (2) In evaluating the quality, the contracting entity shall evaluate each technical proposal, taking into account several criteria:
  - (a) the consultant's relevant experience for the assignment,
  - (b) the quality of the methodology proposed,
  - (c) the qualifications of the key staff proposed, and
  - (d) transfer of knowledge, if required in the TOR.
- (3) Each criterion shall be marked on a scale of 1 to 100 and then the marks shall be weighted to become scores. The weights to be used shall be appropriate to the specific assignment and shall be set out in the bidding documents.
- (4) A proposal shall be considered unsuitable and shall be rejected at this stage if it does not respond to important aspects of the TOR or it fails to achieve a minimum technical score specified in the RFP.
- (5) The consultants whose technical proposals do not meet the minimum qualifying mark or are considered nonresponsive to the RFP and TOR shall be notified that their financial proposals will not be evaluated and their financial proposals shall be returned to them unopened after the signature of the contract.
- (6) The contracting entity shall simultaneously notify the consultants that have secured the minimum qualifying mark, the date, time, and place set for opening the financial proposals. The opening date shall be defined allowing sufficient time for consultants to make arrangements to attend the opening of the financial proposals.
- (7) The financial proposals shall be opened publicly in the presence of representatives of the consultants who choose to attend and the name of the consultant, the technical points, and the proposed prices shall be read aloud and recorded when the financial proposals are opened.

- (8) In considering the financial proposals, any arithmetical errors shall be corrected. For the purpose of comparing proposals, the costs shall be converted to a single currency as stated in the RFP.
- (9) The proposal with the lowest cost may be given a financial score of 100 and other proposals given financial scores that are inversely proportional to their prices. Alternatively, a directly proportional or other methodology may be used in allocating the marks for the cost. The methodology to be used shall be described in the RFP.
- (10) The total score shall be obtained by weighting the quality and cost scores and adding them. The weight for the “cost” shall be chosen, taking into account the complexity of the assignment and the relative importance of quality. The weight for cost shall normally be 20 points out of a total score of 100. The proposed weightings for quality and cost shall be specified in the RFP. The firm obtaining the highest total score shall be invited for negotiations.
- (11) Negotiations shall include discussions of the TOR, the methodology, staffing, the contracting entity’s inputs and special conditions of the contract. These discussions shall not substantially alter the original TOR or the terms of the contract.
- (12) If the negotiations fail to result in an acceptable contract, the contracting entity shall terminate the negotiations and invite the next ranked firm for negotiations. The consultant shall be informed of the reasons for termination of the negotiations. Once negotiations are commenced with the next ranked firm, the contracting entity shall not reopen the earlier negotiations. After negotiations are successfully completed, the contracting entity shall promptly notify other firms on the short list that they were unsuccessful.
- (13) In respect of Selection under Fixed Budget (FBS), the RFP shall indicate the available budget and request the consultants to provide their best technical and financial proposals in separate envelopes, within the budget.
- (14) Evaluation of all technical proposals shall be carried out first as in the QCBS method. Then the priced proposals shall be opened in public and prices shall be read out aloud. Proposals that exceed the indicated budget shall be rejected.
- (15) The Consultant who has submitted the highest ranked technical proposal among the rest shall be selected and invited to negotiate a contract.
- (16) In respect of Least-Cost Selection (LCS), a minimum qualifying mark for the quality is established on the basis that all proposals above the minimum compete only on cost. The minimum qualifying mark shall be stated in the RFP.

- (17) Technical proposals are opened first and evaluated. Those securing less than the minimum qualifying mark are rejected and the financial proposals of the rest are opened in public.
- (18) The firm with the lowest price shall then be selected.
- (19) In respect of selection amongst Community Service Organisations (CSO), for assignments that emphasize participation and considerable local knowledge, the short list may comprise entirely CSO's.
- (20) In this event, the QCBS procedure shall be followed, and the evaluation criteria shall reflect the unique qualifications of CSO's, such as voluntarism, non-profit status, local knowledge, scale of operation, and reputation.
- (21) The contracting entity may select the CSO on a single-source basis, provided the criteria of sub-regulation 62(2)(c) are fulfilled.
- (22) In respect of the Selection of Individual Consultants (SIC), the contracting entity shall prepare the TOR, requesting information on the consultants' experience and competence relevant to the assignment, establish a short list, and select the Consultant with the most appropriate qualifications and references. The selected Consultant shall be asked to submit a combined technical-financial proposal and then be invited to negotiate the contract.

## **PART 10 – TRANSPARENCY AND INTEGRITY**

### **64 Bidder debriefing**

- (1) A contracting 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) Except in so far as they are identified, the debriefing shall not provide details of any other bids, other than information that is publicly available from bid openings or published notices.

**65 Contract award**

The Central Procurement Unit shall promptly publish, and in any event within one month from award, a notice of all procurement contract awards on the website of the Ministry of Finance and National Planning/Procurement Division.

**66 Records and reports of procurement activities**

- (1) The contracting entity shall maintain an individual record for each procurement requirement, which shall be marked with the relevant procurement reference number.
- (2) For all procurement activities above \$ 10,000, the Central Procurement Unit shall maintain an individual record for each procurement requirement, which shall be marked with the relevant procurement reference number.
- (3) The record shall contain the originals and copies, where appropriate, of all information, documents and communications related to that procurement proceeding and shall, to the extent that not already contained in the proposed procurement plan, 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) any requests for clarifications and any responses thereto;
  - (d) a statement of the reason for choice of a procurement method other than competitive bidding or request for proposals
  - (e) bid prices;
  - (f) a summary of the evaluation of bids;
  - (g) summary of any review proceedings, and the related decisions; and
  - (h) any other information required to be recorded under these Regulations.
- (4) The record shall be prepared and disclosed in a manner that avoids disclosure of proprietary commercial information.
- (5) 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.

- (6) 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.
- (7) Contracting entities shall submit report summaries on their procurement activities to the Procurement Division in accordance with templates issued by the Procurement Division.

## **67 Conduct of procurement officers**

- (1) Every officer responsible for any aspect of the procurement of a contracting 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 interests 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.

## **68 Conduct of bidders and contractors**

- (1) Bidders and contractors shall at all times abide by their obligations under these Regulations, procurement contracts and other instruments applicable to their conduct and activities related to procurement.
- (2) A bidder, or a contractor, shall not engage in or abet corrupt or fraudulent practices, including the offering or giving, directly or indirectly, of improper inducements, or the misrepresentation of facts, in order to influence a procurement process or the execution of a contract, including by inducing the commission of inappropriate acts; or

- (3) Bidders shall not engage in collusion, prior to or after bid submission, designed to allocate contracting entities among bidders, establish bid prices at artificial non-competitive levels or otherwise to deprive the contracting entity of the benefits of free and open competition.
- (4) A contracting entity shall reject a bid if the bidder offers, gives or agrees to give an inducement referred to in sub-regulation (2) and promptly notify the rejection to the bidder concerned to the relevant law enforcement authorities.
- (5) Bidders and contractors who engage in fraudulent and corrupt practices in connection with public procurement are subject to prosecution under the applicable criminal laws.

## **69 Offences by procurement officers**

Every officer involved in procurement who breaches any provisions of these Regulations commits a serious 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.

## **70 Debarment**

- (1) For the purpose of this regulation, a 'bidder' shall be a person wishing to participate in a tender, to provide quotations or proposals and may include any 'affiliate' of that person. An 'affiliate' shall mean business concerns, organizations or individuals which, directly or indirectly,
  - (a) either control or have the power to control the bidder, or
  - (b) is controlled by or may be subject to the control of the bidder.

For the purposes of this section, indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment or proposed debarment of a bidder which has the same or similar management, ownership, or principal employees as the bidder that was debarred or proposed for debarment.

- (2) Any person wishing to participate in an invitation to tender, to provide quotations or proposals in accordance with these regulations may be debarred for a specific period of time from future procurement opportunities invited under these Regulations where one of the offences identified in regulation 71 have been committed.
- (3) Where an alleged offence has been committed, the bidder shall be investigated by a Debarment Officer within the contracting entity

making the allegation. Where further action is justified, the Debarment Officer will refer the allegations to the Debarment Committee established by the Government Procurement Committee pursuant to the procedure set out in Schedule 1 of these Regulations.

- (4) 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, debar a person, as prescribed in Schedule 1 of these Regulations.

## **71 Grounds for debarment**

- (1) A person may be 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 on condition that such neglect or failure:
    - (i) has resulted in the termination of the contract by the contracting entity; or
    - (ii) has led to the imposition of liquidated damages or other remedies foreseen in the contract for such acts or omissions; or
    - (iii) has been identified in a judgment of a court of law in respect of a case brought by the contracting entity for breach of contract.
- (2) A person may also be 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.

## **72 No contract award**

No contracting entity shall award a contract to a bidder which has been debarred.

## **PART 11 – COMPLAINTS AND APPEALS**

### **73 Right to complain**

- (1) Subject to sub-regulations (2) and (3) 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 contracting entity by these Regulations, may seek review at any stage of the procurement proceedings.
- (2) An application for review:
  - (a) that concerns alleged improprieties in the invitations to bid or to pre-qualify which are apparent prior to bid opening, shall be entertained only if submitted prior to bid opening;
  - (b) that is made prior to the entry into force of a contract shall not be entertained unless the bidder has first lodged a complaint with the contracting entity in accordance with regulation 74;
  - (c) that is made after a procurement contract has entered into force shall be submitted directly to the Procurement Division in accordance with regulation 76.
- (3) No complaint to a contracting entity or application for review shall be entertained unless it identifies the specific act or omission alleged to contravene these Regulations and the bidding document.

### **74 Review by contracting 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 contracting entity.
- (2) Notwithstanding sub-regulation 73(2)(a), the Head of the contracting entity shall not entertain the complaint:

- (a) unless it was submitted within 14 days of when the bidder submitting it became aware of the
  - (b) circumstances giving rise to the complaint or when the bidder should have become aware of those circumstances, whichever is earlier;
  - (c) in any event within 10 days of the date of notification of the proposed award of the contract.
- (3) Unless the complaint is resolved by mutual agreement, the Head of the contracting entity shall:
- (a) suspend the procurement proceedings unless he is satisfied that urgent public interest considerations require the procurement to proceed and
  - (b) 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 contracting entity does not issue a decision within the 5 days stated in sub-regulation (3)(b), or if the complainant is not satisfied with the decision the complainant may submit a complaint to an Independent Expert under regulation 76.
- (5) Complaints under sub-regulation (4) shall not be heard unless submitted to the procurement Division within 10 days from the elapse of the time stated in sub-regulation (3) or from the date on which the contracting entity's decision was communicated to the complainant.

## **75 Independent Expert**

- (1) The Government Procurement Committee shall appoint one or more Independent Experts for the purpose of reviewing a bidder's complaint with respect to any breach of its obligations under these Regulations.
- (2) Independent Experts shall be nominated by the Procurement Division upon advisement of the Attorney-General's Office. No Independent Expert may be proposed for appointment without the concurrence of the Attorney-General's Office.
- (3) Independent Experts shall be a person or persons
  - (a) who have been legal professionals; or
  - (b) who have previously been senior officers in the service of the Government with experience in the procurement area, or
  - (c) specialists with experience in the procurement area.

**76 Application for Review**

- (1) An application for review may be brought before the Procurement Division in the following circumstances:
  - (a) in the form of an appeal by the complaining bidder against a decision by a Head of contracting entity under Regulation 74, provided that the appeal is submitted within 10 days of the date of the decision;
  - (b) where the Head of contracting entity to whom a complaint is made pursuant to regulation 74 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 74(3)(b);
  - (c) in the case where the contract has already entered into force, any application for review submitted in the first instance to the Procurement Division shall not be entertained unless it is submitted 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.
- (2) Within 7 days of receiving an application for review, the Procurement Division shall advise the parties of the single Independent Expert that will conduct the review and shall notify the bidder of the date for the commencement of its activities which shall be known as the date of establishment.

**77 Review decisions**

- (1) The Independent Expert, advised pursuant to regulation 76(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) An application for review may be dismissed for:
  - (a) failure to submit the application for review within the time-limits specified in comply with any of the requirements of regulation 76(2);
  - (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 in accordance with regulation 73(3); or
  - (c) concerning contract implementation or administration rather than contract award.

- (4) Unless an application for review is dismissed, the remedies that may be ordered by the Independent Expert include:
  - (a) prohibiting the contracting 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 contracting entity, other than any act or decision bringing the contract into force; or
  - (c) reversing a decision by the Head of contracting entity, other than any decision bringing the contract into force;
  - (d) where a contract has been concluded unlawfully, the award of compensation to be paid by the contracting entity to the aggrieved bidder amounting at least to the cost of bid preparation.
- (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 Independent Expert.
- (6) Notwithstanding sub-regulation (5), the Independent Expert may, upon the application of the contracting entity, end the automatic suspension in sub-regulation (5) where the contracting entity satisfies the Independent Expert that the continuation of the suspension would cause disproportionate harm to the public interest, the contracting entity or to other suppliers and contractors.
- (7) The lifting of the automatic suspension provided for in sub-regulation (6):
  - (a) allows the contracting 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 Independent Expert.
- (8) The proceedings of the Independent Expert shall be governed by Schedule 2 of these Regulations which ensure that all parties to the dispute are heard and given fair opportunity of making their case.

## **78 Costs of the Procedure**

- (1) In addition to delivering its decision on the merits of the case, the Independent Expert shall also make an award on the costs, including administrative costs, of the case and decide which of the parties shall bear the costs or the proportions of the costs to be borne by each party.
- (2) Without prejudice to sub-section 1, the Experts' fees and travel expenses shall be determined by the Procurement Division in accordance with the scales agreed by the Minister of Finance.

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## PART 12 – REPEALS AND SAVINGS

### 79 Repeals and savings

- (1) The Public Procurement Regulations 2010 and any rules adopted thereunder are hereby 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.

## SCHEDULE 1

### DEBARMENT PROCEDURE

#### 1 Debarment Officer

- (1) The head of every contracting entity shall appoint a Debarment Officer to investigate allegations of prohibited practices and to decide whether to propose that a bidder should be debarred.
- (2) The Debarment Officer should ordinarily be the chief legal officer of that contracting entity.

#### 2 Debarment Committee

- (1) The Chairman of the Government Procurement Committee shall establish a Debarment Committee whenever an allegation is brought to it by a Debarment Officer.
- (2) The Debarment Committee shall consist of three members as follows: (i) the CEO of Finance or a person delegated by him or her who shall also be the chairman of the Debarment Committee; (ii) a legal officer of the Attorney-General's Office and (iii) the head of the contracting entity which proposes the debarment or suspension or a person delegated by him or her. The head of the Procurement Division shall provide the secretariat services.
- (3) The Debarment Committee shall have the task, on the basis of a referral from a Debarment Officer, to determine whether there is sufficient evidence in each case to debar a bidder accused of a prohibited practice and to issue a Notice of Debarment.
- (4) The decision of the Debarment Committee shall be by majority vote, the Chairman having the casting vote.

#### 3 Initiating the debarment procedure

- (1) If any officer of a contracting entity suspects that a bidder participating in a contract award procedure or an affiliate of such bidder has committed a prohibited practice defined in Regulation 71 or has been the subject of a civil judgment or criminal conviction in respect of a prohibited practice, he may bring this to the attention of the relevant

Debarment Officer together with any documentary evidence at his disposal.

- (2) The Debarment Officer shall consider and/or investigate allegations of the commission of prohibited practices.
- (3) If, as a result of the information provided or of his own investigation, the Debarment Officer is satisfied that there is sufficient evidence to support a finding of a prohibited practice, he may prepare a Draft Notice of Proposed Debarment and submit the same to the Debarment Committee of the Government Procurement Committee.
- (4) Within 10 days of receiving the Draft Notice of Proposed Debarment, the Chairman of the Government Procurement Committee shall convene a meeting of the Debarment Committee to review its contents and decide whether or not to proceed.
- (5) If the Committee agrees with the conclusions of the Debarment Officer as set out in the Draft Notice, it will send to the bidder (known as the 'Respondent') a Notice of Proposed Debarment in the same terms. If an accusation is made against an affiliate of a bidder, such affiliate shall also be named.
- (6) The decision of the Debarment Committee:
  - (a) shall be based on an objective assessment of the truth of the allegations made and of the quality and sufficiency of the supporting evidence;
  - (b) shall not be based on convenience or on the existence of any compromise reached with any particular bidder other than that foreseen in respect of a conditional non-debarment referred to in section 7(1)(b).
- (7) If the Debarment Committee determines that the Draft Notice of Proposed Debarment does not contain sufficient evidence to support the proposed debarment or sanction, it will notify the Debarment Officer of its decision and of the reasons for the decision. The Debarment Officer may, at his discretion, amend and resubmit a revised Draft Notice of Proposed Debarment for consideration by the Debarment Committee.

#### **4 Notice of Proposed Debarment**

- (1) The Notice of Proposed Debarment will be communicated to the named Respondent and any affiliate specifically named therein by registered mail and will inform the Respondent:
  - (a) that debarment is being considered;

- (b) of the identity of each Respondent and/or affiliate alleged to have engaged in a prohibited practice;
  - (c) of the prohibited practice(s) and reasons for relied upon for proposing debarment in terms sufficient to put the bidder on notice of the conduct or transaction(s) upon which it is based;
  - (d) of the evidence that the Debarment Officer;
    - (i) intends to present to the Debarment Committee in support of the proposed debarment, such evidence to be attached to the Notice where practicable, including any relevant witness statements, if any;
    - (ii) possesses or is aware of that would reasonably tend to mitigate the Respondent's culpability;
  - (e) of the period of debarment or other sanction being contemplated and of the consequences of a debarment in those terms;
  - (f) of the procedure applicable to debarment;
  - (g) that, if the Respondent and/or affiliate intends to contest the allegations and/or the debarment or sanction proposed, it shall inform the Debarment Committee by way the Notice to Defend form (to be attached to the Notice of Proposed Debarment) within 10 days of the issuance of the Notice of its intention and requesting, if it considers appropriate, an oral hearing before the Debarment Committee and indicating the identity of any witness(es) it considers necessary for a fair hearing.
- (2) If the prohibited practice relied upon is based on a civil judgment or criminal conviction relating to such practice, the Respondent and/or affiliate may contest the proposed debarment in writing only and only on the basis that the said judgment or conviction
- (a) is irrelevant, in that it does not pertain to the commission of a prohibited practice in the context of a contract award procedure;
  - (b) has been reversed on appeal.
- (3) If the Respondent
- (a) does not inform the Debarment Committee pursuant to subsection (1)(g) of its intention to contest the allegations and/or the sanction proposed in the Notice of Proposed Debarment within ten days (10) days after the said Notice was issued, or
  - (b) responds to the Notice admitting all or part of the allegations, the Debarment Committee will and without need of a hearing issue a decision imposing the sanction recommended in the Notice of Proposed Debarment or any other sanction, taking into account



any mitigating factors disclosed by virtue of sub-section (1)(d)(ii) and of the considerations set out in section 6(7).

- (4) If the Respondent informs the Debarment Committee pursuant to sub-section (1)(g) that it intends to contest the allegations and/or the sanction recommended in the Notice of Proposed Debarment, the Committee will, within 5 days:
- (a) inform the Respondent of the date by which the Respondent's written Response shall be received.

The Response may contain information and argument in opposition to the proposed debarment and include the witness statements of any witnesses that the Respondent wishes to call at the hearing, if any. The Response shall contain a statement, signed by an individual Respondent or an authorized officer of a Respondent that is an entity, that the information contained therein is true, complete and correct to the best of the signatory's knowledge after the exercise of reasonable due diligence in reviewing the matter and the records of the Respondent within Respondent's possession or control;

- (b) where a hearing has been requested, inform the Respondent
- (i) of the date(s), time and location proposed for the hearing;
- (ii) of the evidence that may be adduced and what form it may take;
- (iii) whether and which witnesses will be permitted.
- (c) set and inform the Respondent of the limits for the length of the written and oral submissions and of the hearing, such limits being reasonable in light of the accusations made and evidence presented;
- (d) make appropriate arrangements for the hearing.

## 5 Hearings and evidence

- (1) The Debarment Officer will present the case against the Respondent. He may be assisted or represented by a third party who may or may not be an employee of the same organisation.
- (2) A Respondent may represent himself and/or his organisation or be represented by an attorney or any other individual authorized by the Respondent, at the Respondent's own expense.
- (3) Any affiliate named in the Notice of Proposed Debarment may also be represented by himself or by an attorney or any other individual authorized by the affiliate, at his own expense.

- (4) The Debarment Officer, the Respondent and/or affiliate and their representatives may be present throughout the hearing. None of these may be present for or participate in the deliberations of the Debarment Committee.
- (5) The Debarment Officer or his representative shall present his case first. The Respondent or Respondent's representative shall present the Respondent's case second. The Debarment Officer shall be permitted to reply. The Debarment Committee shall set a reasonable period of time for each presentation.
- (6) Presentations shall be informal and shall be limited to arguments and evidence contained in the written submissions filed with the Debarment Committee and may rely upon or refute individual items of evidence.
- (7) Witnesses may only be called with the prior agreement of the Debarment Committee (based on the indications made in the Notice of Proposed Debarment and the Notice to Defend submitted by the Respondent in accordance with sub-section 7(1)(b)). Witnesses shall provide written witness statements of their evidence in advance of the hearing to be included in the Response of the Respondent. The witnesses may be questioned only by members of the Debarment Committee and there will be no cross-examination, although rebuttal evidence may be presented during the hearing.
- (8) The Debarment Officer, the Respondent and their representatives may also be subject to questions by the members of the Debarment Committee. A party's refusal to answer, or failure to answer truthfully or credibly, may be construed against that party.
- (9) Formal rules of evidence shall not apply and any type of evidence may form the basis of arguments presented. The Debarment Committee nonetheless retains the discretion to determine the relevance, materiality, weight, and sufficiency of all evidence offered. Hearsay evidence or documentary evidence shall be given the weight deemed appropriate by the Debarment Committee. Without limiting the generality of the foregoing, the Debarment Committee shall have the discretion to infer purpose, intent and/or knowledge on the part of the Respondent, or any other party or witness, from circumstantial evidence before it.
- (10) The Debarment Committee shall cause a full record to be kept of the hearing. Nevertheless, the hearing including the content of the written and oral submissions shall remain confidential and not be open or available to the public.

## 6 Decision of the Debarment Committee

- (1) It is the responsibility of the Debarment Committee to determine whether the proposed debarment is in the interests of the contracting entity on the basis of the evidence presented.
- (2) It is the Debarment Officer that bears the burden of presenting sufficient evidence to prove the alleged engagement of the Respondent in prohibited practices and the desirability of debarment.
- (3) In considering that evidence, the Debarment Committee will determine whether the preponderance of the evidence supports the conclusion that is more likely than not that the Respondent has engaged in a prohibited practice.
- (4) If the Debarment Committee determines that it is more likely than not that the Respondent did not engage in a prohibited practice, the Committee shall issue a Notice of Non-Debarment to the Respondent and terminate the proceedings.
- (5) If the Debarment Committee determines that it is more likely than not that the Respondent did engage in a prohibited practice, the Committee may impose an appropriate debarment sanction on the Respondent, which sanction shall be selected from the range of possible sanctions identified in section 7.
- (6) The existence of a proven cause for debarment does not necessarily require that the bidder be debarred or receive the sanction proposed in the Notice of Proposed Debarment. The seriousness of the bidder's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision. The burden rests on the Respondent to provide evidence of mitigating factors which might tend to reduce or remove the desirability for debarment.
- (7) Before arriving at any debarment decision, the Debarment Committee should consider factors such as the following:
  - (a) the severity of the Respondent's conduct;
  - (b) the degree of involvement of the Respondent in the prohibited practice (including whether the conduct involved was "active" or "passive");
  - (c) the magnitude of any losses caused by the Respondent and damage caused by the Respondent to the credibility of the procurement process;
  - (d) the past conduct of the Respondent involving a prohibited practice;

- (e) the extent to which the Respondent cooperated in the investigation and whether such cooperation is of substantial benefit to the contracting entity;
- (f) whether the bidder has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the Debarment Committee and/or taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment;
- (g) whether the bidder's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has instituted or agreed to institute new or revised review and control procedures and ethics training programs or other programmes to prevent recurrence;
- (h) any other factor that the Debarment Committee deems relevant.

## 7 Debarment sanction

- (1) The debarment sanction may take one of the following forms:
  - (a) Reprimand: a formal "Letter of Reprimand" based on the Respondent's conduct but which falls short of debarment.

This may be used where it is the Respondent's first offence and where the offence is relatively minor or where there are sufficiently compelling mitigating factors. It should not be used for a second or subsequent offence.

- (b) Conditional Non-Debarment: a sanction which threatens debarment where certain conditions are not met.

Based on the gravity of the offences and the existence of mitigating factors, the Debarment Committee may decide that the Respondent be required to comply with certain remedial, preventative or other measures as a condition to avoid debarment. In the event the Respondent fails to demonstrate compliance with the conditions within the time periods established by the Debarment Committee, a debarment would automatically become effective for a period of time established by the Debarment Committee, i.e. it would be converted into a Temporary Debarment.

- (c) Temporary Debarment: the primary sanction which debars the Respondent from participation for a specific period of time not to exceed five (5) years.

Based on the gravity of the offence and of any mitigating factors, the Debarment Committee may impose a temporary debarment of one, three or five years. Whilst this is dependent on the circumstances of the case,

it would be expected that a first offence would attract the shortest duration with subsequent offences attracting longer periods of debarment. Sufficiently serious offences could, however and in the absence of mitigating factors, attract longer periods of debarment even where they are first offences.

For debarments of periods of more than one (1) year only, the Debarment Committee may impose additional conditions requiring the Respondent to comply with certain remedial, preventative or other measures similar to the requirement imposed to a Conditional Non-Debarment. If the Respondent succeeds in meeting these conditions, it may subsequently apply to the Debarment Committee for a Review of the debarment and the Debarment Committee may commute the debarment to a shorter period.

(d) Permanent Debarment: this is the most serious sanction and will be used rarely.

It is appropriate only in cases of particularly egregious offences where the Respondent has consistently failed to correct its practices following at least two orders of temporary debarment, at least one of which shall have been accompanied by a compliance programme of remedial, preventative or other measures intended to assist the Respondent in overcoming any institutional impediments to improvement.

- (2) Other than in the case of permanent debarment, the debarment decision of the Debarment Committee will be final and will take effect immediately, without prejudice to any other action taken by any other government organisation under applicable law.
- (3) In the case of permanent debarment, the decision shall automatically be referred to a Debarment Adjudicator to be appointed on an ad hoc basis with the concurrence of the Attorney-General's Office who shall review the facts and evidence presented during the investigation and/or hearings before confirming or rejecting the proposed Notice of Debarment. The Debarment Adjudicator shall
  - (a) not rehear the case or allow any further written or oral submissions but shall carry out an objective assessment of the evidence;
  - (b) only reject the proposed Notice where, in his opinion, the preponderance of the evidence does not establish that the Respondent engaged in a prohibited practice.

## 8 Scope and consequences of debarment

- (1) The Debarment Committee may extend the effect of the Notice of Debarment to include any affiliates of the bidder provided they are:
  - (a) specifically named in the Notice of Proposed Debarment; and
  - (b) given an opportunity to respond.
- (2) When issuing a Notice of Debarment, the Debarment Committee may, as appropriate, impute the fraudulent, corrupt or other seriously improper conduct
  - (a) of any officer, director, shareholder, partner, employee, or other individual associated with a bidder, to the bidder when the conduct occurred in connection with the individual's performance of duties for or on behalf of the bidder, or with the bidder's knowledge, approval, or acquiescence.

The bidder's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

- (b) of a bidder, to any officer, director, shareholder, partner, employee, or other individual associated with the bidder who participated in, knew of, or had reason to know of the contractor's conduct
- (c) of a bidder participating in a joint venture or similar arrangement, to other participating bidders if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these bidders.

Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

- (3) Following debarment, the name of the debarred bidder, affiliates, joint venture partner, officer, director, shareholder, partner, employee or other individual, as appropriate, shall be included in the List of Debarred Bidders maintained by the Procurement Division;
- (4) In respect of bidders and other persons properly included in the List of Debarred Bidders, all government agencies shall:
  - (a) exclude such bidders and other persons from receiving contracts awarded by them;
  - (b) not solicit offers from, award contracts to, or consent to subcontracts with them;
  - (c) reject any bids received from them in response to an invitation for bids;

- (d) not evaluate any proposals, quotations, or offers received from them or enter into discussions with them during the period of ineligibility;
  - (e) not consent to their appointment as a sub-contractor to a bidder which has not been debarred.
- (5) If the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider such bids proposals, quotations, or offers.
- (6) Notwithstanding the debarment of a bidder or other person, contracting entities may continue contracts or subcontracts in existence at the time of the debarment unless the head of the agency directs otherwise.

## **9 Review and appeals**

- (1) A debarred bidder or other person affected by the debarment pursuant to section 7, may seek review of a debarment with the Debarment Committee at any time when:
- (a) newly discovered material evidence or facts come to light which tend to exculpate the debarred bidder;
  - (b) a conviction or civil judgment upon which the debarment was based has been reversed;
  - (c) there has been a bona fide change in ownership or management of the bidder;
  - (d) the bidder has successfully complied with any remedial, preventative or other measures imposed by the Debarment Committee in the context of a Conditional Non-Debarment or Temporary Debarment Committee.
- (2) A request for review shall be made in writing and the procedure for review shall be determined by the Debarment Committee at its discretion.
- (3) Where a bidder or other person affected by the debarment pursuant to section 7 above is not satisfied with the decision of the Debarment Committee in respect of a Conditional Non-Debarment or Temporary Debarment only, he may apply in writing to the Debarment Committee who will refer the case to the Debarment Adjudicator within 5 days of the receipt of the request.
- (4) The procedure for the appeal shall be determined by the Debarment Adjudicator at his discretion but a decision shall be finalised within a reasonable period of time and, in no case, more than 30 days after the request has been received by the Debarment Adjudicator.

- (5) The Debarment Adjudicator shall review the facts and evidence presented during the investigation and/or hearings before confirming or rejecting the Notice of Debarment adopted by the Debarment Committee. The Debarment Adjudicator shall
- (a) not rehear the case or allow any further written or oral submissions but shall carry out an objective assessment of the evidence;
  - (b) only reject the proposed Notice where, in his opinion, the preponderance of the evidence does not establish that the Respondent engaged in a prohibited practice.



**SCHEDULE 2****PROCEDURES FOR COMPLAINTS REVIEW****1 Appointment of Independent Expert**

- (1) An Independent Expert -
  - (a) shall be a person who fulfills the requirements of Regulation 75(3) ;
  - (b) shall not be a member of Parliament or hold any other public office;
  - (c) will not be deemed by virtue of the office to be employed in the Public Service;
  - (d) shall be a person of good reputation in the community and enjoy public confidence;
  - (e) shall have no criminal record.
- (2) An Independent Expert will be appointed for a term of 3 years, renewable once.
- (3) An Independent Expert will be provided with out of pocket expenses and be remunerated at a rate fixed by the Remuneration Authority from money to be appropriated for that purpose.
- (4) An Independent Expert may be removed or suspended from office only by the Minister of Finance upon a resolution of Parliament for incompetence, disability, bankruptcy, neglect of duty or misconduct.
- (5) An Independent Expert may resign from office by giving one month's notice in writing to the Minister of Finance.
- (6) The identity and qualifications of the appointed Independent Expert or Experts shall be posted on the website of the Procurement Division and shall be made available to all interested parties upon request.

**2 Duty of impartiality and independence**

- (1) Experts shall be independent and impartial and shall, in all respects relating to their status and ethical standards, be bound by the rules applicable to public servants.
- (2) If an Independent Expert stands to gain financially or has a conflict of interest in the contract award procedure under review he or she shall not continue as the Independent Expert in that procedure.
- (3) An Independent Expert who has a direct or indirect personal interest in a matter being considered or to be considered by that Expert shall, as soon as reasonably practicable after the relevant facts concerning the matter have come to his or

her knowledge, disclose the nature of his or her interest to the Procurement Division which shall appoint an alternative Independent Expert.

- (4) The obligation of sub-Regulation (3) is a continuing obligation on the Expert appointed. He or she is required to disclose immediately to the Procurement Division any such interest arising between the date of his or her appointment and notification of the final award.
- (5) The Independent Expert shall be required to undertake any specialised training identified by the Procurement Division at the cost of the Procurement Division.

### **3 Secretariat**

- (1) A Secretariat shall be organised within the Procurement Division which will be given responsibility for carrying out the day to day functions associated with the organisation of the review procedure.
- (2) The business of the Independent Experts and all clerical matters arising out of the conduct of procedure under these rules shall be carried out by the Secretariat. In particular, all Applications for Review, Replies and subsequent communications shall be addressed to the Independent Expert at the Secretariat unless otherwise specified.
- (3) Copies of all relevant Forms to be used for the review procedure shall be available for collection at the offices of the Procurement Division and a copy of such forms shall be sent to all interested parties upon request.
- (4) Following the receipt of an Application for Review, the Secretariat shall:
  - (a) appoint from its staff a Clerk to the Independent Expert who shall be responsible for all clerical activities on behalf of the Independent Expert and for all communications between the parties and the Independent Expert;
  - (b) prepare and provide to the Independent Expert the case file and the terms of reference for his or her activities in the form provided for in the Manual of Procedures.

### **4 Representation**

A party may appear in person or may be represented by a lawyer or such other person as shall be recognised by the Independent Expert as suitable for the purposes of such representation.

### **5 Submission of Application for Review**

Any bidder wishing to submit an Application for Review shall submit the following documents to the Secretariat together with an administration fee of \$ 150 to cover the costs of duplication and postage:

- (a) a completed Application for Review Form in the form provided for by the Secretariat;
- (b) copies of any documentary evidence relied upon in support of the claim set out in the Application for Review Form;
- (c) where the request is made by an agent of the Applicant, an appropriate power of attorney.

## **6 Receipt of Application**

- (1) The Secretariat shall record receipt of the Application for Review in the Register of Applications for Review and assign it a Case Reference Number.
- (2) The Secretariat shall immediately verify that the Application for Review is in conformity with the provisions of section 5.
- (3) Any Application for Review found not to be in conformity with section 5 shall be rejected and returned to the Applicant together with a statement of the reasons for rejection. The Applicant may then re-submit its corrected Application for Review.
- (4) Upon recording receipt, the Secretariat shall immediately notify the contracting entity against whom the complaint has been made (the Respondent) of the Application for Review and include with the notice a complete copy of the Application for Review. Such notification shall ordinarily take place at the latest the day following the submission of the Application for Review.

## **7 Reply**

- (1) Within 3 days of the receipt of the notification from the Secretariat, the Respondent shall submit to the Secretariat a Reply containing the following documents:
  - (a) a written Reply to the Application for Review in the form provided by the Secretariat;
  - (b) copies of any documentary evidence relied upon in support of the Reply;
  - (c) where the Reply is made by an agent of the Respondent, an appropriate power of attorney.
- (2) The failure to submit a Reply within the specified period will not prevent the conduct of the review procedure and the Respondent will remain bound by any decision of the Independent Expert as well as by any Award on Costs made by the Independent Expert.
- (3) Where the Respondent fails to submit a Reply within the specified time limit, the Secretariat may proceed with the appointment of the Independent Expert.
- (4) The Independent Expert shall, if it is satisfied that the Application for Review was duly served on the Respondent and the party has failed to serve a Reply

without good cause, have power to proceed with its deliberations on the basis of the evidence before it as if such proceedings had been conducted in the presence of all parties.

- (5) The Secretariat shall in any event inform the Respondent of the appointment of the Independent Expert and of the date of the hearing, if any.

## **8 Registration**

- (1) Following receipt of the Reply, the Secretariat shall collate all the relevant documents into a single Case File, including the Application for Review, the Reply, the documentary evidence provided by the parties and the powers of attorney, if any.
- (2) The Secretariat shall formally appoint the Independent Expert and provide him or her with a copy of the Case File and terms of reference.
- (3) The Secretariat shall simultaneously provide the parties with a copy of the Case File.
- (4) Once the appointment of the Independent Expert is confirmed, the Secretariat shall register the commencement of the complaints procedure in the Register of Applications for Review as the 'date of establishment'.
- (5) The Secretariat shall immediately notify the parties of the date of establishment.

## **9 Opening of Review Procedure**

- (1) The Independent Expert shall, taking into account the nature of the case defined in the terms of reference, determine the order, time and place of its meetings and any Hearing it intends to hold.
- (2) At the request of the parties, the Independent Expert may proceed to make his or her decision in the absence of a Hearing. In such a case, the Independent Expert, if satisfied that he or she can reach a decision on the basis of the terms of reference and without hearing the parties, may proceed to reach a decision without a Hearing.
- (3) In determining the order and time of the Hearing, the Independent Expert shall give sufficient consideration to preventing the delay of the proceedings.
- (4) The Clerk to the Independent Expert shall communicate this decision to the parties in the form provided for in the Manual of Procedures.

## **10 Hearing**

- (1) Hearing shall take place in the manner provided for by the Independent Expert.
- (2) If one of the parties, despite having received notice of the Hearing, fails to appear, the Independent Expert, if satisfied that the notification was received

and the party is absent without good cause, shall have power to proceed with the proceedings which shall be deemed to have been conducted in the presence of all parties.

- (3) The Hearing shall be closed to the public save that, with the consent of the Independent Expert, persons having a justifiable interest in the proceedings may be admitted.
- (4) The Clerk to the Independent Expert shall, for each meeting of the Independent Expert or Hearing, take and keep minutes stating the time, place and the names of those attending together with a summary record of the meeting or Hearing.
- (5) The Clerk to the Independent Expert shall take a stenographic record of the Hearing where the Independent Expert has so ordered or where there has been an application for such a record by one of the parties.

## **11 Evidence**

- (1) All relevant documentary evidence relied upon by the parties in support of their claims and replies shall be put before the Independent Expert in the form of copies of the Application for Review and Reply Forms provided for in the Manual of Procedures.
- (2) Subsequent documentary evidence shall be admitted only where, in the opinion of the Independent Expert, it is relevant and only with his or her consent.
- (3) During the hearing, any party may submit oral evidence in support of its own contentions by way of the voluntary appearance of witnesses.
- (4) The Independent Expert may, at his or her discretion, request the submission of further documentary evidence from the parties or request the presence of other witnesses or expert witnesses.

## **12 Conclusion of the Proceedings**

- (1) The Independent Expert shall, when satisfied that all contentions and evidence of the parties have been submitted, conclude the proceedings.
- (2) The Independent Expert shall deliver his or her decision to the Secretariat within 10 days of the date of establishment.
- (3) The decision of the Independent Expert shall be confined to the issues raised by the Application for Review and Reply.
- (4) The decision shall be formulated in accordance with the form provided for in the Manual of Procedures.
- (5) The Clerk to the Independent Expert shall immediately notify all parties of the decision and shall arrange for the publication of the decision as appropriate.

- (6) The decision of the Independent Expert shall be final and binding on all parties, subject only to appeal to the High Court.

Made at Nuku'alofa this **17** day of **July** 2015.

Hon. Tevita Lavemaau  
**Acting Minister of Finance and National Planning**