

**TURKS AND CAICOS ISLANDS**

## **CHAPTER 19.19**

# **PUBLIC PROCUREMENT ORDINANCE**

**Revised Edition**  
showing the law as at 31 December 2014

This is a revised edition of the law, prepared by the Law Revision Commissioner under the authority of the Revised Edition of the Laws Ordinance.

This edition contains a consolidation of the following laws—

### **PUBLIC PROCUREMENT ORDINANCE**

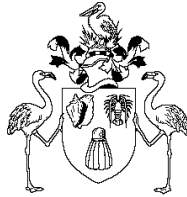
Ordinance 33 of 2012 .. in force 1 November 2012 (L.N. 53/2012)

Amended by Legal Notice 65/2012 .. in force 16 November 2012

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**CHAPTER 19.19**  
**PUBLIC PROCUREMENT ORDINANCE**

*(Ordinances 33 of 2012 and 7 of 2013 and Legal Notice 65/2012)*

AN ORDINANCE TO PROVIDE FOR THE PROCUREMENT OF GOODS AND SERVICES BY THE GOVERNMENT AND PUBLIC BODIES AND AGENCIES, AND FOR RELATED PURPOSES.

**Commencement**

*[1 November 2012]*

**PART 1**

**INTRODUCTION**

**Short title**

1. This Ordinance may be cited as the Public Procurement Ordinance.

**Application**

2. (1) If this Ordinance is inconsistent with the Public Finance Management Ordinance or the Chief Financial Officer Ordinance, the latter Ordinances shall apply to the extent of the inconsistency. If the implementation of a provision of this Ordinance is inconsistent with the implementation of a provision of the latter Ordinances, the implementation of the provision of the latter Ordinances shall apply to the extent of the inconsistency.

(2) This Ordinance does not apply—

- (a) where the government has policies in place in respect of employment contracts for permanent posts (if a Position Identity Number or equivalent exists), for interim appointments of employees or for relief employees (other than consultants);
- (b) to contracts relating solely to the disposal or acquisition of securities or of an interest in land and property;
- (c) to the appointment of Counsel by the Attorney General or the Director of Public Prosecutions; *(Amended by Ord. 7 of 2013)*
- (d) to the appointment of an expert (for example, an expert witness) in legal or potential legal proceedings.

(3) This Ordinance does not apply to contracts within a class of contracts to the extent that the Permanent Secretary, Finance—

- (a) has determined that because of the nature of the contracts within the class of contracts it is unnecessary to apply certain provisions of this Ordinance to contracts within the class of contracts; and
- (b) has given Financial Instructions exempting contracts within the class of contracts from specified provisions of this Ordinance.

## Interpretation

### 3. (1) In this Ordinance—

“accounting officer”, in respect of a department of government, means the officer appointed in respect of the department under section 123(3) of the Constitution or, if no such person has been appointed in respect of a department of government, the chief officer of the department;

“aggregated value”, in respect of a contract or a proposed contract, means the value of goods or services to be procured over the term of the contract or proposed contract or within a financial year;

“approved list” has the meaning given to that expression by section 52;

“best value” means the optimum combination of whole-life costs, price, quality and benefits to meet the government’s requirement;

“capital spending” means the acquisition, construction or development of a tangible capital asset (the spending being distinguished from current account spending for repairs and maintenance in that it enhances the service potential of a capital asset and therefore consists of a betterment enhancing the output of the asset, or extending its useful life) and is divided into two types of capital spending, namely—

(a) capital acquisition, which includes vehicles and heavy equipment, plant machinery and equipment, vessels and boats, furniture and fixtures, office equipment, computer hardware and equipment and computer software; and

(b) capital development, which includes land, building and infrastructure;

“Certificate of Non-Collusion” means a certificate that complies with section 49(2);

“conflict of interest” means the situation that arises when an obligation, interest or distraction exists that would interfere with an independent exercise of judgement;

“contractor” means a person whose tender has been accepted;

“department of government” has the meaning given to the expression by section 123(4) of the Constitution;

“Director of Contracts” means the person holding or for the time being carrying out the duties of the public office of Director of Contracts;

“economy” means the acquisition of the appropriate quality and quantity of financial, human and physical resources at the appropriate times and at the lowest cost;

“effectiveness” means the achievement of the objective or other intended effect of a programme, operation or activity;

“efficiency” means the use of financial, human and physical resources such that output is maximised for a given set of resource inputs, or input is minimised for a given quantity and quality of output provided;

“Financial Instructions” means instructions given by the Permanent Secretary, Finance under section 65 that have been approved by the Governor;

- “framework agreement” has the meaning given to that expression by section 53;
- “government” means the House of Assembly, the courts, the central and local government administrations, the institutions protecting good governance, and any public corporations or other bodies or organisations established by or under an Ordinance;
- “government’s requirement” means the outputs, outcomes and the scope and nature of supplies, services or works required by the government from a procurement process;
- “high value procurement” means procurement with an estimated value of \$75,000 or more and a procurement that is to be funded from the capital programme;
- “intermediate value procurement” means procurement with an estimated value of more than \$5,000 but less than \$75,000;
- “invitation to tender” means an invitation to submit tenders in respect of proposed procurement by the government;
- “low value procurement” means procurement with an estimated value of \$5,000 or less;
- “officer” means—
- (a) an employee of the government and includes the holder of an office in the government whether by appointment or election; and
  - (b) in respect of procurement or a contract, the officer with immediate responsibility for the management or administration of the procurement or contract;
- “open procedure” means a procedure for inviting tenders without prior short listing, as set out in section 35;
- “person” includes an individual, a sole trader, a partnership or a company (limited or unlimited) or an incorporated trade, professional or commercial body;
- “private finance initiative”, in respect of a project, means a public / private partnership project in which one or more of the private sector bodies in the partnership will be funding the whole or part of the cost of the project;
- “Procurement Board” or “Board” means the Procurement Board established by section 23(1);
- “Procurement plan” means a plan that identifies major projects—
- (a) that can be used to identify appropriate financial resources; and
  - (b) that provides advance notice of tendering opportunities to potential contractors;
- “public / private partnership”, in respect of a project, means a project that will be carried out by a partnership that includes the government and one or more private sector bodies;
- “quotation” means an offer to supply or procure goods or materials, execute works or provide services at a stated price;

- “reporting threshold”, in respect of a contract, means an amount specified by Financial Instructions, as being the level above which tendering action must be undertaken before awarding a contract with an estimated value in excess of the level;
- “restricted procedure” means a procedure in which persons are invited to tender who have been previously short listed, as set out in section 36;
- “Returns List” means the list of tender forms issued and abstract of tenders received;
- “Secretary to the Board” means the Director of Contracts or a person, who need not be an officer, appointed by the Director to be the Secretary to the Board;
- “services” includes the employment of consultants or temporary employment agencies services and the hiring and renting of premises;
- “standing offer” means an arrangement setting out the terms and conditions, including a basis for pricing, under which a supplier agrees to supply specified goods and services for a specified period;
- “supplies” includes the purchase of goods and equipment;
- “tender” means an offer to supply or procure goods or materials, execute works or provide services at a stated price submitted in response to an invitation to tender;
- “tender documents” mean the conditions of tender and contract documents, the form of tender, the specification, the form of agreement and any other related documents or papers;
- “tenderer” means a person who has submitted or who intends to submit a tender;
- “works” includes building work, engineering work and demolition work;
- “writing”, in respect of a requirement that a document should be written, includes text created, transmitted or stored by electronic means that is capable of being retrieved in legible form.

(2) If an officer has any doubt as to a requirement of this Ordinance, or as to a procedure to be followed under it, the officer shall seek the advice of the Director of Contracts.

(3) Evidence that an officer sought the advice of the Director of Contracts and followed any advice given may be given in a prosecution of the officer for an offence under this Ordinance as a defence or in mitigation.

## PART 2

### STATEMENT OF PRINCIPLES

#### Framework rules

4. (1) The purpose of this Ordinance is to provide framework rules for the procurement of supplies, goods and services or the construction of works by or on behalf of the House of Assembly, a court, the central administration, a local government administration, an institution protecting good governance, and a

public corporation or other body or organisation established by or under an Ordinance.

(2) By following the framework rules, value for money, transparency of practice, propriety and the proper spending of public money will be achieved.

(3) The principles underpinning this Ordinance are—

- (a) the need to ensure that appropriate competition and propriety are present in government procurements and the award of contracts;
- (b) the need to secure best value for money from procurement through the consideration of both financial and non-financial costs and benefits;
- (c) the need to maintain fairness, transparency, equality and integrity in government procurements;
- (d) the need to ensure that the highest standards of probity are observed by officers involved in the procurement, award and management of government contracts.

(4) During the procurement process an officer must follow a policy of non-discrimination, equal treatment and transparency.

(5) An officer must not accept a gift or hospitality contrary to section 11 of the Public Service Ordinance.

(6) An officer must declare an interest the officer may have in any entity that does or could supply the government with goods, services or works.

(7) A notification of a potential conflict of interest must be made by an officer in writing and held on the project file.

(8) If it is found that a conflict of interest was known to a contractor the contract is annulable by the government.

(9) An accounting officer must be mindful of the need to obtain value for money (economy, efficiency, and effectiveness) in the procedures and services the officer's department is following or providing and must strive to encourage a working environment conducive to achieving best value for money.

(10) An officer who incurs expenditure on behalf of government must have regard to whether the best value for money may be obtained by using Turks and Caicos registered vendors.

(11) An officer who incurs expenditure on behalf of government must ensure that best value for money is obtained since the officer may be held personally responsible where it is shown that the officer failed to ensure suitability, effectiveness, prudence, quality, good value and the avoidance of error and other waste.

(12) Accordingly, an officer must ensure that expenditure is appropriate and necessary for the services being provided.

(13) An officer must keep in mind the fact that the Auditor General, Internal Audit or Director of Contracts will report where—

- (a) money was expended without due regard to economy or efficiency;

- (b) satisfactory procedures were not established to measure and report the effectiveness of a programme; or
- (c) such procedures could appropriately and reasonably have been implemented.

(14) An officer must ensure that the government's reputation is safeguarded from any imputation of dishonesty or corruption at all times.

(15) An accounting officer must report, as soon as practicable, to the Deputy Governor and Director of Contracts any failure by an officer to comply with this Ordinance.

(16) An officer shall not attempt to circumvent this Ordinance.

(17) An attempt to circumvent this Ordinance is the offence of financial misconduct for the purposes of section 62.

(18) The intentional splitting of a known procurement requirement into smaller lots with the intention of circumventing tendering requirements is an attempt to circumvent the provisions of this Ordinance.

(19) If it is found that an order has been intentionally split—

- (a) the separate orders must be cancelled and consolidated into one requirement, albeit a delay may be caused in the procurement process;
- (b) any delegated purchasing authority in respect of the order must be cancelled; and
- (c) the relevant officer is to be held to account.

### **Certain procurements to be high value procurements**

5. (1) If the risk in a specific procurement is perceived by the relevant accounting officer to be high, the procurement must be treated as high value procurement regardless of the estimated value of the contract.

(2) If procurement may involve a transfer of staff, (for example if a public / private partnership project is to be put into place) it must be treated as high value procurement.

(3) Capital spending, except to the extent that it falls within a class of capital spending exempted from this subsection by Financial Instructions, must be treated as high value procurement, unless it is covered by a government wide contract (for example for information technology equipment).

### **Governor may intervene**

6. The Governor acting in his or her discretion may, prior to the signing of a contract, stop or overturn a tender process if he or she is satisfied that to progress it further would not be in the best interests of the government.

### **Value for money**

7. (1) An officer undertaking procurement must clearly understand and express the goals and purpose of the procurement to obtain best value for money.

(2) In planning, developing and executing a project an officer must follow these five stages, namely—

- (a) the appraisal and business case stage;
- (b) the procurement stage;
- (c) the contract management stage;
- (d) the delivery stage; and
- (e) the evaluation stage.

(3) If a business requirement arises, an officer must consider whether procurement will deliver the best value for money.

(4) In order to comply with subsection (3), the officer must take into consideration—

- (a) non-procurement alternatives;
- (b) consultation with stakeholders;
- (c) the business need;
- (d) resourcing;
- (e) pre-existing arrangements.

(5) A public / private partnership project or a private finance initiative project, whether funded from conventional borrowing or an alternative financing arrangement is, following approval from a Secretary of State, to be suitably appraised by the House of Assembly before the procurement stage to ensure value for money will be obtained and that a robust cost-benefit analysis has been carried out.

(6) With the exception of a development project funded by a donor agency, a project, whether funded from recurrent surpluses, conventional borrowing or any alternative financing arrangement, is to be suitably appraised by the Permanent Secretary, Finance before the procurement stage to ensure value for money will be obtained and that a robust cost-benefit analysis has been carried out.

(7) If a development project is funded by a donor agency and the agency stipulates the procurement procedures to be followed, the donor agency's procedures must be followed where that procedure is inconsistent with a provision of this Ordinance.

(8) To ensure that an informed decision can be made on whether or not to proceed to the procurement stage of a project, the business case that results from the appraisal process must—

- (a) demonstrate the economic need for the project; and
- (b) include a fully argued and costed risk and impact assessment and specify the benefits the project is designed to deliver.

(9) If it is determined that procurement represents the best value for money, those considerations must be used to inform the development and implementation of the procurement.

(10) Since achieving value for money is a core principle of procurement the relevant officer must be satisfied, after reasonable enquires, that the procurement achieves a value for money outcome.

(11) In this respect, value for money in procurement requires—

- (a) encouraging competitive and non-discriminatory processes;
- (b) using resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the government;
- (c) making decisions in an accountable and transparent manner;
- (d) considering the risks; and
- (e) conducting a process commensurate with the scale and scope of the procurement.

(12) An officer must not take the price of the goods or services as the sole determining factor in assessing value for money.

(13) A comparative analysis of the relevant financial and non-financial costs and benefits of alternative solutions throughout the procurement must be used to inform a value for money assessment, taking into consideration—

- (a) fitness for purpose;
- (b) a potential supplier's experience and performance history;
- (c) flexibility (including innovation and adaptability over the life-cycle of the procurement);
- (d) environmental sustainability (such as energy efficiency and environmental impact); and
- (e) whole-of-life costs.

(14) If a contract may continue for an undetermined period, an officer must ensure that the contract provides for—

- (a) periodic reviews; and
- (b) termination by the government if the government determines that the contract no longer represents value for money.

### **Encouraging competition**

**8.** (1) Competition is a key element of the government's procurement framework.

(2) Effective competition requires non-discrimination and the use of competitive procurement processes.

(3) Participation in procurement imposes costs on both government and potential suppliers.

(4) Accordingly, those costs must be considered by an officer when designing a procurement process that is commensurate with the scale, scope and risk of the proposed procurement.

(5) Since the government's procurement framework is non-discriminatory, an officer—



- (a) must negotiate with a potential supplier equitably based on the supplier's commercial, legal, technical and financial abilities; and
- (b) must not discriminate against a supplier due to the supplier's size, degree of foreign affiliation or ownership, location, or the origin of the supplier's goods or services.

### **Efficient, effective, economical and ethical procurement**

9. (1) It is the duty of an officer to promote the proper use of government resources.

(2) Proper use means efficient, effective, economical and ethical use that is not inconsistent with the policies of the government.

(3) An officer must, therefore, put in place effective procurement processes that provide confidence and ensure suitability, effectiveness, prudence, quality, good value and the avoidance of error and other waste.

(4) Efficient, for the purposes of this section, relates to the achievement of the maximum value for the resources used.

(5) In procurement, it includes the selection of a procurement method that is not inconsistent with the policies of the government and that is the most appropriate for the procurement activity, given the scale, scope and risk of the procurement.

(6) Effective, for the purposes of this section, relates to the extent to which intended outcomes or results are achieved.

(7) It concerns the immediate characteristics, especially price, quality and quantity, and the degree to which these contribute to specified outcomes.

(8) Economical, for the purposes of this section, relates to minimising cost.

(9) It emphasises the requirement to avoid waste and sharpens the focus on the level of resources that the government applies to achieve outcomes.

(10) Ethical, for the purposes of this section, relates to honesty, integrity, probity, diligence, fairness and consistency.

(11) Ethical behaviour identifies and manages conflicts of interests, and does not make improper use of an individual's position.

(12) In particular, an officer undertaking procurement must act ethically throughout the procurement.

(13) Ethical behaviour includes—

- (a) recognising and dealing with actual, potential and perceived conflicts of interest;
- (b) dealing with suppliers and potential suppliers and tenderers equitably, including by seeking appropriate internal or external advice if probity issues arise and by not accepting gifts or hospitality contrary to any law, instruction or guidance; and
- (c) carefully considering the use of government resources.

(14) An officer must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.

(15) This includes not entering into contracts with tenderers who have had a judicial decision against them (not including a decision under appeal) relating to employee entitlements where they have not paid the claim.

(16) Accordingly, an officer must seek a declaration from tenderers confirming that they have no such unsettled judgments against them.

### **Accountability and transparency in procurement**

**10.** (1) The government is committed to ensuring accountability and transparency in its procurement activities.

(2) Accountability in this respect means that an officer is responsible for the actions and decisions that he or she takes in relation to procurement and for the resulting outcome.

(3) Transparency in this respect means that an officer involved in procurement must take steps to enable appropriate scrutiny of his or her procurement activity.

(4) The fundamental elements of accountability and transparency in procurement means those outlined in this Part.

### **Records**

**11.** (1) An officer must maintain appropriate documentation for procurement he or she undertakes.

(2) The appropriate detail of documentation must be commensurate with the scale, scope and risk of the procurement.

(3) The documentation must provide accurate and concise information on—

- (a) the requirement for the procurement;
- (b) the procurement process that was followed;
- (c) how value for money was considered and achieved; and
- (d) relevant decisions, including the basis of those decisions.

(4) The officer must have appropriate documentation with the supplier, such as a written contract or purchase order.

(5) The officer must retain the documentation in respect of a contract for at least six years after each obligation under the contract has been discharged or ceased to be enforceable, unless a longer period is prescribed by an Ordinance.

### **Providing information**

**12.** (1) An officer undertaking procurement must, on request, promptly provide a potential supplier with any documentation and information that are needed to permit the supplier to prepare and give a quotation or submit a tender.

(2) An officer must, as soon as practical after the rejection of a tender or the award of a contract, inform the tenderer of the decision.

(3) The officer must make debriefing available on request to each unsuccessful tenderer, outlining the reason why his or her tender was unsuccessful.

(4) The officer must also make debriefing available, on request, to the successful tenderer.

### Reporting arrangements

13. (1) An officer must, prior to procurement, publish in the *Gazette* for public consultation details of—

- (a) any proposed capital project; and
- (b) any appraisal for a proposed capital project,

with an expected lifetime value of or in excess of any value specified in Financial Instructions unless the Minister advises that he or she considers there to be wider public interest.

(2) An officer in respect of any other procurement valued at or above the reporting threshold must report the contract and any amendment to it on the government website and in the *Gazette* within forty-two days of entering into the contract or amending it.

(3) Regardless of value, the officer in respect of a standing offer must report the offer on the government website and in the *Gazette* within forty-two days of entering into or amending the offer.

(4) The officer in respect of a standing offer must keep the relevant details in the offer notice, such as supplier details and the names of those participating in the offer, current by notice on the government website and in the *Gazette*.

### Subcontractors

14. (1) The officer in respect of a contract must make available on request, the name of any subcontractor engaged by the contractor under the contract.

(2) To enable this to be done—

- (a) an invitation to tender must require a contractor to agree to the public disclosure of the names of any subcontractors engaged to perform services in relation to the contract;
- (b) a contractor must be required to inform any subcontractor that the subcontractor's participation in fulfilling the contract may be publicly disclosed.

(3) An officer must not nominate a sub-contractor in a contract since to do so would remove the accountability of the main contractor.

### Treatment of confidential information

15. (1) An officer must, during procurement and the award of a contract, take necessary steps to protect the government's confidential information.

(2) This includes observing any relevant obligation in an Ordinance.

(3) An officer must treat a submission as confidential both before and after the award of a contract.

(4) Once a contract has been awarded the terms of the contract, including parts of the contract drawn from the supplier's quotation or tender, cease to be confidential unless the government has determined and identified in the contract specific information that is to be kept confidential, such as—

- (a) a description of the methodology to be used by a contractor that reveals confidential intellectual property; or
- (b) information obtained or generated as a result of the performance of the contract, such as a report that contains information that is protected since its disclosure would be contrary to the public interest.

(5) The need to maintain the confidentiality of information must always be balanced against the public accountability and the transparency requirements of government.

(6) Accordingly, an officer must plan for, and facilitate, appropriate disclosure of procurement information.

(7) In particular, an officer must—

- (a) include provisions in invitations to tender and contracts that alert potential suppliers to the public accountability and transparency requirements of government, including disclosure to the House of Assembly and its committees;
- (b) where relevant, include a provision in a contract to enable the National Audit Office and Internal Audit to access the contractor's records and premises to carry out appropriate audits;
- (c) consider, on a case-by-case basis, any request by a supplier for material to be treated as confidential after the award of a contract; and
- (d) not enter into a commitment to maintain confidentiality unless such a commitment is strictly necessary.

(8) If confidential information is required to be disclosed, for example following a request from a parliamentary committee, the officer must give reasonable written notice of the requirement to the contractor.

### **Other obligations**

**16.** Other reporting and disclosure obligations that apply to an officer include—

- (a) disclosure of procurement information for an annual report;
- (b) disclosure to the House of Assembly or its committees, in accordance with the Standing Orders of the House of Assembly;
- (c) disclosure of discoverable information to a court.

## Compliance

17. The officer in respect of a contract to be entered into by the government must ensure that the contract complies with—

- (a) any relevant statutes, including the Constitution; and
- (b) the government's strategic objectives and policies, including its procurement strategy.

## Accountability

18. (1) The accounting officer in respect of a department of government must ensure, in respect of procurement by the department, that this Ordinance is complied with and that any officer of the department with an obligation under this Ordinance carries it out.

(2) The accounting officer must, therefore, ensure that each decision, document, quotation, tender or contracts under this Ordinance is made available for inspection and monitoring by the Permanent Secretary, Finance, Director of Contracts, Auditor General, and Head of Internal Audit or, in each case, his or her nominee.

(3) Subject to section 19, an accounting officer may nominate an officer to undertake procurement on behalf of the department.

(4) However, in the case of high value procurement the accounting officer must undertake the procurement.

(5) The accounting officer must ensure that, if a person who is not an officer is required to supervise a contract on behalf of the government, it is made a condition of the contract between the government and the person that the person complies with the requirements of this Ordinance relating to procurement.

## Delegated authority

19. (1) Procurement by the government may not be carried out except by an officer with the authority to do so and where the procurement has been properly authorised.

(2) An officer with authority to carry out procurements on behalf of the government may delegate that authority to another officer, but only to an officer who has suitable experience and seniority.

(3) An accounting officer who has delegated to an officer authority to carry out procurement on behalf of the government must inform the officer of the extent of the delegated authority and any applicable financial threshold.

## Procurement risk

20. (1) Risk management comprises the activities and actions taken by government to ensure that it—

- (a) is aware of the risks it faces;
- (b) makes informed decisions in managing those risks; and
- (c) identifies and harnesses potential opportunities.

(2) Accordingly an accounting officer must establish processes for the identification, analysis, allocation and treatment of risk when carrying out procurement.

(3) The effort directed to risk assessment and management must be commensurate with the scale, scope and risk of the procurement.

(4) An officer must consider risks and their potential impact when making a decision relating to a value for money assessment, an approval of a proposal to spend public money and the terms of a contract.

(5) As a general principle, an officer must ensure that a risk is borne by the party best placed to manage it.

(6) Therefore, the officer must ensure that the government is not liable in respect of a risk that another party is better placed to manage.

(7) Similarly, if government is best placed to manage a particular risk, the officer should not seek to transfer inappropriately the risk to the contractor.

### **Waivers of this Ordinance**

**21.** (1) The Director of Contracts and Permanent Secretary, Finance, acting jointly, may waive a requirement of this Ordinance in respect of procurement if satisfied that emergency circumstances as set out in subsection (5) exist.

(2) Despite subsection (1), no waiver may be given in respect of a public / private partnership or private finance initiative project.

(3) In the case of any disagreement between the Director of Contracts and the Permanent Secretary, Finance the decision of the Permanent Secretary, Finance shall prevail.

(4) If it is the Permanent Secretary, Finance seeking a waiver, the matter must be referred to the Deputy Governor for a decision.

(5) For the purpose of this section, emergency circumstances exist if there is a direct risk to the public, government staff or government property to an extent where normal service is disrupted.

(6) An application for a waiver must be made in writing.

(7) However, the Permanent Secretary for the relevant Ministry may initially make an oral application to the Director of Contracts and the Permanent Secretary, Finance for a waiver.

(8) If the Director of Contracts is not available, the Permanent Secretary, Finance may give the approval.

(9) However, if the Director of Contracts is not available and it is the Permanent Secretary, Finance making the oral application the Deputy Governor may give the approval.

(10) Whenever an oral application for a waiver is made a written application for the waiver must follow within twenty-four hours of the oral application.

(11) If an application for a waiver is made and approved and it is subsequently found that the emergency did not exist as reported in the

application, the Director of Contracts must make a report to the Deputy Governor for a decision on what action (if any) is to be taken.

(12) The Director of Contracts must inform the Cabinet, at periods not exceeding three months, of each waiver granted under this section.

### **Procurement plan**

22. (1) In order to draw the market's early attention to potential procurement opportunities, each minister must publish an annual procurement plan by 31 May in each year setting out any high or intermediate value procurement that his or her area of ministerial responsibility expects to undertake during the forthcoming financial year.

(2) The annual procurement plan must include the subject matter of any procurement and the estimated publication date of any invitation for quotations or tenders.

(3) A minister must ensure that his or her procurement plan is regularly updated throughout the financial year.

## **PART 3**

### **THE PROCUREMENT BOARD**

### **Procurement Board**

23. (1) There is established a Procurement Board.

(2) The Procurement Board must carry out the functions conferred on it by this and any other Ordinance.

(3) The Procurement Board shall consist of—

- (a) a Chairperson, appointed by the Governor in Council to hold office at the pleasure of the Governor;
- (b) six officers drawn from across government appointed by the Deputy Governor to hold office at the pleasure of the Deputy Governor;
- (c) the Permanent Secretary, Finance; and
- (d) the Director of Contracts.

(4) The Auditor General and Chief Internal Auditor (or their nominees) shall be invited to attend meetings of the Board.

(5) The role and responsibilities of the Chairperson are set out in Schedule 1.

(6) The role and responsibilities of members of the Procurement Board are set out in Schedule 2.

(7) The role and responsibilities of the Secretary to the Procurement Board are set out in Schedule 3.

(8) To ensure impartiality of the Procurement Board, its members present at a meeting of the Board must be independent from the area of government in respect of which an invitation to tender is due to be processed at the meeting.

(9) In considering a person for appointment to the Board, the Deputy Governor must seek to establish a balance of skills and experience among its members to ensure that the Board includes persons with—

- (a) a proven track record of sound management;
- (b) an appropriate level of seniority and experience in decision-making;
- (c) experience in at least one recognised professional experience; and
- (d) experience in public procurement.

(10) An appointed member of the Board may not remain a member of the Board for more than six years.

(11) A member of the Procurement Board shall receive no payment or allowances as a member of the Board.

(12) An appointed member of the Procurement Board must, on appointment, sign the code of ethics.

(13) The Procurement Board must meet on a pre-set date and time to open tenders submitted in respect of an invitation to tender and process the tenders before they are sent to the evaluation panel for detailed evaluation and recommendation.

(14) Attendance of members at meetings of the Board is to be managed on a roster managed by the Secretary of the Board.

(15) A member who is unable to attend a meeting on his or her allocated day must notify the Secretary of the Board at least seventy-two hours prior to the meeting so that a replacement may be found.

(16) A member must, as soon as practicable, inform his or her line manager of the date of each meeting of the Board that the member is required to attend.

(17) If—

- (a) a member fails to arrive at the start of a meeting of the Board the member is required to attend and has not previously advised the Secretary; and
- (b) a replacement cannot be arranged resulting in the postponement of the meeting,

the Director of Contracts must notify the Deputy Governor and the relevant Permanent Secretary so that any disciplinary action may be considered.

### **Functions of the Procurement Board**

24. (1) The functions of the Procurement Board are to—

- (a) award contracts;
- (b) approve invitation to tender documents;



- (c) approve procurement procedures;
- (d) approve the choice of a procurement procedure;
- (e) approve solicitation documents before issue;
- (f) approve the findings of evaluation panels;
- (g) endorse decisions of departmental tender boards; and
- (h) approve contract documentation and any amendment to an awarded contract.

(2) In order to prevent allegations of fraud and corruption and to ensure fairness, impartiality and confidentiality in the treatment of tender documents, an officer must ensure that tenders are receipted through the Secretary to the Procurement Board.

(3) The Director of Contracts and Procurement Board Chairperson must ensure that in carrying out its functions the Procurement Board follows the procedures prescribed by this Ordinance.

(4) An officer must instruct potential tenderers to send tenders direct to the Secretary to the Board using a pre-addressed label that shows the invitation to tender reference number together with the date and time by which tenders must be submitted.

(5) The Secretary to the Procurement Board must ensure that a tender is kept, unopened, in a locked tender box or cupboard until the appointed day and time for the Board to meet to consider the tender.

(6) The Board procedures, as set out in this section and in the Schedules to this Ordinance, for opening and checking tenders and signing, stamping and embossing key documents containing prices together with the tender certificate, must be followed to ensure impartiality.

(7) The following actions have the following purposes—

- (a) embossing proves that the pages are originals and have not been replaced with alternatives;
- (b) signing proves that the pages have been checked by the Board members;
- (c) stamping proves that the Board has processed the documents.

(8) The Board must check the documents for completeness, timeliness of delivery and for any irregularities such as a price alteration.

(9) The following checks by the Board must be recorded by the Secretary to the Board in the following documents—

- (a) Returns List – the Board must annotate the number of tenders received and any late tender;
- (b) record of proceedings – the Board must record tenders received, late tenders and the time the Board meeting finished;
- (c) irregularities book – the Board must record irregularities (for example, any unusual incidents during the Board meeting, late tenders and any price alteration).

(10) The Secretary to the Board must send the Returns List together with the tenders received to the evaluation panel.

(11) The Secretary to the Board must ensure the record of proceedings and irregularities book are kept in the locked tender box or cupboard to provide an audit trail should a dispute arise.

(12) A key task for the Board is to process late tenders.

(13) The action the Board must take in respect of a late tender is set out in section 42(1). This also applies to tenders received during a Board meeting.

(14) Other than as required by this section and the Schedules to this Ordinance, a member of the Board must not alter, add a note or write anything else on a tender document.

(15) The Board must not permit the withdrawal, substitution or alteration of a tender document or the embossing of a document other than a tender document.

(16) Any suggestion to do so must be recorded by the Secretary to the Board in the irregularities book.

### **Procurement Board may offer its services to contractors**

25. The Board may offer its services to contractors for their competitive sub-contract tendering.

### **Proceedings of the Procurement Board**

26. (1) The quorum at a meeting of the Procurement Board is the chairperson and four other members.

(2) The Secretary to the Board must attend all meetings of the Board.

(3) Each member present at a meeting of the Board must sign the record of attendance.

(4) The Board shall consider each tender.

(5) Based on the information contained in its supporting documents, the Board must either approve or reject a tender.

(6) In so far as possible a decision of the Board must be by consensus, and where this is not possible must be made by a vote of the members present and voting.

(7) If there is an equality of votes the Chairperson has a casting vote.

(8) The Secretary of the Board must prepare and record written reasons for a rejection by the Board of a tender.

(9) The Board may co-opt an adviser to assist it in the discharge of its functions.

(10) An adviser shall not take part in a decision of the Board and may only attend the meeting while the Board is considering the matter on which the advice of the adviser is required.

(11) The adviser must sign the attendance record of the meeting.

PART 4

PRE-PROCUREMENT PROCEDURES

**Pre-procurement procedure**

27. (1) An officer must, before commencing a procurement exercise, identify the need for the exercise and assess any options for meeting the need.

(2) The officer must give consideration to the government procurement strategy.

(3) Unless approval has been granted previously as part of a larger project, or the procurement is covered by an existing framework agreement, before undertaking a high value procurement an officer must—

- (a) establish a business case, including risk assessment, options appraisal and financial needs assessment for the procurement;
- (b) decide on the procurement route to be taken under section 30; and
- (c) seek approval to conduct the exercise from the Deputy Governor.

(4) The Deputy Governor must bring the proposed procurement to the attention of the House of Assembly, except in the case of a public / private partnership or private finance initiatives project where approval must be sought from the Governor.

(5) The officer must also before undertaking a high value procurement—

- (a) consult the Director of Contracts to ascertain whether there is an appropriate framework agreement or approved list that should be used;
- (b) consult the Permanent Secretary, Finance to ensure that funding is available;
- (c) consider the design of the contract documentation in consultation with the Director of Contracts and the Attorney General;
- (d) consult, as appropriate, with users of the service;
- (e) establish a written specification for the procurement requirement;
- (f) ensure that any relevant documents are available in electronic format if considered appropriate; and
- (g) record the intention to procure with the Director of Contracts, and obtain a tender reference number.

(6) Before undertaking procurement with a value of less than any amount prescribed by Financial Instructions an officer must carry out an appraisal of the options appropriate to the procurement.

**Estimating value**

28. (1) Before entering procurement an officer must estimate its value.

(2) Its estimated value will determine the appropriate procedure to be followed under this Ordinance.

(3) Estimates of value and methods of valuation must be genuine and not designed to avoid exceeding any relevant threshold.

(4) An officer must ensure that government makes the best use of its purchasing power by aggregating purchases wherever possible.

(5) For the purpose of this Ordinance, the value of procurement is the expected amount of consideration (in money or money's worth) that will be received by the contractor over the expected lifetime of any resulting contract.

(6) The maximum value of the goods and services being procured must include—

- (a) all forms of remuneration, including any premiums, fees, commissions, interest, allowances and other revenue streams that may be provided for in the proposed contract;
- (b) the value of the goods and services being procured, including the value of any options in the proposed contract; and
- (c) any taxes or charges.

(7) If the procurement is to be conducted in multiple parts with contracts awarded either at the same time or over a period of time, with one or more contractors, the estimated value of the goods and services being procured must include the maximum value of all of the contracts.

(8) An officer must not divide procurement into separate parts solely to avoid a relevant procurement threshold.

(9) If the maximum value of the procurement over its entire duration cannot be estimated, an officer must treat the procurement as being high value procurement.

(10) For a “one-off” contract the estimated value is the contract price.

(11) For recurrent purchases of the same type of services or supplies, the estimated value will be its aggregated value being the sum of all spending within a year or, if longer, the term of the contract.

(12) Before undertaking a new procurement process or awarding a new contract an officer must—

- (a) establish whether the government's requirement can be met through any existing contract; and
- (b) ensure that the estimated value can be met from the appropriate budget (capital or revenue or both).

### **Use of specifications**

29. (1) An officer must ensure that a procurement process specifies the government's requirement in a clear, precise manner, using outcome performance and functional measures as appropriate.

(2) The officer must fully prepare the specification before advertising the proposed procurement.

(3) The specifications must not include a requirement that is discriminatory or may distort competition, for example, by including a manufacturer's name or model number.

(4) An officer must not specify a specific product, source or process unless this is essential for meeting the government's requirement and the specification permits the use or provision of an equivalent product, source or process.

(5) If appropriate, the officer must specify a non-discriminatory quality standard.

(6) The officer must ensure that specifications (and subsequent contracts) incorporate any approved contract conditions reflecting legal requirements or the policies of the government.

## PART 5

### PROCUREMENT PROCEDURES

#### **Procurement methods**

**30.** (1) There are three main methods of procurement tendering undertaken by government, namely—

- (a) by an open tender, which involves publishing an open invitation for submissions;
- (b) by a prequalified tender, which involves publishing an invitation for submissions from potential contractors on—
  - (i) a shortlist of potential contractors that responded to an initial open invitation;
  - (ii) a list of potential contractors selected from a multi-use list established through an open invitation; or
  - (iii) a list of all potential contractors that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the procurement; and
- (c) by a limited tender. (*Amended by Legal Notice 65/2012*)

(2) If an officer reports procurement from a standing offer the officer must report the original procurement method used to establish the standing offer.

(3) An officer must not undertake limited tender action except with the approval of the Permanent Secretary, Finance.

(4) Also a procurement at or above any relevant procurement threshold through a limited tender may only be undertaken if, in response to an approach to market—

- (a) no submission, or no submission that represented value for money, was received;
- (b) no submission that met the minimum content and format requirements for submission as stated in the request documentation was received; or

- (c) no tenderer satisfied the conditions for participation, and the government does not substantially modify the essential requirements of the procurement.

(5) If an officer is considering a project with a lifetime value above a limit specified in Financial Instructions or a project that uses a public / private partnership or any other form of alternative financing, the officer must ensure that independent accounting, legal, financial, economic, environmental and other technical advice as appropriate is retained to ensure that a robust investment appraisal is produced.

(6) The officer must ensure that sufficient expert advice, whether internal or external, is retained to ensure that the government is an “intelligent customer” of services or other arrangements agreed with private sector suppliers.

(7) The officer must ensure that sufficiently competent teams are in place to manage the project and ensure receipt of high quality services and products as agreed at the procurement stage.

(8) If payment under a contract is withheld to ensure the due performance of the contract, the payment may, subject to this or any other Ordinance, be charged to the appropriation for the contract, and the amount so charged may be placed to the credit of a special account to be paid out in accordance with the contract and in any manner the Minister of Finance may specify.

### **Low value procurement**

**31.** (1) This section applies if the estimated value of a proposed contract is \$5,000 or less.

(2) If an appropriate framework agreement or approved list is in place, an officer must use it as an alternative to the provisions of this section.

(3) An officer may obtain goods and services with an estimated value of \$1,500 or less on the basis of a single quotation by telephone or in writing.

(4) Since goods and services procured on a recurring basis are subject to aggregation, an officer, before proceeding, must consider the aggregated value of the purchase.

(5) For proposed contracts or orders with an estimated value of more than \$1,500 but less than \$5,000, an officer must obtain at least three written quotations.

(6) The officer must retain on file full details of each quotation, including the supplier approached, the contact person and the quotation details.

(7) The officer must ensure that procurement is formalised by issuing a purchase order that details the exact nature of the goods or services purchased and the agreed price.

(8) Exceptionally, if an officer is of the opinion that it is not reasonably practicable to obtain competitive or sufficient competitive quotations as required under this section, the officer must follow the procedure for obtaining a waiver set out in section 21. (*Amended by Legal Notice 65/2012*)

### **Intermediate value procurement**

**32.** (1) This section applies if the estimated value of a proposed contract is more than \$5,000 but less than \$75,000.

(2) If an appropriate framework agreement or approved list is in place, an officer must use it as an alternative to the provisions of this section.

(3) An officer must obtain at least three written quotations.

(4) The officer must retain on file full details of each quotation, including the supplier approached, the contact person and the quotation details.

(5) The officer must ensure that procurement is formalised by issuing a purchase order that details the exact nature of the goods or services purchased and the agreed price.

(6) Exceptionally, if an officer is of the opinion that it is not reasonably practicable to obtain competitive or sufficient competitive quotations as required under this section, the officer must follow the procedure for obtaining a waiver set out in section 21.

### **High value procurement**

**33.** (1) This section applies if the estimated value of a proposed contract is \$75,000 or more or is capital spending.

(2) This section applies despite any waiver granted under section 21.

(3) The proposed contract shall be subject to a tendering process.

(4) The nature of the procurement route to be followed shall be determined by the pre-procurement phase set out in section 27.

(5) In each case the route to be followed shall be as set out in sections 35 and 36.

(6) The Director of Contracts must log high value procurement and give it a reference number that must be quoted on all documentation relating to the invitation to tender and any subsequent contract.

(7) An officer must ensure that high value procurement is authorised by the Permanent Secretary, Finance before being advertised.

### **Public / private partnership and private finance initiatives**

**34.** (1) An officer must ensure that a public / private partnership or a private finance initiative project, whether funded from conventional borrowing or an alternative financing arrangement, is suitably appraised by the House of Assembly before the procurement stage to ensure that value for money is obtained and that a robust cost-benefit analysis is carried out.

(2) A project where a public / private partnership or a private finance initiative or any other form of alternative financing is involved may not be considered unless the written approval of a Secretary of State has been obtained and—

(a) there exists a sound appraisal underpinning the proposed project before the financing means has been determined;

- (b) a financial appraisal demonstrates improved value for money against a conventionally financed alternative;
  - (c) the long term affordability case has been assessed and agreed by the appropriate technical experts retained by the government; and
  - (d) an independent opinion has been received from a qualified accountant of good standing on the correct accounting treatment in the government's accounts.
- (3) A public / private partnership or a private finance initiative or any other form of alternative financing must not be used for—
  - (a) a project with a lifetime value of less than any amount specified in Financial Instructions (too small to justify its transaction costs); or
  - (b) a project where the fast pace of change in the sector makes it difficult to define effectively the outputs it requires in a long term contract (such as information and communication technology projects).

### **Open procedure**

35. (1) An officer must use the open procedure if—
- (a) it is known or thought that the number of potential contractors is unrestricted;
  - (b) there is no current approved suppliers list or framework agreement in place; or
  - (c) the government is procuring the goods or service for the first time.
- (2) The officer must advertise the procurement in the local media and on the government website informing potential contractors of the procurement route being followed.
- (3) The advertisement must contain details of the proposed procurement and specify a time limit within which interested parties may express an interest in tendering for the contract.
- (4) Within one week after the expiry of the deadline for expressions of interest, an officer must send an invitation to tender to each person that expresses an interest.
- (5) The invitation to tender must specify a return date for tenders.
- (6) Any tenders received must be processed in accordance with this Ordinance.
- (7) If the advertisement in the local media or the website fails to attract any potential contractors, the Director of Contracts may permit the officer to advertise the invitation to tender outside the Islands.
- (8) The same permission may be granted where there is a single expression of interest and the officer feels that this does not represent value for money for the government.



### **Restricted procedure**

**36.** (1) An officer must not use the restricted procedure except where—

- (a) it is known, and recorded, that there is a high number of potential suppliers in the supplier market within the Islands that would make the open procedure impractical to administer;
- (b) it is possible to shortlist recipients of the invitation to tender, using the pre-qualification criteria set out in section 37, without prejudicing or disadvantaging other potential suppliers, or loss of transparency of process; or
- (c) the procurement is to enable the construction of a framework agreement or a list of approved suppliers.

(2) The officer must advertise the procurement in the local media and on the government website informing potential suppliers of the procurement route being followed.

(3) The advertisement must include details on how the shortlist for receiving an invitation to tender will be decided, being the pre-qualification criteria referred to in section 37 and a timetable for the procurement.

(4) The office must invite a minimum of three suppliers to tender.

(5) The officer must inform each unsuccessful supplier.

(6) If there are not enough persons meeting the pre-qualification criteria to comply with the requirements of section 37(3) then, provided that best value for money can still be obtained through that tendering exercise, the officer may, with the approval of the Procurement Board, invite a lesser number of persons to tender.

(7) The officer must seek the advice of the Director of Contracts in the circumstances referred to in subsection (6).

### **Pre-qualification**

**37.** (1) An officer must carry out pre-qualification on objective but not subjective based information.

(2) An officer must ensure that evaluation criteria are weighted and based around—

- (a) eligibility;
- (b) financial standing; and
- (c) technical capacity.

(3) Eligibility includes economic, social and environmental criteria (for example the number of Turks and Caicos Islanders employed as a percentage of total workforce or the number of young Turks and Caicos Islanders employed as trainees).

(4) Financial standing must include audited financial statements and provision of proof of ability to provide any guarantee or performance bond as required under the proposed contract.

(5) An officer must also check with the relevant authorities including the Integrity Commission, the Accountant General, the Director of Contracts, the Director of Procurement, the Collector of Customs and the Revenue Collection Office.

(6) Technical capacity must include the contractor's ability to meet the specification, quality management systems including human resources, health and safety and environmental management systems relevant and appropriate to the performance of the proposed contract.

### **Single source procurement**

**38.** (1) Single source procurement must not be used unless—

- (a) in the case of procurement that is estimated to have a value of \$5,000 or more, the procurement is approved by the Procurement Board; or
- (b) in the case of a procurement that estimated is to have a value of less than \$10,000, an officer has determined that there is only one source for the supply of the goods, services or construction and the procurement is approved by the Board.

(2) In these circumstances the Board or an officer may, without competition, negotiate and award a contract for the procurement of the goods, services or construction.

(3) The Director of Contracts is to be notified when action under this section is contemplated.

(4) The Director must—

- (a) make a record of the basis of the Board's or officer's determination that there was only one source of supply; and
- (b) file a copy of the contract in the procurement's document file.

## **PART 6**

### **TENDER PROCEDURES**

### **Invitation to tender**

**39.** (1) The invitation to tender must include details of the government's requirements for the particular contract.

(2) It must include—

- (a) a description of the services, supplies or works being procured and minimum content and format requirements that include details of the nature, scope and, where known, the quantity of the goods and services to be procured and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings, or instructional materials;
- (b) any conditions for participation, including any financial guarantees, information and documents that a tenderer is required to submit;

- (c) a procurement timetable with a common return date and time, that allows a sufficient period of at least four weeks for a potential tenderer to prepare a tender;
- (d) specifications and instructions on any variations available;
- (e) a copy of the draft contract, and instructions for tenderers on how to highlight any clauses they do not accept and how to provide alternative wording based on technical or practical improvements to the value;
- (f) any evaluation criteria or weighting that will be considered in assessing tenders;
- (g) any pricing mechanism and instructions for completion;
- (h) the form and content of method statements to be provided;
- (i) the rules for submitting tenders;
- (j) a Certificate of Non-Collusion;
- (k) any further information that will inform or assist a potential tenderer to prepare a tender.

(3) An invitation to tender must include a section for a tenderer to list any sub-contractors that the tenderer would use to fulfil the contract.

### **Conditions for participation**

40. (1) An invitation to tender may specify conditions that potential contractors must be able to demonstrate compliance with in order to participate in procurement or a class of procurement.

(2) However, the conditions for participation must be limited to those that will ensure that a potential contractor has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement.

(3) Conditions for participation may require relevant prior experience where that experience is essential to meet the requirements of the procurement but must not specify, as a requirement, that potential contractors have previous experience with government.

(4) In assessing whether a potential contractor satisfies the conditions for participation, an officer must—

- (a) evaluate financial, commercial, and technical abilities on the basis of the potential contractor's business activities, wherever they have occurred; and
- (b) base his or her determination solely on the conditions for participation that the officer has specified.

(5) An officer may exclude a potential tenderer on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

### **Submission and opening of responses to an invitation to tender**

41. (1) Each tender, regardless of value, must be opened in accordance with the procedures set out in this Ordinance.

(2) As a further demonstration of transparency, a meeting of the Board at which tenders are opened must be open to the public.

(3) A tender may only be accepted in electronic format if a robust system is in place to ensure the security of the tender, for example, that it be held securely until the closing date and time has passed and cannot be opened before that time.

(4) Before being used an electronic system must be approved by the Director of Contracts and the Permanent Secretary, Finance.

(5) The Secretary to the Board must ensure that the contents of a tender are kept confidential and that nobody other than those evaluating it has sight of the detail contained in the tender.

(6) A person, other than persons evaluating a tender, must not discuss the contents of a tender until a decision is reached on the award of a contract.

(7) An officer must immediately inform the Director of Contracts if he or she feels under undue pressure to disclose the contents of a tender before the contract has been awarded.

(8) The Director must settle with the officer an appropriate plan of action to take, which may include excluding a potential tenderer from the process, reporting the matter to Internal Audit or the Deputy Governor, and, for serious breaches, reporting to the Auditor General or the Integrity Commission.

(9) A person submitting a tender, unless submitting it electronically, must submit it in a sealed plain envelope addressed to the Secretary to the Board and endorsed with the word "Tender" followed by the tender reference number to which it relates and the date and time the tender closes.

(10) The Secretary to the Board must return an envelope that bears a name or mark indicating its sender's identity.

(11) The Secretary to the Board must keep tenders in a locked, safe place and ensure that they remain unopened until the time and date specified for their opening.

(12) Except in the circumstances set out in section 42, the Secretary to the Board must return unopened a tender that is received after the specified date and time for receipt of tenders.

(13) This also applies to a pre-qualification questionnaire.

(14) Returning a late tender or a pre-qualification questionnaire unopened—

- (a) ensures that it is not evaluated or compared with those that were submitted by the due time and date;
- (b) demonstrates that the process for receiving tender or pre-qualification questionnaires is fair and impartial; and
- (c) eliminates scope for any suggestion that the tender or pre-qualification questionnaire was rejected for a reason other than because it was late.

(15) It may be necessary to open a late tender or pre-qualification questionnaire before it is returned if there is no return address or any indication of what it relates to.

(16) If a tender or pre-qualification questionnaire is opened under the circumstances described in subsection (15), the sender must be advised by the Secretary to the Board why it was rejected and why it was opened.

### **Acceptance of late tenders or pre-qualification questionnaires**

**42.** (1) The Secretary to the Board may accept a tender or a pre-qualification questionnaire that is received after the specified date and time for its receipt if the delay in submitting it is due to—

- (a) mishandling of the tender or questionnaire by government;
- (b) a natural disaster (for example a hurricane or tropical storm);
- (c) the non-availability of flights for more than forty-eight hours; or
- (d) any known disruption to a postal service.

*(Amended by Legal Notice 65/2012)*

(2) However, government mishandling does not include mishandling by a courier or mail service provider engaged by a potential supplier to deliver a tender.

(3) A person submitting a tender or pre-qualification questionnaire must ensure that it is dispatched in sufficient time for it to be received before the specified date and time.

### **Alterations to invitation to tender**

**43.** (1) This section applies if an officer, during the course of a procurement—

- (a) modifies the evaluation criteria or specifications set out in an invitation to tender or in request documentation; or
- (b) amends or reissues an invitation to tender or any request documentation. *(Amended by Legal Notice 65/2012)*

(2) The officer must, in adequate time to allow potential tenderers to modify and re-lodge their tenders, transmit all modifications or amended or reissued documents to the potential tenderers that the officer knows were participating at the time the information was amended and, for other cases, in the same manner as the original information.

(3) An officer must include in an invitation to tender a statement that an application to alter a tender received after the closing date for tenders will not be accepted.

(4) If an arithmetical error or a similar discrepancy is found in an otherwise successful tender, the Secretary to the Board must inform the tenderer of the error, in accordance with the terms of the proposed contract.

(5) However, this does not permit an alteration of a tender if the tender price is a single total figure.

(6) If a bill of quantities is included in a tender, the order of precedence set out in the procurement procedures must be followed to determine the action to be taken if the rates specified do not agree with the total figure.

### **Post-tender negotiations**

**44.** (1) Post-tender negotiations are not permitted unless—

- (a) the tender documents included a reference to the possibility of the tender being subject to post tender negotiations; and
- (b) a tender included an alternative to a specified element, where there is a potential cost saving to the government. (*Amended by Legal Notice 65/2012*)

(2) In such a case, two officers including an officer independent of the procurement process must be present when the post tender negotiations are carried out.

(3) Any communication with the tenderer under this section must be in writing.

(4) The officer independent of the procurement process must make and retain detailed notes, certified by the officer to be correct, of any meeting held with the tenderer.

### **Evaluation of tenders**

**45.** (1) Each tender submitted in respect of an invitation to tender must be evaluated in accordance with the procedure laid out in any Procurement Procedure Manual issued by the Permanent Secretary, Finance and approved by the Governor.

(2) The evaluation criteria to be used must be included in any invitation to tender sent to potential tenderers.

(3) Any sub-criteria that will be used as part of the evaluation criteria must be predetermined and approved by the officer and the Director of Contracts.

(4) The criteria must be observed and remain unchanged during the contract award procedure.

(5) The Procurement Board must form an evaluation panel in respect of the tenders received in respect of each invitation to tender.

(6) An evaluation panel must consist of—

- (a) the Director of Contracts or a person appointed by the Director, who shall preside at meetings of the panel;
- (b) a person representing the Ministry of Finance appointed by the Permanent Secretary, Finance; and
- (c) two other members appointed by the Board.

(7) However, an evaluation panel in respect of a capital project or a public / private partnership project must consist of—

- (a) the Director of Contracts or a person appointed by the Director, who shall preside at meetings of the panel;

- (b) the Permanent Secretary for the department that has responsibility for the project;
- (c) a representative from the Ministry of Finance appointed by the Permanent Secretary, Finance; and
- (d) not less than two other member appointed by the Board.

(8) The evaluation panel must satisfy itself that any companies submitting tenders are not connected in any way that may compromise the fairness of the process, including by ownership, shared directorships, and beneficiaries of companies or trusts.

(9) If such a concern is identified, the evaluation must be halted and the matter referred to the Director of Contracts for consideration.

(10) The evaluation of each tender must be carried out individually.

(11) Each member of the panel must score a tender.

(12) The person presiding at the panel meeting must then collate those scores.

(13) Following scoring, the panel must hold a moderation meeting to highlight any major discrepancies in scoring and to allow discussion and a moderated final score to be given.

(14) The person presiding at the meeting must minute the meeting and retain the final evaluation score sheet marked where any score has been moderated.

(15) If a tenderer considers that the evaluation process has not been applied fairly, the tenderer may raise an objection using the complaints process set out in section 61.

### **Awarding contracts**

46. (1) Except in the case of a capital project or a private public partnership project, the decision to award a contract in respect of a project following a tendering process shall be made by the Procurement Board on receipt of the evaluation report from the person who presided at meetings of the panel.

(2) In the case of a capital project or a private public partnership project, the Secretary to the Board must complete a Contract Award Notification and submit it to the Deputy Governor, who must submit it to Cabinet for the decision to award a contract in respect of the project.

(3) The officer in respect of a contract awarded in respect of a capital project, whatever its value, or in respect of any other contract with a lifetime value of \$75,000 or more must report the contract to the Director of Contracts together with a summary or the details of the contract.

(4) The Director of contracts must publish the report and summary in the *Gazette* and on the government web-site.

### **Debriefing tenderers**

47. (1) If requested in writing to do so by an unsuccessful tenderer, the officer responsible for the procurement must provide the tenderer with a full debriefing.

- (2) The officer may provide the tenderer with—
  - (a) a copy of the tender evaluation scoring with the names of other tenderers removed; and
  - (b) details of any notes made that resulted in less than top scores being allocated to the tenderer in any criteria, or sub-criteria area.

### Letters of intent

**48.** (1) An officer must not use a letter of intent except in exceptional circumstances.

(2) A letter of intent must not be used without the written approval of the Director of Contracts.

(3) The Director of Contracts must not give consent unless the wording of the letter has been approved by the Attorney General.

### Preventing collusion and corrupt practices

**49.** (1) An evaluation panel must not consider a tender unless it includes a completed Certificate of Non-Collusion signed by or on behalf of the tenderer.

(2) A Certificate of Non-Collusion is a certificate in a form approved by the Procurement Board in which the tenderer certifies that the tenderer has not been involved in practice specified in subsection (3).

- (3) The practices referred to in subsection (2) are—
  - (a) that the tenderer has not—
    - (i) made an arrangement or agreement with a person that requires the tenderer or the person to fix or adjust their tender price or to refrain from tendering;
    - (ii) communicated to a person the amount or approximate amount of their tender price otherwise than in confidence to obtain premium quotations for insurances or a bond;
    - (iii) given, agreed to give, offered to give or promised to give a person (directly or indirectly for the benefit of that person or for the benefit of any other person) a gift, loan, fee, reward or any other consideration or conferred an advantage as an inducement to, reward for or otherwise on account of the person having done, agreed or forborne to do anything in relation to a tender or a proposed tender;
    - (iv) shown favour or disfavour to a person in relation to a contract with the government;
    - (v) failed to disclose a conflict of interest; and—
  - (b) that the tenderer has not directly or indirectly canvassed a Minister or an officer to obtain or to attempt to obtain—
    - (i) entry to a list of persons approved by government to carry out works on its behalf;
    - (ii) information concerning another tenderer or a tender submitted by another tenderer; or



(iii) an advantage or benefit to the disadvantage of another tenderer.

(4) If the government has entered into a contract with a tenderer and it is subsequently proved that the Certificate of Non-Collusion submitted by the tenderer certified a fact that was false or misleading in a material manner, the government may terminate the contract in whole or in part and shall not be liable to pay any compensation to the contractor for any resulting damages the contractor may incur but may sue the contractor for any damages the government has incurred as a result of the false or misleading statement or the termination of the contract.

(5) A tenderer who, in a Certificate of Non-Collusion submitted with the tender of the tenderer, knowingly certifies a fact that the tenderer knows to be false or misleading in a material manner is guilty of an offence and is liable on conviction—

(a) on indictment to a fine of \$200,000 or to imprisonment for a period of five years or to both; or

(b) on summary conviction to a fine of \$20,000 or to imprisonment for a period of two years or to both.

(6) An officer must include in an invitation to tender a statement setting out the provisions of this section.

## PART 7

### CONTRACTS

#### **Contract terms and conditions**

50. (1) An officer must ensure that a contract entered into on behalf of the government is evidenced in writing.

(2) Except with the approval of the Governor, the initial period of a contract must not exceed five years.

(3) The Governor must not give his or her approval except in exceptional circumstances and then only for a period not exceeding ten years.

(4) A contract may provide for its extension for a period not exceeding five or, as the case may be, ten years.

(5) However, any such contract must provide that any extension will only be granted if both parties agree and if any performance standards have been continuously met and that no major breaches of the terms and conditions of the contract have occurred.

(6) Unless a contract is in a form previously approved by the Attorney General, the form of a contract must be approved by the Attorney General before it is entered into.

(7) Except with the approval of the Attorney General, an officer must not include in a contract a provision that has not previously been approved by the Attorney General for that type of contract or omit a provision from such a contract.

(8) An officer must ensure, for payment purposes, that there is a Purchase Order in respect of a contract and, if relevant, a Cabinet Conclusion reference from the approval granted in the pre-procurement stage.

(9) If, in respect of a contract, a department acts as agent for another department, an officer must ensure that any relevant Financial Instructions are followed.

(10) An officer must ensure that a contract that may have an effect on government land including leased land is countersigned by the Permanent Secretary of the department that has responsibility for support services.

### **Registers to be kept**

51. (1) The Director of Contracts must maintain a contracts register of all government contracts.

(2) Each accounting officer must also maintain a register of all contracts entered into by his or her department on behalf of the government regardless of value.

### **Approved lists**

52. (1) An approved list, or a list of pre-qualified suppliers, means a list that has been approved or drawn up by the Director of Contracts.

(2) In order to allow new businesses to become eligible for inclusion and to ensure sufficient rotation of contractors, the Director of Contracts must ensure that each approved list is updated at least once in any period of twelve months.

(3) An officer must not use an approved list if aggregated spend on the product or service to be acquired is more than any limit specified in Financial Instructions.

### **Framework agreements**

53. (1) A framework agreement is an agreement compiled in accordance with this section and administered by the Director of Contracts that is to be used if the government wishes to contract for the provision of certain supplies, services or works without a full procurement exercise being conducted.

(2) A framework agreement must include within its terms a requirement for a mini competition exercise between the various contractors who are parties to the agreement.

(3) A framework agreement must be tendered for in accordance with this Ordinance.

(4) If a framework agreement relates to the provision of professional services the rates must be established using fee based tenders.

(5) A framework agreement must contain a mechanism that is to be applied to pricing particular requirements during the period of the agreement.

(6) The agreement should also make it possible to establish the scope and types of goods or services that will need to be called off under the agreement.

(7) If the government has entered into a framework agreement, an officer must use it.

## Consultants

54. (1) An officer must not appoint a consultant to the government otherwise than in accordance with the procedure for procurements on behalf of the government set out in this Ordinance.

(2) An officer must ensure that if a consultant acts on behalf of the government in respect of procurement, the consultant carries out the procurement in accordance with this Ordinance as if the consultant were an officer.

(3) However, a consultant may only advise the government on whether to award a contract or as to whom a contract should be awarded and has no authority to award a contract on behalf of the government.

(4) Any attempt to contravene subsection (3) is of no effect.

(5) An officer must ensure a consultant's performance is monitored.

## PART 8

### POST CONTRACT ARRANGEMENTS

#### Monitoring of contracts

55. (1) An officer must ensure—

(a) that a contract is monitored throughout the period of the contract; and

(b) that the performance of the contractor is regularly reviewed and recorded in writing.

(2) The officer must record and, as soon as practicable, report to the Director of Contracts any incidences of non-performance by the contractor.

(3) The officer must also, at periods not exceeding three months, provide to the Director of Contracts a written report, using a form provided by the Director of Contracts, on the performance of contracts for which the officer is responsible.

(4) The Director of Contracts must, at periods not exceeding twelve months, provide a written report to the Deputy Governor on the performance of all contracts.

#### Contract variation and extension

56. (1) Unless a contract contains a provision for its extension, an officer must not extend a contract.

(2) However, a contract may be extended with the written approval of the Director of Contracts and the Permanent Secretary, Finance.

(3) That approval may only be given following consideration of a written report from the accounting officer of the relevant department of government.

(4) Approval must only be given if it can be demonstrated that—

(a) the extension will achieve best value for the government and will not contravene any legal requirement; and

(b) that further funding is available.

(5) A contract that does not contain a provision for its extension may only be extended once.

(6) An extension cannot be approved retrospectively.

(7) A contract that has expired cannot be extended.

(8) A variation to a contract made in accordance with its provisions must be authorised in writing by an officer.

### **Over contract spending**

57. (1) If an officer has reason to believe that the estimated final cost of a contract will be exceeded by more than 10% of the original estimate of proposed cost, the officer must submit to the Permanent Secretary, Finance a written report setting out the reason for the over spend so that any necessary action may be taken.

(2) If the officer is not the accounting officer of the relevant department of government, the officer must also send the report to that accounting officer.

### **Claims arising from contracts**

58. (1) If a claim arises under a contract in respect of a matter not clearly within the terms of the contract, the accounting officer of the relevant department of government must seek the advice of the Attorney General on the government's legal liability and the advice of the Permanent Secretary, Finance on any financial considerations.

(2) If the completion of a contract is likely to be delayed, resulting in claims under the contract, the accounting officer of the relevant department of government must inform the Director of Contracts and the Permanent Secretary, Finance of any action taken or proposed to be taken.

### **Termination of contracts**

59. (1) An officer must ensure that there is included in a contract a provision setting out the grounds on which the government may terminate the contract.

(2) An officer must not terminate the contract in accordance with its termination clause without the approval of the Director of Contracts and the Attorney General.

(3) If the officer is not the accounting officer of the relevant department of government, the approval of that accounting officer must also be obtained.

### **Disposal of capital assets**

60. (1) This section does not apply to gifts to which section 52 of the Public Finance Management Ordinance applies.

(2) The accounting officer of the relevant department of government must manage the disposal of surplus or obsolete capital assets.

(3) In managing such disposal, the officer must comply with any relevant Financial Instructions, notify the Accountant General and update the government's capital asset records where necessary.

(4) If capital assets are destroyed, lost, stolen or abandoned the accounting officer of the relevant government department must notify the Accountant General.

(5) If theft or unlawful intentional destruction is suspected, the accounting officer must also notify the police.

(6) Before an officer may purchase government property, the accounting officer of the relevant government department must ensure that no financial advantage is being given because the person is an officer.

### **Complaints and disputes**

**61.** (1) This section applies to a complaint, made to an officer in writing, in respect of procurement on behalf of the government.

(2) The complaint must be dealt with in an equitable, courteous and non-discriminatory manner.

(3) The officer who received the complaint must inform the Director of Contracts.

(4) The Director of Contracts may take all or any of the following actions—

- (a) as appropriate, inform the Deputy Governor, Chief Internal Auditor, Auditor General or Attorney General;
- (b) undertake an initial review of the relevant procurement process and prepare a written report with recommendations for any follow up action;
- (c) if a detailed audit is required, request the Chief Internal Auditor to carry out a relevant audit;
- (d) meet the complainant and any officer about whom the complaint was made, ascertain the relevant facts, and prepare a written report.

(5) The Director of Contracts must give a written reply to the complaint and place details of the complaint and the result on the project file.

(6) If a complainant is not fully satisfied with the response received in respect of his or her complaint, the complainant may refer the complaint and the response to the Deputy Governor for consideration and likewise in turn to the Governor.

(7) Any contractual dispute between a Contractor and government must be settled in accordance with any provision of the contract relating to escalation and arbitration.

### **Offences**

**62.** (1) An officer who willfully fails to comply with his or her obligation under this Ordinance is guilty of the offence of financial misconduct and is liable on conviction—

- (a) on indictment to a fine of \$200,000 or to imprisonment for a period of five years or to both; or
- (b) on summary conviction to a fine of \$20,000 or to imprisonment for a period of two years or to both.

(2) A court that has convicted an officer of the offence of financial misconduct may, in addition to or in substitution for any penalty to which the officer may be liable, order the officer to make restitution to the government to the extent of any loss sustained by the government by reason of the offence.

(3) An order for restitution made under subsection (2) is enforceable as if it were an order for the payment of a fine.

### **Power to surcharge**

**63.** The power to surcharge in accordance with section 45 of the Public Finance Management Ordinance shall, for the purposes of this Ordinance, apply equally to an officer.

### **Regulations**

**64.** (1) The Deputy Governor may make regulations for the better carrying out of this Ordinance.

(2) The regulations may, in particular—

- (a) provide for any aspect of the procurement of goods and services by the government;
- (b) designate persons with authority to award contracts;
- (c) provide for the establishment of boards charged with the award of prescribed contracts, or classes of contracts;
- (d) provide for the establishment of a board to advise the government generally on procurement.

(3) The regulation may also amend this Ordinance by amending the amounts specified in the definitions high value procurement, intermediate value procurement and low value procurement in section 2.

(4) The regulations may also provide for the imposition upon persons convicted of offences under the regulations of penalties not exceeding a fine of \$10,000 or imprisonment for two years or both.

(5) Regulations made under this section must be laid before the House of Assembly as soon as practicable after their publication in the *Gazette* and may be annulled by resolution of the House within twenty-one days of being laid before the House.

### **Financial Instructions**

**65.** (1) The Permanent Secretary, Finance may give instructions for the better administration and implementation of this Ordinance.

(2) Instructions given under this section must be given in writing and have no effect until approved by the Governor.

## SCHEDULE 1

(Section 23(5))

### RESPONSIBILITIES OF THE CHAIRPERSON OF THE PROCUREMENT BOARD

1. The Chairperson must ensure—
  - (a) that each tender is correctly processed by the Members of the Board;
  - (b) that any late submission and any irregularity is properly recorded.
2. Before tenders are processed the Chairperson must check that the tender box or cupboard and embossing machine are secure before they are unlocked with the Board key and the key held by the Secretary to the Board.
3. The Chairperson must then remove the contents of the box or cupboard and ensure that the tender box or cupboard is completely empty.
4. The Chairperson must then ensure that the tenders are sorted by the reference detail shown on their envelopes into three categories, namely –
  - (a) tenders due on the appointed day;
  - (b) tenders that bear no return date and miscellaneous letters; and
  - (c) tenders due on a future date.
5. The Chairperson must then ensure that any tender with no due date is checked against the Board's diary to establish its status. (If it is a single tender forwarded in error to the Board it must be sent by the Secretary to the Board to the officer concerned.)
6. The Chairperson must then ensure that any tender not due to be opened on the day is returned to the tender box or cupboard.
7. Anything the Chairperson writes on a tender, the record of proceedings or in the Irregularities Book must be written in blue ink.
8. The Chairperson must check that, for each tender—
  - (a) the master copy of the invitation to tender has been embossed;
  - (b) there is an original signature on the tender certificate;
  - (c) the total value of the tender is recorded on the tender certificate;
  - (d) the prices on the schedule have not been amended or tampered with in any way;
  - (e) the Returns List is completed correctly, signed by the Members and embossed by the Secretary to the Board;
  - (f) the tender certificate has been initialed and numbered;
  - (g) any irregularity has been entered in the Irregularities Book; and
  - (h) any late tender is securely fastened to its envelope (to provide evidence of posting, since lateness may be due to delay in the post) and then stamped and embossed in the same way as other tenders and that any late tender is also stamped with a stamp stating LATE TENDER and signed by the Chairperson and Members.

9. The Chairperson must also ensure that the irregularities book is completed to record—

- (a) any irregularity in a tender;
- (b) any late submission of a tender;
- (c) any package that arrived not fully sealed; and
- (d) any unusual occurrences during the meeting.

10. The Chairperson must ensure—

- (a) that entries are headed by the date of the Board meeting;
- (b) that each entry indicates the relevant invitation to tender reference number, the name of the tenderer and any unusual incident (for example, price alteration); and
- (c) that at the conclusion of each Procurement Board meeting, a line is drawn under the last entry.

11. The Chairperson must sign on this line.

12. At the end of each Board meeting, the Chairperson must—

- (a) check that the tender box or cupboard is locked and that the embossing machine is locked or locked away in a double key box or cupboard;
  - (b) sign the Irregularities Book; and
  - (c) check that the record of proceedings has been completed and then sign it.
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## SCHEDULE 2

(Section 23(6))

### RESPONSIBILITIES OF MEMBERS OF THE PROCUREMENT BOARD

1. Members of the Procurement Board must—
  - (a) carry out physical checks of the tender documents;
  - (b) stamp, emboss and sign the documents; and
  - (c) complete a Returns List.
2. One Member appointed by the Chairperson must collect the Board key and jointly with the Secretary who has a second key unlock the tender box or cupboard and the embossing machine.
3. Anything a member writes on a tender, the Returns List or record of proceedings or in the irregularities book must be written in red ink.
4. (1) The Members must—
  - (a) as the tenders are opened, number each priced tender on the top right-hand corner of the tender certificate, starting at the number 1;
  - (b) check that the invitation to tender reference number on the tender envelope agrees with the invitation to tender reference number on the tender certificate;
  - (c) check that the tender certificate is signed and has the total tender value expressed in both words and figures;
  - (d) flag any tender if there is an alteration in a price;
  - (e) to prevent any later addition, score through, with red ink, each blank space in the price column where the tenderer has not entered a price or where the words, 'No quote', 'No bid', or any similar marking has been entered;
  - (f) initial each proposal on the tender certificate;
  - (g) enter details in the Returns List and, in the "Response" column, enter 'Not invited' if the name of a tenderer does not agree with any appearing on the list;
  - (h) place a tick in the 'Response' column of the Returns List against the name of each tenderer who has made a positive reply by offering a price;
  - (i) insert a 'C' in the 'Response' column of the Returns List against the name of each tenderer who has made a negative reply by being unable to offer a price (this is not the same as no tender);
  - (j) after a set of tenders has been processed, count the number of ticks in the 'Response' column of the Returns List to ensure it equates with the number given to the last tender and then enter this number, in words, in the space provided on the List; and
  - (k) sign the Returns List.

(The insertion of tender prices and other details on the Returns List will be undertaken subsequently by the relevant commercial officer in the acquisition team, and not the Procurement Board.)

5. The Members must emboss the tenders or pass them to the Secretary of the Board for both embossing and stamping.

(Drawings and specifications returned with tenders are not normally embossed. However, if a tenderer forwards his or her own drawings or specifications or has inserted any modification or other matter forming an essential part of his or her tender, those documents should be firmly affixed to the embossed tender by the Secretary to the Board.)

6. Members must ensure that no tender document is concealed amongst drawings and other papers.

7. A member appointed by the Chairperson, together with the Secretary to the Board, must re-lock the tender box or cupboard and ensure that the embossing machine is locked or locked away.

8. The members must then sign the Record of Proceedings.

9. A member appointed by the chairman must then return the Board key to a location approved by the Board.

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### SCHEDULE 3

#### (Section 23(7))

#### RESPONSIBILITIES OF THE SECRETARY TO THE PROCUREMENT BOARD

1. The Secretary to the Board must—
  - (a) assist the Chairman in convening meetings of the Board and in preparing the agenda for a Board meeting;
  - (b) advise on procurement procedures and protocols;
  - (c) organise and provide the necessary facilities for each meeting of the Board;
  - (d) book the closing date and time for each invitation to tender into the Board diary.
  - (e) manage a roster of Board members and ensure that each Member is informed of the time and date he or she is required at a meeting of the Board;
  - (f) in order to safeguard tenders awaiting formal opening by the Board, ensure that the tender box or cupboard is secured by double locks;
  - (g) on receipt, immediately place, unopened, in the tender box or cupboard each tender bearing the appropriate label;
  - (h) ensure that the Board key for the tender box or cupboard is securely kept in the place approved by the Board;
  - (i) after evaluation, and using the safest and most expeditious means available, send the processed tenders to the officer responsible for procurement.
2. The Secretary to the Board must also support the functioning of the Board by—
  - (a) preparing tender documents;
  - (b) preparing advertisements of invitations to tender;
  - (c) issuing tender documents;
  - (d) maintaining a list of providers;
  - (e) issuing approved contract documents;
  - (f) maintaining and archiving records of the Board;
  - (g) receiving tenders; and
  - (h) managing tender closings and tender openings.
3. The Secretary to the Board must also—
  - (a) ensure that the agenda, submissions and any other documentation are distributed to Members of the Board within a reasonable time before a meeting of the Board;
  - (b) arrange for the minutes of the meetings of the Board to be taken;

- (c) prepare reports and keep all records of the Board, including agendas, submissions and minutes;
  - (d) co-ordinate the activities of the Board.
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