

THE CONTRACTOR-GENERAL ACT

THE PUBLIC SECTOR PROCUREMENT REGULATIONS, 2008

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THE CONTRACTOR-GENERAL ACT

THE PUBLIC SECTOR PROCUREMENT REGULATIONS, 2008

WHEREAS the Handbook of Public Sector Procurement Procedures (hereinafter called the "Handbook") has been the basis for the regulation of public sector procurement:

AND WHEREAS it is considered desirable to more stringently regulate the procurement of general services, goods and works by making the duty to observe procurement procedures legally enforceable and subject to penal sanction so as to promote the objectives of—

- (a) maximizing economy and efficiency in public procurement;
- (b) fostering and encouraging participation in public sector procurement proceedings;
- (c) promoting competition among prospective contractors for the supplying of general services, goods and works;
- (d) providing for the fair and equitable treatment of all prospective contractors;

- (e) promoting integrity of, and fairness and public confidence in, the public sector procurement process; and
- (f) achieving transparency in the procedures relating to procurement:

NOW, THEREFORE, in exercise of the power conferred upon the Minister by section 31 of the Contractor-General Act, the following Regulations are hereby made:

PART I. *Preliminary*

Citation. 1. These Regulations may be cited as the Public Sector Procurement Regulations, 2008.

Interpretation. 2. In these Regulations, unless the context otherwise requires—
“accounting officer” has the same meaning as under the Financial Administration and Audit Act;

“Board” means the Procurement Appeals Board established under regulation 10;

“consultant” means a contractor or prospective contractor service provider whose services are primarily intellectual in nature;

“currency” means monetary unit of account;

“day” means calendar day;

“goods” means objects of every kind and description (except real property or interests in real property), and includes—

- (a) raw materials;
- (b) products, equipment and objects in solid, liquid or gaseous form;
- (c) electricity; and
- (d) services incidental to the supply of the goods, if the value of those services incidental to the supply of the goods does not exceed that of the goods themselves;

“National Contracts Commission Register of Public Sector Contractors” means the register of public sector contractors who have satisfied prescribed criteria for placement in specified categories and grades of work;

“Procurement Appeals Board” means the appeals body established under regulation 32;

“procurement committee” means the body established in each procuring entity to oversee the procurement process and review recommendations for contract award;

"procurement contract" means a contract between the procuring entity and a contractor resulting from procurement proceedings;

"procuring entity" means any Government Ministry, department, statutory body, executive agency, local government authority, public company or any other agency in which the Government owns the controlling interest, that is to say, at least fifty-one *per centum*, or in which the Government is in a position to direct the policy of the entity, including government-approved authorities acting on behalf of the procuring entity;

"prospective contractor" means any person, Firm or entity proposing to obtain the award of a Government contract;

"public sector procurement" means the acquisition of goods, works and services, by any method, using public funds by or on behalf of procuring entities for their use; and includes procurement by Government-approved authorities acting on behalf of the procuring entity;

"services" means any object of procurement other than goods or works;

"threshold" shall be construed in accordance with regulation 5;

"works" means all work associated with construction, demolition, repair or renovation, which include civil, electrical, mechanical and other related engineering works, and includes the supply and installation of equipment and specialized engineering incidental services that are related to those works.

Scope of
these
Regulations.

3. These Regulations govern public sector procurement in Jamaica and are applicable to all procurement of goods, works, services and other activities carried out by the Government of Jamaica.

PART II. Exclusions

Exclusions.

4.—(1) The following categories of procurement are not subject to the procedures contained in these Regulations—

- (a) procurement of items of a sensitive nature for national defence or security purposes;
- (b) procurement of goods, services and works between Government entities;
- (c) procurement under Government's bilateral and other agreements, unless otherwise agreed with the donor;
- (d) procurement for the production of national honours, medallions and insignias;
- (e) procurement of travel services and hotel accommodation;

- (f) procurement of motor vehicles for assignment to public officers;
- (g) legal services for non-routine assignments and litigation;
- (h) acquisition or rental of land, existing buildings or other immovable property or the rights thereon or thereto;
- (i) procurement of fiscal agency or depository services, liquidation and management services in respect of regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities; and
- (j) any other exceptions as prescribed or issued by instructions or circulars, from time to time, by the Minister.

PART III. Oversight of Procurement

Approval
thresholds and
authorities.

5.—(1) These Regulations do not apply to the tendering and other procurement activities in relation to contracts that are below the approval thresholds lawfully prescribed from time to time including special thresholds prescribed for specific entities.

(2) Procuring entities may approve contracts which are below such threshold values as are prescribed from time to time.

Procurement
Committee.

6.—(1) Each procuring entity shall establish and maintain a procurement committee, consisting of not less than five persons, appropriate to the needs of the entity.

(2) The functions of a procurement committee shall be to—

- (a) review recommendations for award of contracts within the threshold set by the head of or otherwise applicable to the entity;
- (b) ensure compliance with relevant Government policies, guidelines and procedures relating to procurement;
- (c) review evaluations done by evaluation committees;
- (d) facilitate response to inquiries from prospective contractors; and
- (e) ensure compliance by the entity with reporting obligations relating to procurement.

(3) The Accounting officer for the entity shall set the monetary threshold for procurements to be reviewed by the procurement committee.

(4) The committee shall consist of—

- (a) a Chairman;
- (b) senior financial management personnel;
- (c) procurement personnel (non-voting members);

- (d) a recording Secretary (non-voting member); and
- (e) any other appropriately qualified officer of the entity.

(5) Internal Audit personnel may not sit on the Procurement committee.

(6) The Committee may co-opt technical personnel as necessary, pursuant to the nature of the procurement.

(7) The Procurement committee shall not be chaired by an officer who by virtue of his functional position in the entity, would approve or sign-off on procurements.

(8) With respect to Parish Councils and Municipalities, an elected Councillor may sit on the Procurement committee subject to the provisions of the preceding paragraphs and any other applicable requirements relating to matters such as conflict of interest.

(9) The chairman shall call Procurement committee meetings pursuant to the needs of the entity and ensure that proper minutes of the meetings and records of procurements are maintained for each meeting.

(10) The quorum of the meeting should be pre-determined by the Chairman and no meeting shall be properly convened in the absence of this quorum.

PART IV. *Tender Proceedings*

Handbook to
guide tender
proceedings.

7. Tender Proceedings for prospective government contracts shall be conducted according to the procedures outlined in the Handbook, as amended from time to time, and more particularly for the purposes of these Regulations the procedures as regards—

- (a) invitations to tender;
- (b) qualification of suppliers;
- (c) requirements for the publicising of bid Opportunities and Contracts;
- (d) receipt and opening of bids;
- (e) bid validity; and
- (f) bid evaluation.

PART V. *Procurement methods for contracts for General Services, Goods and Works*

Purpose of
this Part.

8.—(1) The purpose of this Part is to establish the structure and content of contracts for the procurement of general services, goods and works in the public sector; and such procedures apply to all such procurement of general services, goods and works.

(2) The following procurement methods apply to procurement of general services, goods and works—

- (a) open tendering (the default method);
- (b) selective tendering;
- (c) limited tendering; and
- (d) direct contracting or sole source.

(3) Each method shall be utilized in accordance with the thresholds and established criteria through circulars by the Ministry responsible for Finance and as prescribed in the Handbook.

Procedure in bidding.

9.—(1) A procuring entity shall be responsible for the conduct and management of the entire process for procurement in relation to government contracts for which it is responsible.

(2) Once bids have been evaluated and a determination is made on the lowest evaluated responsive bid, and a further decision has been made in respect of the award, the procuring entity shall—

- (a) obtain the necessary approvals to award the contract;
- (b) except in the case of sole source or direct contracting, not negotiate the award with the successful bidder;
- (c) not require the selected bidder to provide performance security, in excess of that specified in the bid documents;
- (d) request the supplier to return the signed contract, together with the required performance security within the time specified in the bidding documents;
- (e) notify the unsuccessful bidders as soon as possible after receiving the signed contract and the performance security;
- (f) send
 - (i) the notification of the award;
 - (ii) a contract form; and
 - (iii) a performance security form (indicating the amount of security) to the successful bidder in the manner and time specified in the bidding documents.

Failure of successful bidder to return signed contract, etc.

10. If the successful bidder fails to return the signed contract or to provide the required performance security, the procuring entity may—

- (a) forfeit the bid security of the successful bidder; and
- (b) proceed to offer the contract to the second lowest evaluated bidder, when the procuring entity is satisfied that he is capable of performing satisfactorily.

Rejection of all bids. 11.—(1) The procuring entity may reject all bids under the following circumstances—

- (a) where the price in the lowest evaluated bid exceeds by a substantial margin the procuring entity's bid cost estimates;
- (b) when all the bids received are not responsive to the requirements in the bid documents; and
- (c) where the procuring entity, after receiving bids, reasonably concludes that there is lack of competition.

(2) Where all the bids are rejected, the procuring entity procurement staff shall review the bidding documents and make any appropriate revisions; and where substantial changes are made to the bid documents, the procuring entity shall then invite new bids on the basis of the new bidding documents.

Reporting requirements.

12.—(1) A procuring entity shall report all contracts awarded by it which are above the relevant prescribed threshold to the Cabinet and to the National Contracts Commission, as the case may require.

(2) Reports under this regulation shall be made on a monthly basis using the Government's standard PRS-1 form.

(3) The procuring entity shall send, no later than seven days after the end of the reference period—

- (a) the completed PRS-1 form directly to the Ministry responsible for procurement policy; and
- (b) a copy of the completed PRS-1 form to the accounting officer and Permanent Secretary, as the case may require, in the Ministry responsible for the proposed contract.

Standard bidding documents.

13. A procuring entity shall use the relevant standard bidding documents for the particular procurement method being utilized.

General Conditions of Contracts.

14. A procuring entity shall use the *General Conditions of Contracts* in the bidding documents mentioned in regulation 13 and those conditions shall not be changed by procurement personnel where, the general provisions in those conditions contain—

- (a) operational clauses which establish the relationship between the procuring entity and the suppliers or contractors and contain information regarding—
 - (i) definitions;
 - (ii) rights and obligations of both parties;
 - (iii) procedures for shipment and documentation;
 - (iv) delivery and transfer of risk;

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- (v) terms and currencies of payment;
 - (vi) mode and form of dispute settlement;
 - (vii) governing language;
 - (viii) the applicable law;
- (b) protective clauses where these establish protection against various risks and allocate them between the parties, including instructions on—
- (i) performance security;
 - (ii) retention of payments;
 - (iii) insurance;
 - (iv) inspections and tests;
 - (v) warranty;
 - (vi) protection against third party infringement suits;
 - (vii) *force majeure*;
 - (viii) a valid, current tax compliance certificate which the bidder is required to provide upon tendering;
- (c) variations, such as unforeseen or planned changes during the life of the contract which are identified and provided for under these general conditions of contract, including—
- (i) quantity changes;
 - (ii) adverse physical conditions;
 - (iii) price adjustments; and
 - (iv) changes in delivery requirements; or
- (d) remedying those clauses which deal with breach of contract by one of the parties and which include provisions on—
- (i) forfeiture of performance security;
 - (ii) procedures for obtaining damages or paying penalties for delay;
 - (iii) procedure for suspension or termination of contract;
 - (iv) non-payment or failure to provide required approvals and information.

PART VI. *Procurement Methods for Consultant Services*

- Purpose of this Part. 15. This Part applies to procurement in relation to Government contracts for consulting services.
- Methods of selection for procurement of services. 16.—(1) The procuring entity shall select the appropriate method of selection for procurement of consulting services having regard to—
- (a) the nature, size and complexity of the assignment;
 - (b) the likely impact of the assignment;
 - (c) technical and financial considerations;
 - (d) the established thresholds in the Handbook and in accordance with the circulars issued, from time to time, by the Minister.
- (2) The procurement methods for consulting service are—
- (a) quality-cost based selection;
 - (b) quality based selection;
 - (c) fixed budget selection;
 - (d) least cost selection; and
 - (e) individual consultant.
- Quality or cost based selection. 17.—(1) A procuring entity that proposes to use a quality or cost based selection method shall comply with this Regulation.
- (2) A quality and cost based selection method (hereinafter, in this regulation, called “QCB method”) is a method based on the quality of the proposals and the cost of the services to be provided.
- (3) The QCB method shall be utilized when—
- (a) the scope of work of the assignment can be precisely defined and the terms of reference are well specified and clear;
 - (b) both the procuring entity and the consultants can estimate with reasonable precision the staff time as well as the other inputs and costs required.
- (4) The QCB method is appropriate for assignments such as—
- (a) feasibility studies and designs where—
 - (i) the nature of the investment is clear and well defined;
 - (ii) known technical solutions are being considered; and
 - (iii) the evaluation of the impacts from the project are not uncertain or too difficult to estimate;

- (b) the preparation of detailed designs;
- (c) supervision of construction of works and installation of equipment;
- (d) technical assistance services and institutional development; and
- (e) procurement and inspection services.

(5) A request for proposals under the QCB method may be used to indicate the expected staff time as estimated by the procuring entity to carry out the assignment; but this estimate shall not bind the consultants and they may propose the level of inputs that they consider appropriate.

(6) Under the QCB method, the technical and financial proposals shall be submitted at the same time in separate sealed envelopes (hereinafter called the two-envelope system); and proposals received after the submission deadline shall be rejected.

(7) Evaluation of proposals shall be carried out in the two-envelope system in stages: first, the evaluation of quality, and then evaluation of cost.

(8) The technical envelopes shall be opened by the procurement committee of the procuring entity immediately after the closing time for submission of proposals; and the financial proposals shall remain sealed and shall be deposited with the committee until the technical evaluation and the evaluation report are completed; thereafter, technical scores shall be disclosed publicly to all the firms that submitted proposals.

(9) The financial envelopes of those consultants who submitted responsive technical proposals which meet the minimum qualifying mark shall be opened in the presence of the consultants or their representatives; and the proposals shall then be evaluated.

(10) Once the financial proposals are evaluated, a combined evaluation of the technical and financial proposals shall be carried out by weighting and adding the quality and the cost scores, and the consultant obtaining the highest combined score shall be invited for negotiations:

Provided that staff rates and other unit rates shall not be negotiated.

Quality based
selections.

18.—(1) A procuring entity that proposes to use a quality based selection method shall comply with this Regulation.

(2) Quality based selection shall be based on an evaluation of—

- (a) the quality of the proposals;
- (b) the subsequent negotiation of the financial proposals; and
- (c) the contract with the consultant who submitted the highest ranked technical proposal.

(3) A quality based selection is appropriate where --

- (a) the downstream impact of the assignment is so large that the quality of the services becomes of overriding importance for the successful outcome of the project;
- (b) the scope of work of the assignment and the terms of reference are difficult to define because of—
 - (i) the novelty or complexity of the assignment;
 - (ii) the need to select among innovative solutions;
 - (iii) particular physical conditions; and
- (c) the assignment can be carried out in substantially different ways, so that cost proposals may not easily be comparable; and
- (d) the introduction of cost as a factor of selection renders competition unfair.

Technical
proposals.

19.—(1) A procuring entity that proposes to use a technical proposal based selection method shall comply with this Regulation.

(2) Technical proposed based selection shall be based on the procuring entity's evaluation of the technical proposals of the proposed contractor only.

(3) After technical evaluation, the consultant with the highest-ranking technical proposal shall be invited to present its financial proposal; but the procuring entity may also request that the financial proposals be submitted at the same time as the technical proposals in separate envelopes, in which case, the financial proposals shall be kept secured until the technical evaluation is finalized.

(4) Only the financial proposal of the winning consultant shall be opened; and the others shall all be returned unopened after negotiations with the winning firm are successfully concluded.

(5) The request for proposals shall provide the staff-months only as an estimate by the procuring entity.

Selection
under a fixed
budget.

20.—(1) A procuring entity that proposes to use a fixed budget selection method shall comply with this Regulation.

(2) A procuring entity may select bids under a fixed budget method when—

- (a) the budget is fixed and cannot be exceeded;
- (b) the time and staff-month effort required from the consultants can be assessed with precision.

(3) The procuring entity shall ensure that the budget is compatible with the terms of reference and that consultants will be able to perform the tasks within the budget.

(4) In selecting bids under a fixed budget method the procuring entity shall disclose the available budget to invited consultants in the request for proposals and selecting the consultant with the highest-ranking technical proposal within the budget.

(5) Fixed budget selections shall be used for well-defined and simple assignments with a low financial risk for the consultants, such as—

- (a) sector studies, market studies and surveys of limited scope;
- (b) simple pre-feasibility studies and review of existing feasibility studies;
- (c) review of existing technical designs and bidding documents; and
- (d) project identification for which the level of detail can be matched with the available funds.

Submission of
proposals.

21.—(1) In making selection under a fixed budget method, the procuring entity shall invite prospective contractors to submit their technical and financial proposals in separate envelopes and the prospective contractor shall act accordingly.

(2) The technical proposals shall be evaluated first, using the same procedure followed for the quality and cost based selection process and in the quality based selection process the financial envelopes shall be opened in the presence of representatives of firms that submitted proposals.

(3) In any case where a proposal does not cover minor technical aspects included in the terms of reference, the procuring entity shall calculate the evaluated price of that proposal by adding to the offered price, the estimated cost of the missing activities or items.

(4) Proposals that exceed the indicated budget after adjustments and corrections shall be discarded.

(5) The consultant who has submitted the highest ranked technical proposal among the remaining proposals shall be selected.

Changes in
terms of
reference and
other details.

22.—(1) The terms of reference for a consultant may not be changed substantially, and technical negotiations shall cover minor aspects only.

(2) Financial negotiations shall not include discussion of remuneration rates as of other unit rates, but may only include minor re-arrangements of activities and staff for purposes of compatibility with the work-plan and clarification of any tax liability.

(3) Sections under a fixed budget shall be used by the procuring entity to plan a budget.

(4) In utilizing the selections under a fixed budget, it shall be ensured that the terms of reference are consistent with the established budget and

contain a well-specified scope of work so that consultants may present clear and responsive proposals.

Least Cost
Selection.

23.—(1) A procuring entity that uses a least cost selection method shall comply with this regulation under the least cost selection method, a minimum qualifying mark for quality shall be established and indicated in the request for proposals.

(2) Short-listed consultants shall submit their proposals in two envelopes; and the technical proposals shall be opened first and evaluated.

(3) Where proposals score less than the minimum technical qualifying mark, they shall be rejected, and the financial envelopes of the remaining proposals shall be opened—

(a) in the presence of representatives of proposal submitting firms;

(b) in public,

and the consultant with the lowest evaluated price shall be selected.

(4) The least cost selection method shall be utilized for small assignments of a standard or routine nature where well-established practices and standards exist and from which a specific and well-defined outcome may be expected, and which can be executed at different costs, including—

(a) standard accounting audits;

(b) engineering designs or supervision of simple projects;

(c) repetitive operations, maintenance work and routine inspections;
and

(d) simple surveys.

Qualifying
marks.

24. For the purposes of regulation 23, the procuring entity shall set a minimum qualifying mark at approximately seventy-five to eighty *per centum*, to ensure quality and avoid the risk of selecting low-cost proposals of poor or marginally acceptable quality.

Individual
consultants.

25.—(1) A procuring entity that proposes to use an individual consultant as contractor shall comply with this Regulation.

(2) A procuring entity may engage an individual consultant on contracts referred to in paragraph (3) for which—

(a) the experience and qualifications of the individual shall be dominant;

(b) no support from a home office is needed for the individual;

(c) teamwork or a multidisciplinary approach is not necessary.

(3) The contracts referred to in paragraph (2) are those related to advisory services assignments or technical opinions on specific matters in which specialist individual knowledge is the most outstanding issue.

(4) For the hiring of individual consultants, the procuring entity shall first prepare brief terms of reference for the assignment, including the scope of work and its estimated budget.

(5) Thereafter, the procuring entity shall request expressions of interest from suitable consultants, or advertise, if necessary, requesting them to submit their *curriculum vitae*.

(6) Subject to paragraph (7), individual consultants who have expressed interest in the assignment, shall then be selected, on the basis of comparison of their qualifications, for the assignment.

(7) Suitability of the candidates under paragraph (6), shall be evaluated on the basis of their—

- (a) academic background;
- (b) experience; and
- (c) knowledge of local conditions where necessary.

Conflicts of interest.

26. Subject to Part III, from time to time, permanent staff or associates of a consulting firm may be available as individual consultants; and in such cases, the conflict of interest provisions in these Regulations and other relevant enactments shall apply to the parent firm only.

Examples of Conflicts of Interest.

27.—(1) A consultant prospective contractor is ineligible for public sector procurement opportunities where a conflict of interest exists in the following circumstances, namely where there have been—

- (a) downstream procurement of goods and works, related to the consultants' work such as the a consultant attempting or being perceived to influence the procuring entity's decisions for his own benefit or that of his affiliates by specifying, designing, or suggesting that works or equipment be obtained from those affiliates;
- (b) downstream provision of consulting services related to—
 - (i) the procurement of works;
 - (ii) the supply of equipment; and
 - (iii) the installation of such equipment, by an affiliate of the consultant;
- (c) downstream conflicting activities closely related to the consultant's work, including an investment bank in a consulting capacity.

supplying funds to the procuring entity in a sale transaction after advising a seller, while in a consulting capacity, on the same transaction;

- (d) conflicting assignments which by nature could cause the consultants to bias their advice to be consistent with findings of their assignments or that of their affiliates;
- (e) conflicting downstream assignments where the incumbent consultants create conditions under which they attain or, are perceived to attain, an undue advantage over other consultants who may apply for consideration in the downstream assignment, thereby depriving the client of the full benefits of competition.

~~PART VII. Procurement of Insurance~~

Grounds for
rejection of
proposals.

28.—(1) A procuring entity that proposes to procure a government contract for insurance services shall in addition to the other applicable requirements of these Regulations, comply with this Regulation.

(2) The procuring entity shall reject a bid proposal where—

- (a) the bidding Broker or Insurer is not pre-qualified by the Financial Services Commission;
- (b) limits of cover are unspecified (particularly for Motor Third Party, Employers Liability, Public Liability and Fidelity Guarantee risks), if however, the cover obtained is “unlimited” then this should be clearly indicated;
- (c) quotations and rates are ambiguous and could give rise to doubt in the interpretation of the proposal, such as where—
 - (i) in a tender proposal, a broker or insurer stipulate a rate of ten *per centum* and it is not clear as to whether it is applicable to the sum insured or declared value; or
 - (ii) at the request of the broker, the insurer gives a number of different types of discounts but there is no explanation as to how these discounts should be applied (that is to say, whether aggregated or step-wise).
- (d) multi-options for some of the risks are presented but without the broker putting together complete sets of proposals;
- (e) brokers’ slips have not been signed, stamped and dated;
- (f) supporting documentation for special arrangements such as package discounts have not been supplied;

- (g) varying rates, terms and conditions have been quoted to different brokers by the insurer for the same specifications;
- (h) the proposal fails to meet the procuring entity's specified requirements for cover;
- (i) the proposal fails to meet the insurers' conditions regarding minimum and maximum levels of participation or quotations tied to acceptance of other risks;
- (j) the proposal fails to provide satisfactory evidence that one hundred *per centum* cover has been secured for a risk;
- (k) where all participants in a co-insurance or multi-policy arrangement have agreed to the rates and terms, omission of risks, premium or proposed insurer, no evidence of these matters has been supplied;
- (l) there are arithmetic errors, such as adding the currency of the United States of America to that of the currency of Jamaica without first converting to a common currency;
- (m) there is a failure to include a valid tax compliance certificate for the participating broker or insurer;
- (n) there is a failure to submit two copies of the tender that are identical in every respect;
- (o) there is a failure to submit proof from the Financial Services Commission that permission had been granted for facultative placement, where relevant; or
- (p) an insurer gives a "No Quote" unconditionally to a broker, but later gives quotations to another broker and fails to advise the broker that he is now open to proposals.

PART VIII. Review and Appeals Process

Complaints
by
contractor,
prospective
contractor.

29.—(1) A contractor or prospective contractor that claims to have suffered loss or injury due to a breach of these provisions by a procuring entity may seek review.

(2) Notwithstanding anything in paragraph (1), the following are not subject to review—

- (a) the selection of a method of procurement; or
- (b) a decision by the procuring entity to reject all tenders, proposals, offers or quotations.

Review by
Procuring
Entity.

30.—(1) Upon receipt of a complaint, the Head of the Procuring Entity shall ensure that the complaint is copied to the sector or relevant procurement committee with responsibility for approval of the award recommendation which shall deal with the complaint in accordance with the procedures set out herein.

(2) The complaint shall be received by the procuring entity—

- (a) within fourteen days of the date the complainants became aware; or
- (b) the date upon which the complainants should have become aware, whichever is earlier, that the circumstances giving rise to the complaint have occurred.

(3) Unless the procuring entity and the complainant reach agreement on the resolution of the complaint, the Head of the Procuring Entity shall, within fourteen days of receipt of the complaint, issue a written decision to the complainant stating the reasons for the decision and indicating that any appeal of that decision shall be lodged with the National Contracts Committee within fourteen days of the contractor's receipt of the procuring entity's decision.

Review by
National
Contracts
Commission.

31.—(1) Appeals shall be addressed to the National Contracts Commission and copied to the head of the procuring entity, and an appeal from the decision of the National Contracts Commission may be lodged with the Procurement Appeals Board within the next fourteen days after the Commission's decision.

(2) A copy of all appeals and the resolution recommendations therefore shall be maintained by the procuring entity in the record of the procurement.

Procurement
Appeals
Board.
Second
Schedule.

32.—(1) There is hereby established a body to be called the Procurement Appeals Board and the provisions of the Second Schedule shall have effect as to its constitution and otherwise in relation thereto.

(2) The Procurement Appeals Board shall, within fourteen days of receipt of the appeal request, recommend an appropriate resolution, a copy of which should be communicated to the Head of the Procuring Entity, the NCC the contractor and any other persons deemed appropriate. Should the NCC and the Procuring Entity fail to comply with the recommendations of the Procurement Appeals Board, the contractor may institute proceedings for judicial review.

Review by
Financial
Services
Commission.

33. The Financial Services Commission shall enter in the adjudication process only with respect to complaints regarding the following—

- (a) if a broker has a genuine complaint regarding the conduct of an insurer who is deemed to have acted with prejudice towards the broker's proposal, a formal complaint may be submitted to the insurance division of the Financial Services Commission; and

- (b) a copy of the compliant shall be forwarded to the responsible Ministry in the procurement policy implementation unit and a copy to the entity associated with the tender in question.

PART IX. *Miscellaneous*

Effect of
failure to
keep records.

34. The Government shall not incur external or third party liability solely by failure to maintain a record of any procurement proceedings:

Provided that, in accordance with any provision of law, an accountable officer may face internal disciplinary action if—

- (a) procurement records do not justify procurement expenditure; and
- (b) the Financial Secretary considers proffered explanations to be unsatisfactory.

Confidentiality.

35. For greater certainty it is declared that in accordance with section 24 of the Act all transactions relating to all aspects of the procurement process shall be treated by the public officers concerned with any public sector procurement as secret and confidential.

Duty to
declare
interest.

36.—(1) It is the duty of any public officer directly or indirectly involved with the procurement process and particularly in the preparation of bidding documents, evaluation, contract negotiations and contract management and payments to—

- (a) declare to the head of his entity or chairman of the entity's procurement committee any potential conflict of interest in relation to a proposed Government contract;
- (b) declare to the head or chairman, any relationship with a bidder, supplier, contractor or consultant and refrain from taking part in either the decision making process or the implementation of any prospective Government contract where such a relationship exists.

(2) Every personal relationship shall be disclosed in writing or, if in a meeting orally and then minuted, and any person who has made such a disclosure of personal relationship shall not sit in any meeting while deliberations on the subject matter are being conducted.

(3) A prospective contractor with potential or actual conflict of interest in relation to goods, works or services under a proposed Government contract shall be ineligible to bid or to submit any proposal.

(4) A conflict of interest exists in the case of a firm previously hired by the Government to provide related services for any project design, preparation or implementation; and that firm and all its affiliates shall be ineligible to provide goods, works or services for any contract which relates in whole or in part to those earlier services provided by ~~it to the Government~~.

(5) In this regulation, a "personal relationship" means consanguinity or affinity up to the third civil degree.

Review by
Procurement
and Asset
Policy Unit.

37.—(1) Where any question arises as to the materiality of an apparent situation of conflict of interest shall be reviewed by the Procurement and Asset Policy Unit of the Ministry responsible for procurement policy taking into consideration—

- (a) timing;
- (b) the relatedness of the assignments;
- (c) their source;
- (d) the potential impact of the conflict and the circumstances under which it arises.

(2) The risks of a conflict of interest deriving from the consultants' assignment under consideration, shall be identified in the request for proposals; and the related provisions for its avoidance or mitigation (such as disqualification, cooling off periods, and corporate separations), shall be clearly stipulated in the information to consultants in the contract.

Ethical
standards.
First
Schedule.

38. In addition to standards of behaviour otherwise lawfully prescribed, a public officer who is concerned with any aspect of public sector procurement shall comply with the standards set out in the First Schedule.

Civil Liability and Offences

Civil
liability.

39. A person who—

- (a) contravenes any provision of these Regulations;
 - (b) aids, abets, counsels or procures the contravention of any such provision;
 - (c) is knowingly involved in or is a party to any such contravention;
 - (d) conspires with any other person to contravene any such provision,
- is liable in damages for any loss caused to any other person by such conduct.

Offences and
penalties.

40. A person who—

- (a) contravenes these Regulations; or
- (b) aids, abets or otherwise knowingly facilitates or is an accessory to the contravention of these Regulations, commit an offence and is liable, on summary conviction in a Resident Magistrate's Court, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding three months or to both such fine and

FIRST SCHEDULE

(Regulation 38)

Ethical Standards in Procurement

1. In this Schedule "procurement officer" includes any public officer who is concerned in any aspect of the process of public sector procurement.

2.—(1) A procurement officer shall not use his authority or office for personal gain.

(2) In this paragraph, "personal gain" includes accepting or requesting anything of material value from bidders, prospective bidders or suppliers for the individual, his spouse, parents, children or other close relatives, or on behalf of other persons from whom the individual might gain direct or indirect benefit of or from the gift.

3. A procurement officer—

- (a) shall not accept gifts from a prospective contractor;
- (b) shall avoid any hospitality which may reasonably be regarded as potentially or actually influencing the making of a decision in relation to a prospective Government contract;
- (c) shall report any perceived or reasonably suspected unethical conduct by a colleague, a bidder or a supplier to that person's supervisor, oversight agencies, or to the auditors;
- (d) shall not—
 - (i) reveal confidential information either directly or indirectly, to any bidder or prospective bidder;
 - (ii) discussing a procurement bid with any bidder or prospective bidder outside the official rules and procedures for conducting procurements;
 - (iii) favouring or discriminating against any bidder, prospective bidder or consultant in the preparation of technical specifications, terms of reference, standards or the evaluation of bids and proposals;
 - (iv) destroying, damaging, hiding, removing, or improperly changing any formal procurement document;
 - (v) accepting or requesting money, travel expenses, meals, entertainment, gifts, favours, discounts or anything of material value from bidders or prospective bidders, suppliers, contractors or consultants;
 - (vi) discussing or accepting future employment with bidders or prospective bidders, suppliers, contractors or consultants;

FIRST SCHEDULE, *contd.*

- (vii) requesting any other person to violate the public procurement rules or procedures;
- (viii) ignoring evidence that these Regulations or any other enactment relating to public sector procurement practices is being or has been breached and fail;
- (ix) ignoring illegal or unethical activity by bidders or prospective bidders, suppliers, contractors or consultants, including any offer of personal inducements or rewards.

SECOND SCHEDULE

(Regulation 32)

Procurement Appeals Board

- Constitution of Board. 1. The Procurement Appeals Board shall consist of a chairman and two other members, sitting together and shall comprise—
- (a) a legal practitioner nominated by the Bar Association of Jamaica;
 - (b) a member of the private business sector, nominated by the Private Sector Organization of Jamaica; and
 - (c) the Financial Secretary or his representative.
- Tenure of Office. 2.—(1) The members of the Appeal Board shall, subject to the provisions of this Schedule, hold office for such period not exceeding two years as the Minister may determine, and each member shall be eligible for re-appointment.
- (2) Any member of the Board other than the chairman may at anytime resign by instrument in writing addressed to the Minister and transmitted through the chairman and such resignation shall take effect as from the date of receipt by the Minister of that instrument.
- (3) The chairman may at anytime resign his office by instrument in writing addressed to the Minister and such resignation shall take effect as from the date of receipt by the Minister of that instrument.
- Revocation of appointments. 3. The Minister may at any time revoke the appointment of any member of the Board if he thinks it expedient so to do.
- Filling of vacancies. 4. If any vacancy occurs in the membership of the Board it shall be filled by the appointment of a person in the same category of the person vacating membership.
- Meetings. 5.—(1) The Appeals Board shall meet at such times as are necessary or expedient for the proper carrying out of its functions and such meetings shall be held at such place and time and on such days as the Appeals Board shall determine.
- (2) The chairman shall preside at all meetings of the Appeals Board.
- (3) The Minister may appoint one of the members of the Appeals Board in the case of the absence or inability to act of the chairman or other member.
- (4) The decision of the Appeals Board shall be by a majority of votes of the members present and the chairman shall have a casting vote in any case where the voting is equal.

(5) Minutes in proper form shall be kept of the proceedings of the Appeals Board.

(6) Subject to the provisions of this Schedule, the Appeals Board shall have power to regulate its own proceedings.

(7) The quorum at any sitting of the Appeals Board shall be two.

Dated this 12th day of December, 2008.

AUDLEY SHAW
Minister of Finance and the Public Service.