

ANTIGUA AND BARBUDA



THE PROCUREMENT AND CONTRACT ADMINISTRATION ACT, 2011

No. of 2011

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ANTIGUA AND BARBUDA

THE PROCUREMENT AND CONTRACT ADMINISTRATION ACT, 2011

No. of 2011

AN ACT to reform the procurement and contract administration procedures of the Government, to repeal the Tenders Board Act and to provide for incidental and connected purposes.

ENACTED by the Parliament of Antigua and Barbuda as follows:

1. Short title

This Act may be cited as the Procurement and Contract Administration Act, 2011 and shall come into operation on a date as the Minister may, by Notice published in the Gazette, appoint.

2. Interpretation

In this Act—

"Accountant General" includes any public officer acting in the post of Accountant General;

"accounting officer" means a public officer designated as such under section 8(1) of the Finance Administration Act, 2006;

"Board" means the Procurement Board established under section 38(1);

"Chief Procurement Officer" means the Chief Procurement Officer appointed under section 9(1);

"competitive quotations" means a quotation in the prescribed form submitted in response to an advertisement or request for construction, goods or services;

"competitive sealed bid" means a sealed bid in the prescribed form submitted in response to an advertisement or request for construction, goods or services;

"competitive sealed proposals" means a sealed proposal in the prescribed form submitted in response to an advertisement or request for construction, goods or services;

"construction" means the construction, reconstruction, erection, installation, repair, renovation, extension or demolition of a building, structure or works and includes services such as mapping, drilling, soil testing, site preparation, excavation, demolition, maintenance and other similar activities furnished in connection therewith if the value does not exceed the value of the construction, reconstruction, erection, installation, repair, renovation or extension or demolition of the building, structure or works;

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

- (a) other governments; or
- (b) statutory bodies or public authorities inside or outside Antigua and

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

"department" includes a unit or part of a department;

"donor organisation" means an organisation based outside Antigua and Barbuda which provides, or joins in providing, grants, credits or loans to the Government of Antigua and Barbuda or its agencies;

"estimate of the amount of contract award" means the estimate of the amount of the contract award referred to in section 17;

"Financial Secretary" includes public officer acting in the post of Financial Secretary;

"goods" means tangible personal property and software, whether on a CD-ROM or other tangible medium or as a download from the Internet or otherwise, and includes services incidental to the supply of goods if the value of those services does not exceed the value of the goods;

"Government" means the Government of Antigua Barbuda;

"large emergency solicitation" means the solicitation procedure referred to in section 20;

"large sole source solicitation" means the solicitation procedure referred to in section 21;

"Minister" means Minister responsible for Finance;

"Permanent Secretary" includes anyone acting in the post of the Permanent Secretary;

"person" means a corporation, association, individual, sole proprietorship, partnership or joint venture and includes their assigns and heirs, executors and administrators or other legal representatives;

"procurement" means—

- (a) all activities that pertain to the solicitation for construction, the purchase, lease, rental or acquisition of goods or the rendering of services and includes the award of contract, execution of a contract and other activities related to the finalization of a contract for the construction, the purchase, lease, rental or acquisition of goods or the rendering of services; and
- (b) where the context permits, includes the construction, goods or services procured;

"public officer" has the meaning referred to in section 127(1) of the Antigua and Barbuda Constitution Order 1981, Cap. 23;

"responsible authority", in respect of the solicitation of construction, goods or services, means the responsible authority listed in the following paragraphs—

- (a) the accounting officer of the department designated by the Board under section 44(1) (a) in respect of specified construction, goods and services approved as centralized solicitations;
- (b) the accounting officer of the department in respect of—
 - (i) a solicitation by competitive sealed bids,
 - (ii) a solicitation by competitive sealed proposals, or
 - (iii) an emergency solicitation or sole source solicitation where the estimate of the amount of the contract award for the procurement is that of a small procurement or more; or
- (c) the Chief Procurement Officer in respect of—
 - (i) an emergency solicitation or sole source solicitation where the estimate of the amount of the contract award for the procurement is less than that of a small procurement, or
 - (ii) a solicitation by competitive quotations;

"secretary" means the Chief Procurement Officer;

"services" means the supply of—

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

but does not include services exempted under this Act;

"small emergency solicitation" means the solicitation procedure referred to in section 24;

"small procurement" means a procurement for which the value is less than an amount prescribed by the Minister by Order published in the Gazette;

"small sole source solicitation" means the solicitation procedure referred to in section 25;

"solicitation", in relation to construction, the purchase, lease, rental or acquisition of goods or the rendering of services, means all the activities commencing with the preparation of the solicitation documents for one of the solicitation procedures referred to in section 18, 19, 20, 21, 23, 24 or 25 and ending with the delivery of the submissions to the responsible authority;

"standard solicitation documents" means—

- (a) documents approved by the Board under section 44(l) (c) (i); and
- (b) all variations or amendments of standard solicitation documents approved by the Board under section 44(1) (c) (ii);

"submission" means the response to a solicitation.

(2) Unless the context otherwise requires, the cognates and grammatical forms of a word or phrase in this Act have the same meaning as the word or phrase.

(3) Where a power to delegate, designate, appoint or authorise a person to do an act or thing is given under this Act, the delegation, designation, appointment or authorisation may be made by the person's name, title or office and where a delegation, designation, appointment or authorisation is by title or office, delegation, designation, appointment or authorisation applies to every person while he holds that title or office.

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

3. Meaning of "confidential" in relation to solicitations

A solicitation is confidential if—

- (a) the procurement is for the purpose of national defence or national security; and
- (b) the Minister responsible for national defence and national security certifies in writing that the confidentiality of the solicitation is necessary to preserve the national interest.

PART I

PURPOSES AND EXEMPTIONS

4. Purposes

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

- (a) encourage public competition in the procurement process except to the extent that the circumstances or size of the procurement make it impracticable;
- (b) foster and encourage broad participation in the procurement process by persons in Antigua and Barbuda and, where required under an international or regional agreement, to persons outside Antigua and Barbuda;
- (c) provide for increased public confidence in the Government procurement process by maintaining safeguards to ensure its integrity, fairness and transparency;
- (d) ensure fair and equitable treatment of all persons who participate in the procurement process; and
- (e) provide increased economy in procurement activities and to maximize to the fullest extent practicable the procurement value of the money of the Government.

5. Procurements exempt under the Act

The procurements exempted from this Act are listed in the Schedule and the Cabinet may by Order published in the Gazette amend the procurements exempted from this Act.

6. Artificial division of solicitations prohibited

A solicitation shall not be artificially divided so as to be treated as a small procurement and artificial divisions include the division of solicitations—

- (a) as an exempt procurement under section 5(2) (a) or (c);
- (b) to avoid a financial limit established under this Act whether by using—
 - (i) two or more competitive quotations rather than competitive sealed bids or competitive sealed proposals,
 - (ii) two or more oral competitive quotations rather than written competitive quotations,
 - (iii) two or more small emergency solicitations rather than a large emergency solicitation, or
 - (iv) two or more small sole source solicitations rather than rather than a large sole source solicitation.

PART II**PROCUREMENT ADMINISTRATION****7. Definition of “solicitation”**

In section 11, “solicitation” in the case of a solicitation by competitive sealed bids or competitive sealed proposals, includes an invitation to pre-qualify for a solicitation.

8. Establishment of Procurement Unit

There is established a Procurement Unit in the Ministry of Finance.

9. Appointment of Chief Procurement Officer and staff

(1) There shall be appointed a Chief Procurement Officer who shall—

- (a) be the head of the Procurement Unit; and
- (b) perform the duties and exercise the powers assigned to him under this Act.

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

(3) The Chief Procurement Officer may delegate the performance of his duties or the exercise of his powers to any public officer employed in the Procurement Unit and the making of occasional small procurements to any public officer outside the Procurement Unit.

(4) Subsection (3) does not permit any delegation under Division 2 of Part IV other than a delegation that is expressly permitted therein.

10. Duties and powers of Chief Procurement Officer regarding standardized documents

(1) The Chief Procurement Officer shall, as soon as practicable after this Act comes into force—

- (a) develop standard solicitation documents that comply with and facilitate the administration of this Act and that are appropriate for the solicitation of construction, goods or services or a class of construction, goods or services; and
- (b) submit the standard solicitation documents developed under paragraph 10(1) (a) to the Board for approval as appropriate for use in the solicitations to which they relate.

(2) Subsections (1) and (2) apply, with such modifications as the circumstances require, to the variation or amendment of standard solicitation documents.

11. Duties and powers of responsible authority

(1) In addition to the other duties and powers of a responsible authority under the Act, a responsible authority shall—

- (a) make the procurements for which he is responsible;
- (b) prepare the solicitation documents using standard solicitation documents, where they exist for the solicitation, subject to such modifications as are necessary to adapt them to the circumstances and nature of the solicitation;
- (c) do all things necessary and advisable, after receipt of submissions, to facilitate a decision to award or not award a contract or to facilitate the determination of the course of action to be taken where a solicitation is unsuccessful, including—
 - (i) the review and evaluation of submissions,
 - (ii) the correction, confirmation or withdrawal of solicitations, and
 - (iii) making recommendations and obtaining necessary approvals;
- (d) ensure that formal contracts are prepared, where required under this Act;
- (e) administer, or oversee the administration of contracts in accordance with the contract documents and the Regulations;
- (f) facilitate the determination of the course of action to be taken in the event that a contract of procurement is breached or frustrated or any other similar situation arises; and
- (g) comply with the Finance Administration Act and obtain all approvals required by the Minister in respect of the solicitation.

(2) A responsible authority, other than the Chief Procurement Officer shall submit the documents for a solicitation by competitive sealed bids or competitive sealed proposals to the Chief Procurement Officer to be dealt with by him under Division 2 of Part IV and, in accordance with the Regulations, support the Chief Procurement Officer in the discharge of his duties under that Division or the Regulations, including advising on and preparing addenda and cancelling solicitations.

(3) The Chief Procurement Officer may delegate his authority to any other responsible authority and shall give notice in writing of the delegation to the Board.

(4) A responsible authority other than the Chief Procurement Officer may delegate his authority to any other responsible authority other than the Chief Procurement Officer and shall give notice in writing of the delegation to the Chief Procurement Officer.

12. General duties and powers of Chief Procurement Officer

In addition to any other duties and powers, the Chief Procurement Officer—

- (a) shall have responsibility for the management of the central inventory by the Department of Public Works, including—
 - (i) determining which goods should be held in the inventory and in what amounts,
 - (ii) determining whether the supplier of goods hold those goods in inventory, and
 - (iii) minimizing the overall cost of the goods, including the cost of transportation, insurance and other expenses of procuring the goods and the cost of operating the inventory, while maximizing the convenience to persons requiring the goods;
- (b) may enter into contracts or arrangements with statutory bodies or other entities in the public sector to procure construction, goods or services on their behalf and may require the payment of a fee approved by the Minister for the services by the statutory body or other entity;
- (c) shall procure construction, goods or services or a class or classes of construction, goods or services on behalf of specified statutory bodies or entities in the public sector and may require the payment of a fee for such services by the statutory body or other entity; and
- (d) provide advice to Government on all aspects of procurement.

PART III

ETHICAL STANDARDS

13. Confidentiality of Board business

(1) A person having an official duty or being employed in the administration of this Act or engaged as a consultant to the Board shall consider and deal with all documents and information relating to the functions of the Board as confidential.

(2) Subject to section 47 a person in possession of or control over any document or information relating to any business or transaction of the Board shall not communicate or attempt to communicate any information contained in that document or pass on the document to any person other than a person authorised under this Act to receive the document.

14. Corruption prohibited

(1) A person, whether that person has made an offer or not, shall not, with intent to gaining any advantage or concession for himself or any other person—

- (a) offer any member of the Board or a committee thereof or any employee of the Board or any consultant or person providing service under this Act, a gift of money or other thing;
- (b) approach any member of the Board, committee or any officer under this Act with respect to any matter that is before the Board or a committee or that is expected to come before the Board or Committee.

(2) A person appointed under this Act shall not accept any gift of money or other thing which is intended—

- (a) to influence the vote at any meeting of the Board, or
- (b) to influence the Board or any member of the Board or committee with respect to any matter that is before the Board or committee or that is expected to come before the Board or committee.

15. Offences and penalties under this part

(1) A person who contravenes section 13 commits an offence and is liable on summary conviction to a fine of \$10,000 or to a term of imprisonment for twelve months or to both.

(2) A person who contravenes section 14 commits an offence and is liable on conviction on indictment to a fine of \$100,000 or to a term of imprisonment for five years or to both.

(3) Where a person who commits an offence under subsection (2) is a corporate body, every director or officer thereof who knowingly authorised or conspired with another person to commit the offence and is liable on conviction to a fine of \$100,000 or to a term of imprisonment for five years or to both.

PART IV

PROCUREMENT PROCEDURES

Division 1

Solicitation Procedures

16. Requirements for all procurements

(1) All procurements shall be made in accordance with this Act.

(2) Notwithstanding subsection (1) if this Act conflicts with the procurement rules of a donor organisation, the application of which is mandatory pursuant to an obligation entered into by Antigua and Barbuda under any treaty or other form of agreement, those procurement rules shall prevail.

17. Estimate of amount of contract award

Before commencing a solicitation, the responsible authority shall ensure that an accurate estimate of the amount of the contract award for the procurement has been prepared.

18. Solicitation by competitive sealed bids to be default procedure

(1) A procurement shall be made by soliciting competitive sealed bids unless the procurement may be made by one of the solicitation procedures referred to in section 19, 20, 21, 23, 24 or 25.

(2) Where procurement is solicited by competitive sealed bids even though the estimate of the amount of the contract award for the procurement is less than that prescribed for a small procurement, the solicitation shall be treated as a procurement by competitive sealed bids.

(3) A solicitation by competitive sealed bids is commenced by an invitation to bid in response to which a bidder submits a bid.

19. Solicitation by competitive sealed proposals where practicable or advantageous

(1) A procurement may be made by soliciting competitive sealed proposals only if a responsible authority other than the Chief Procurement Officer, upon the approval of the Chief Procurement Officer, determines that it is not practicable or advantageous to make the procurement by soliciting competitive sealed bids.

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

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

(4) Where a procurement is solicited by competitive sealed proposals even though the estimate of amount of the contract award for the procurement is less than that of a small procurement, the solicitation shall be treated as a procurement by competitive sealed proposals for all the purposes of this Act.

(5) A solicitation by competitive sealed proposals is commenced by a request for proposals in response to which an offeror submits a sealed proposal.

20. Large emergency solicitations

- (1) A large emergency solicitation may be made with such competition as is practicable in the circumstances—
 - (a) by the Chief Procurement Officer on the written instruction of the Board, if the Board determines that there exists a threat to public health, welfare or safety and the procurement is for the purpose of eliminating or mitigating the threat; or
 - (b) by the Board, if the Board determines that—
 - (i) the procurement is urgently required in the public good, and
 - (ii) the urgency justifies a less stringent competitive procedure than would otherwise apply.

(2) For the purposes of subsection (1) (b), the Board shall have regard to the purposes of this Act and shall consider the relevant circumstances in determining what competition is appropriate in the circumstances.

- (3) Relevant circumstances under subsection (2) include—
 - (a) the time and resources required to prepare, or complete the preparation of solicitation documents;
 - (b) the time required to permit solicitation by competitive sealed bids sealed proposals, as the case may be;
 - (c) the degree of urgency of the procurement and the damage to, or additional damage to, the public good that would likely ensue from delaying the procurement to permit solicitation referred to in paragraph (b) to take place; and
 - (d) the time required if a less stringent competitive procedure were adopted and the damage to, or additional damage to, the public good that would likely ensue if that less stringent procedure was followed.

21. Large sole source solicitations

A large sole source solicitation may be made if the procurement is not reasonably available except from a single source as determined by the Board.

22. Small procurements

A small procurement may be made by a solicitation procedure referred to in section 23, 24 or 25.

23. Competitive quotations to be default procedure for small procurements

(1) A small procurement shall be made by soliciting competitive quotations unless the solicitation may be made as a small solicitation under section 24 or a small sole source solicitation under section 25.

(2) A solicitation by competitive quotations is commenced by a request for quotations in response to which a person solicited submits a quotation.

24. Small emergency solicitations

- (1) A small emergency solicitation may be made with the competition practicable in the circumstances—
 - (a) by the Chief Procurement Officer if the responsible authority determines that there exists a threat to public health, welfare or safety and the small procurement is for the purpose of eliminating or mitigating the threat; or
 - (b) by the responsible authority, where the responsible authority is not the Chief Procurement Officer, if the responsible authority determines that—
 - (i) the small procurement is urgently required in the public good, and
 - (ii) the urgency justifies a less stringent competitive procedure than would otherwise apply.

(2) For the purposes of subsection (1) (b), the responsible authority shall have regard to the purposes of this Act and shall consider the relevant circumstances in determining what competition is appropriate in the circumstances.

- (3) Relevant circumstances under subsection (2) include—
 - (a) the time and resources required to prepare, or complete the preparation of solicitation documents;
 - (b) the time required to permit solicitation by competitive quotations,
 - (c) the degree of urgency of the small procurement and the damage to, or additional damage to, the public good that would likely ensue from delaying the small procurement to permit a solicitation referred to in paragraph (b) to take place; and
 - (d) the time required if a less competitive procedure were adopted and the damage to, or additional damage to, the public good that would likely ensue if that less stringent procedure was followed.

25. Small sole source solicitations

A small sole source solicitation may be made if a small procurement is not reasonably available except from a single source or as determined by the Chief Procurement Officer.

Division 2**Notice of Competitive Sealed Bids or Proposals and Invitations to Pre-qualify and****Opening of Bids, Proposals and Applications****26. Notice of solicitation or invitation to pre-qualify that is not confidential**

(1) This section does not apply to a solicitation by competitive sealed bids or competitive sealed proposals or an invitation to pre-qualify for a solicitation by competitive sealed bids or competitive sealed proposals that is confidential under section 3.

(2) Subject to subsection (3), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall give public notice of—

- (a) a solicitation by competitive sealed bids or competitive sealed proposals; or
- (b) an invitation to pre-qualify for a solicitation by competitive sealed bids or competitive sealed proposals,

in at least one newspaper of general circulation in Antigua and Barbuda for a reasonable period before the day and time for the close of bids or proposals or invitations to pre-qualify, as the case may be.

(3) Notwithstanding paragraph (2) (a), where applicants have been pre-qualified in respect of solicitation by competitive sealed bids or competitive sealed proposals, the Chief Procurement Officer is required to give notice only to the applicants who pre-qualify.

27. Opening bids, proposals and applications to pre-qualify that are not confidential

(1) Bids, proposals and applications to pre-qualify for a solicitation by competitive sealed bids or competitive sealed proposals, other than those that are confidential, shall be opened publicly—

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

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

- (a) the name and address of each bidder; and
- (b) the amount of his bid or, where there more than one amount in the bid, each amount bid.

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

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

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

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

28. Notice of solicitation or invitation to pre-qualify that is confidential

(1) Subject to subsections (2) and (3), the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall give notice of—

- (a) a solicitation by competitive sealed bids or competitive sealed proposals; or
- (b) an invitation to pre-qualify for a solicitation by competitive sealed bids or competitive sealed proposals;

that is confidential under section 3—

- (c) a reasonable time before the day and time for the close of bids or proposals invitations to pre-qualify, as the case may be; and
- (d) to as many bidders as practicable who meet the requirements of the Chief Procurement Officer under subsection (2).

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

(3) Notwithstanding paragraph (1) (a), where applicants have been pre-qualified in respect of a solicitation by competitive sealed bids or competitive sealed proposals, the Chief Procurement Officer shall give notice only to the applicants who pre-qualify.

29. Opening bids, proposals and applications to pre-qualify that are confidential

(1) Bids, proposals or applications to pre-qualify by competitive sealed bids or competitive sealed proposals that are confidential shall be opened in private—

- (a) by the Chief Procurement Officer, or a person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, on the day and at the time and place specified in the invitation to bid, the request for proposals or the invitation to pre-qualify, as the case may be; and
- (b) in the presence of at least one member of the Board or his designate.

(2) An opening is in private if the only persons present and able to hear or see are—

- (a) the Chief Procurement Officer and persons employed in the Procurement Unit and authorised by the Chief Procurement Officer to be present;
- (b) the responsible authority or a representative of the responsible authority; and
- (c) any member of the Board or his designate and the secretary.

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

- (a) the name and address of each bidder; and
- (b) the amount of the bid or, where there is more than one amount in the bid, each amount bid.

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

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

(5) In the case of an application to pre-qualify for a solicitation by competitive sealed bids or competitive sealed proposals referred to in subsection (1), the Chief Procurement Officer, or person employed in the Procurement Unit and authorised by the Chief Procurement Officer for the purpose, shall—

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

Division 3

Award of Contract

30. Award of contract after competitive sealed bids

(1) A contract for a procurement that is awarded after a solicitation by competitive sealed bids shall be awarded by the Board to the qualified bidder who submits the lowest responsive evaluated bid.

(2) For the purposes of subsection (1), "evaluated" means evaluated in accordance with objective evaluation criteria set out in the invitation to bid to determine if the construction, goods or services meets the description of what is being procured.

31. Award of contract after competitive sealed proposals

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

- (a) is qualified and submits a proposal that is responsive and that, after being evaluated accordance with the request proposals, is reasonably capable of acceptance; and
- (b) submits the best and final offer that is determined to be most advantageous to the Government after—
 - (i) discussions with offerors whose proposals comply with paragraph (a), and
 - (ii) the offerors are given an opportunity to revise their proposals on a fair basis,

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

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

(3) A person conducting or privy to discussions with an offeror shall not disclose any information derived from a proposal or discussions—

- (a) with any offeror to any other offeror directly or indirectly; or
- (b) to any other person except if it is necessary for that person to know the information in order to perform his functions under this Act.

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

32. Award of contract after a large emergency solicitation

(1) A contract for a procurement that is awarded after a large emergency solicitation referred to in section 20 (1) (a) shall be awarded by the Board to the qualified person who, after such competitive procedure as is practicable in the circumstances in the opinion of the Chief Procurement Officer, is determined by the Board to be the most appropriate, having regard to the solicitation procedure referred to in section 18, 19, 21 or 23 to which the competitive procedure bears the closest analogy.

(2) A contract for a procurement that is awarded after a large emergency solicitation referred to in section 20(1) (b) shall be awarded by the Board to the qualified person who, after such competitive procedure as is practicable in the circumstances in the opinion of the Board, is determined by the Board to be the most appropriate, having regard to the solicitation procedure referred to in section 18, 19, 21 or 23 to which the competitive procedure bears the closest analogy.

33. Award of contract after a large sole source solicitation

A contact for a procurement that is awarded after a large sole source solicitation shall be the best terms that can be negotiated in the circumstances and shall awarded by the Board.

34. Award of contract after a solicitation by competitive quotations

(1) A contract for a small procurement that is awarded after a solicitation by competitive quotations shall be awarded to the qualified person who submits the lowest responsive evaluated quotation.

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

35. Award of contract after a small emergency solicitation

(1) A contract for a small procurement that is awarded after a small emergency solicitation referred to in section 24(1)(a) shall be awarded by the responsible authority to the qualified person who, after such competitive procedure as is practicable in the circumstances in the opinion of the Chief Procurement Officer, is determined by the responsible authority to be the most appropriate, having regard to the solicitation procedure referred to in section 34 and 37 to which the competitive procedure bears the closest analogy.

(2) A contract for a small procurement that is awarded after a small emergency solicitation referred in section 24(1)(b) shall be awarded by the responsible authority to the qualified person who, after such competitive procedure as is practicable the circumstances in the opinion of the responsible authority, is determined by the responsible authority to be the most appropriate, having regard to the solicitation procedure referred to sections 34 and 37 to which the competitive procedure bears the closest analogy.

36. Award of contract after small sole source solicitation

A contract for a small procurement that is awarded after a small sole source solicitation shall be on the best terms that can be negotiated in the circumstances and shall be awarded by the responsible authority.

37. Award where the consideration for a proposed contract exceeds the amount prescribed as a small procurement

Notwithstanding anything in sections 34, 35 or 37, and subject to the consent of the Board under section 44(1)(g), where a procurement is solicited by competitive quotations as a small emergency solicitation or a small sole source solicitation and the amount of a proposed contract will be that of a small procurement or more, the contract may be awarded as if it had been a solicitation by competitive sealed bids or competitive sealed proposals or a large emergency solicitation or a large sole source solicitation, as the case may be.

PART V

PROCUREMENT BOARD

38. Procurement Board established

(1) There is hereby established a Procurement Board consisting of—

- (a) the following *ex officio* members—
 - (i) the Permanent Secretary of the ministry responsible for public works;
 - (ii) the Accountant General or his delegate;
- (b) a person appointed by the Minister from the Ministry of Finance;
- (c) an attorney-at-law of more than ten years standing; and
- (d) two persons from the private sector, appointed by the Minister on the advice of the Cabinet for such term as the Minister considers appropriate.

(2) A member may in writing designate a person to represent him at any meeting of the Board, but no designate of an *ex officio* member shall be entitled to sit as chairperson or deputy chairperson if any *ex officio* member is present.

(3) The Board is considered to be properly constituted notwithstanding that there is a vacancy or defect in the appointment of a member or designation of a person to represent a member.

(4) A previous appointment under subsection (1) (b) does not affect a person's eligibility to be reappointed as a member.

39. Chairperson, deputy chairperson and interim chairperson

(1) The Minister shall appoint a chairperson and a deputy chairperson from among the members of the Board.

(2) The deputy chairperson shall, in the absence of the chairperson, discharge his duties and exercise his powers.

(3) In the absence of the chairperson and the deputy chairperson, the remaining members and the designates of members may select an interim chairperson for the meeting from among themselves.

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

40. Quorum

A quorum of the Board shall be four of the members or their designates.

41. Authority of chairperson to act on behalf of the Board

(1) Where a matter that requires a decision of the Board cannot, in the opinion of the chairperson referred to in section 39(1) or the deputy chairperson named under section 39(2), await the next meeting of the Board without causing substantial prejudice to the Government, the chairperson or deputy chairperson, as the case may be, may, after such consultations with other members of the Board as are reasonable the circumstances, make the decision on behalf of the Board.

(2) The decision and a summary of the consultations by the chairperson or deputy chairperson, as the case may be, shall be reported to the Board and recorded in the minutes.

42. Board may hold meeting by signing resolution

(1) Where all the members of the Board or their designates sign a resolution, a meeting of the Board relative to the resolution is considered to have been held.

(2) The secretary shall include the resolution in the minutes of a meeting.

43. Committees

(1) The Board may appoint committees, either generally or with respect to a specific matter, to advise the Board.

(2) A committee may consist of members of the Board, persons designated under section 38(2) or persons other than members of the Board or designated persons or any combination thereof.

44. Duties and powers of the Board

(1) The Board, in addition to the duties and powers assigned to it under this Act, has the authority to—

- (a) approve specified construction, goods or services as centralized solicitations and designate the accounting officer of the department that has responsibility for their solicitation;
- (b) confirm the minutes of each meeting and after they are certified by the Chairperson, forward the minutes, through the Secretary, to the Minister at the next succeeding meeting;
- (c) approve—
 - (i) standard solicitation documents as appropriate for the solicitation of construction, goods or services or a class or classes of construction, goods services for use in the solicitations to which they relate, or
 - (ii) variations or amendments of standard solicitation documents;
- (d) make the determinations under section 20 (l) (a) or (b);
- (e) make the determination under section 21;
- (f) make an award of contract under section 30, 31, 32 or 33;
- (g) consent or refuse to consent to the award of a contract referred to in section 37;
- (h) determine, in consultation with the Attorney General, the course of action to be taken in the event that a solicitation is abortive;
- (i) determine, in consultation with the Attorney General and subject to the rights of any person who furnished a performance security, the course of action to be taken in the event that a contract of procurement is breached or frustrated or any other similar situation arises;
- (j) suspend or debar a person from participating in solicitations; and
- (k) exercise the powers in respect of contract administration conferred on the Board.

(2) The Board may make rules governing its procedure.

45. Annual assessment and report

(1) The Board shall annually, without delay after the tabling of the Report of the Director of Audit on the Public Accounts in the House of Representatives and after considering the submissions under subsection (2), or more often as necessary—

- (a) do an assessment of procurement and contract administration under this Act, having regard to—
 - (i) the issues and problems that have arisen or are likely to arise, including those identified in the Report of the Director of Audit for the previous financial year and the representations referred to in subsection (2), and
 - (ii) the costs and other measures necessary to address those issues and problems; and

- (b) prepare a report setting out its findings and its recommendations to address the issues and problems identified in the assessment, including a summary of the steps that need to be taken and by whom.

(2) The Board shall annually, not later than March 31, publish in a newspaper of general circulation in Antigua and Barbuda a notice inviting written representations from the public respecting government procurement and contract administration and setting out the deadline for the receipt of the representations, which shall not be less than 30 days after the notice is published.

(3) The report may contain recommendations for the amendment of the Act.

(4) The report shall be sent to the Minister who, after such consultations as appear to him to be appropriate, shall determine what action shall be taken in relation to the report.

46. Secretary to the Board

The Chief Procurement Officer shall be the secretary to the Board, and shall provide administrative support to the Board, which includes—

- (a) preparing the agenda for each meeting of the Board and giving notice of meetings that include the agenda, the day, time and place of the meeting and the minutes of the previous meeting;
- (b) taking accurate minutes of meeting of the Board, including attendance by each member and each person designated as the representative of a member under section 38(2);
- (c) inserting any resolution referred to in section 42 in the minutes;
- (d) providing copies of minutes to members of the Board and to affected public officers;
- (e) preparing correspondence of the Board; and
- (f) carrying out such other tasks in relation to procurement as are assigned to him by the Board or under the Act.

PART VI

REVIEW

47. The Ombudsman

(1) In addition to the functions of the Ombudsman under the Ombudsman Act, 1994 No. 5 of 1994, the Ombudsman shall,—

- (a) review the practices and procedures of the Procurement Unit;
- (b) assess the fairness and transparency of the practices and procedures of the Procurement Unit;
- (c) review the policy of the procurement Board and make recommendations in writing regarding the improvement of procurement practices and procedures to the Minister;
- (d) prepare a report based on the findings emanating from the actions outlined at (a), (b) and (c) above and submit that report to Minister triennially; and
- (e) review any complaint respecting an award of contract or the procurement process.

(2) The procedure for conducting investigations under this Act by the Ombudsman shall be the same as that prescribed under the Ombudsman Act, 1994 No. 5 of 1994.

(3) Regarding a complaint made under this Act, notwithstanding the powers of the Ombudsman under the Ombudsman Act, 1994 No. 5 of 1994, the Ombudsman—

- (a) shall not recommend the cancellation of any contract awarded under this Act;
- (b) may make recommendations to the Board regarding any action to be taken with respect to persons who suffered as a result of an award of contract made under this Act or the procurement process; and
- (c) shall, where he investigates a complaint, submit a report of his findings and make recommendations regarding any action to be taken, to the Minister within six months of the completion of his investigation.

48. Complaints

(1) A person may make a complaint regarding the award of a contract or any procurement procedure under this Act in writing to the Ombudsman.

(2) Notwithstanding subsection (1) a person shall not make a complaint regarding an award of contract under this Act before the contract to which the complaint relates has been awarded.

49. Reports

The Minister shall cause a report made under this Act to be laid before the Parliament at the sitting of the Parliament immediately following the receipt of that report.

PART VII**REGULATIONS AND MISCELLANEOUS****50. Regulations**

- (1) The Minister may make Regulations for the better administration of this Act, including regulations—
- (a) exempting services for the purposes of the definition of "services" in section 2;
 - (b) exempting procurements for the purposes of section 5(2) (c);
 - (c) for the purposes of section 12(c) and notwithstanding any other Act, providing for the mandatory procurement by the Chief Procurement Officer of construction, goods or services, or a class or classes of construction, goods or services, on behalf of specified statutory bodies or entities in the public sector and requiring the payment of a fee for such services by the statutory body or other entity;
 - (d) respecting solicitations by competitive sealed bids, including defining "qualified" in relation to "bidder" and the meaning of "lowest" and "responsive" in relation to a bid and further defining "evaluated" for the purposes of section 30;
 - (e) respecting solicitations by competitive sealed proposals, including defining "qualified" in relation to "offeror" and the meaning of "responsive" in relation to a proposal and further defining "evaluated" for the purposes of section 31;
 - (f) respecting large emergency solicitations and large sole source solicitations;
 - (g) respecting solicitations by competitive quotations, including defining "qualified" relation to a person who submits a quotation and the meaning of "lowest" and "responsive" in relation to a quotation and further defining "evaluated" for the purposes of section 34;
 - (h) respecting small emergency solicitations and small sole source solicitations;
 - (i) respecting the course of action to be taken in the event that a solicitation is abortive;
 - (j) respecting the course of action to be taken in the event that a contract of procurement is breached, frustrated or any other similar situation arises;
 - (k) respecting the award and execution of contracts;
 - (l) respecting the maintenance of procurement files;
 - (m) respecting the maintenance of procurement files for procurements exempted under section 5(2);
 - (n) respecting the confidentiality of solicitations, invitations to pre-qualify, awards of contract and particulars of contract performance;
 - (o) respecting the suspension or debarment of bidders, offerors and other persons who have or propose to participate in procurement;
 - (p) respecting contract administration and the role of the Board therein; and
 - (q) respecting the treatment of small procurements.

(2) Regulations made under this section shall be published in the Gazette and the Minister shall lay them before the House of Representatives as soon as may be after they are published and, if the House of Representatives resolves that the Regulations or any provision of the regulations be annulled, then the regulations or the provision is annulled and is deemed to have been repealed by the resolution, but without prejudice to the validity of anything done under the Regulations or provision of the Regulations before its annulment or to the making of new Regulations.

51. Immunity

A person shall not commence proceedings for a function done or duty performed in good faith under this Act against—

- (a) an employee or agent of the Government; or
- (b) a member of the Procurement Board.

52. Transitional provision

A solicitation commenced before the coming into operation of this Act shall continue as if this Act had not been passed until the solicitation is cancelled, a contract is awarded or the solicitation is abortive.

53. Transitional Regulations

The Minister may, in the one year period following the coming into operation of this Act, make Regulations providing for any transitional matter arising as a consequence of the coming into operation of this Act and may make the Regulations retroactive to the day this Act comes into force.

54. Regulations and Orders

Regulations and Orders made under this Act shall be subject to the positive resolution of the Parliament.

55. Repeal of Cap, 424A

The Tenders Board Act (Cap. 424A) is repealed.

SCHEDULE

(Section 5)

1. A procurement made under a co-operative procurement agreement; or
2. A procurement, the funding or part of the funding for which, is furnished to the Government by another government or by an international or regional agency, on the condition that the procurement procedures of the other government or international or regional agency, or procurement procedures approved or agreed to, by the government or international or regional agency will apply to the procurement.

Passed by the House of Representatives on
the , 2011.

Passed by the Senate on the , 2011.

Speaker.

President.

Clerk to the House of Representatives.

Clerk to the Senate.

EXPLANATORY MEMORANDUM

This Bill would reform the law relating to procurement by the Government of construction, goods and services to comply with generally accepted international standards of government procurement, particularly the 1994 United Nations Commission on International Trade Law (UNCITRA) Model Law on Procurement of Goods, Construction and Services. The standard requires public competition wherever possible and award of contracts based on fair competition. It is anticipated that the solicitations and awards under the Bill and subsequent regulations would be reviewed annually by the Director of Audit for conformity with an Act such as this and regulations thereto.

PART 1: PRELIMINARY

Clause 1 would make provision for the citation of the Act and for the Act to come into operation. Clause 2 would define the key terms relevant to the scope of procurements, namely, "construction", "goods" and "services". These definitions would recognize that it is rare for a procurement to be purely for construction or purely for the acquisition of goods or purely for services since the categories overlap. To ensure the integrity of the classification system in this situation, a contract would be a construction contract, for example, if the value of the construction component is not exceeded by the value of services supplied in association with it. Similar distinctions would be made in the definitions of "goods" and "services".

The Bill would distinguish solicitation for procurement from an award of contract for that procurement. It would provide that solicitation is the procedure to determine to whom a contract may be awarded and that the award of the contract for procurement is a separate process with its own rules.

The definition of "responsible authority" in clause 2 would be the key provision assigning responsibility for solicitations. By virtue of paragraph (a) of that definition, centralized solicitations would be made by the department designated by the Procurement Board. The ability to designate centralized solicitations permits the consolidation of procurements into larger units. By virtue of paragraph (b) of that definition, larger solicitations would be made by the department that requires the construction, goods or services. The theory behind this provision is that the department would be in the best position to determine what it needs. Under paragraph (c) of the definition, the Chief Procurement Officer has responsibility for the remainder.

The definitions of "solicitation" and "procurement" are the two cornerstones of the Bill and Regulations.

Under clause 3, certain solicitations would be confidential. These procurements would form an important exception to the public character of solicitations under the Bill and regulations.

The purposes of the Bill and regulations, as set out in clause 4, would be to increase transparency in government procurement and more particularly, to depoliticize government procurement, to increase the public's confidence in the integrity of the procurement process, to ensure fair and equitable treatment of persons participation in the procurement process and to get the best value for the Government's procurement dollar.

Clause 5 would provide for exemptions under the Bill. For example, Antigua and Barbuda purchases drugs under an agreement with the Eastern Caribbean Central Bank under which several countries in the Caribbean pool their purchasing power. Such a pooling agreement is called a "co-operative procurement agreement" and would be exempted from the Bill under clause 5(1) (a). Clause 5(1) (b) would recognize that outside funding agencies may wish to determine the procurement process that would be used and accordingly exempts such procurements from the Bill. Clause 5(2) would recognize that certain small procurements should be exempted from the Bill.

Clause 6 would prevent the artificial division of solicitations. It would be an anti-avoidance provision to ensure that the procedures appropriate to financial limits set in the Bill and the regulations are observed.

PART II: PROCUREMENT ADMINISTRATION

This Part would provide for the establishment of a Procurement Unit in the Department of Public Works (clause 8) and appointment of a Chief Procurement Officer as its head and for the appointment of a Deputy Chief Procurement Officer and other staff (clause 9). The Bill provides that the Chief Procurement Officer may delegate his powers and duties to a public officer who would report to him and may delegate the making of occasional small procurements to any public officer outside the Procurement Unit (clause 9(3)). The establishment of the Procurement Unit would foster the training and development of a core of procurement professionals and thereby maximize economy and effectiveness in procurement.

It is anticipated, for example, that the Board under clause 41(1) (a) would approve a number of centralized solicitations so that classes of procurements could be consolidated into larger units. Typically, the Chief Procurement Officer would consolidate into a small number of contracts the high volume low cost procurements such as office supplies and paper, cleaning supplies, paper towels and

toilet paper, which are labour intensive to procure in small quantities and where there little advantage terms of savings unless they are bought in bulk. Other procurements that are usually centralized are vehicles and vehicle related equipment (such as tires), fuel, computers and related equipment and construction. Departments are typically forbidden to procure such items themselves. If ongoing supply contracts (often referred to as "standing orders") are appropriately set up and managed, the consolidation and centralization of procurements need not lead to the accumulation of inventories that are expensive to administer and are often accompanied by costly loss, unexplained disappearance, obsolescence and damage to goods. Typical modern contracts for these sorts of items provide that the supplier warehouses the goods and delivers them to specified delivery points just in time for their use. Indeed, a supplier who is responsible for warehousing goods should be the rule. Only items that are very difficult to obtain and that may be required on short notice should be in government warehouses. Well trained and experienced procurement professionals can help ensure that practices such as this are implemented to maximize the value that the Government receives for its procurement dollars.

Under clause 10, the Chief Procurement Officer would be responsible for the development of sets of solicitation documents appropriate to each of the forms of solicitation permitted by the Bill. It is presumed that there will be several sets of documents for—

- the solicitation of construction (for example, for the construction of buildings, roads or other works, for the renovation or repair of buildings and so on)
- the procurement of goods (for example, for the procurement of vehicles, computers or office supplies and paper)
- the solicitation of services (for example, consulting contracts, survey contracts or contracts for the maintenance and repair of goods).

The responsible authority (as defined in clause 2) would prepare solicitation documents based on standard documents, evaluate submissions and perform tasks related to the decision to award or not to award a contract, attend to the execution of formal contracts, administer contracts and so on (clause 11(1)). When the solicitation documents are prepared outside the Procurement Unit, they would have to be submitted to the Chief Procurement Officer to be dealt with under Division 2 of Part II (clause 11(2)).

The Chief Procurement Officer would have general responsibility for managing the central inventory, may be able to voluntarily procure construction, goods or services on behalf of statutory bodies or other entities in the public sector, and, when so provided in the regulations, would have a duty to do so on behalf of those statutory bodies or other entities (clause 12). The consolidation of Government procurements with those of statutory bodies or other entities would allow Antigua and Barbuda to take advantage of the economies of scale.

PART III: PROCUREMENT PROCEDURES

Division 1; Solicitation Procedures

This Division sets out the possible solicitation procedures, which are—

- competitive sealed bids
- competitive sealed proposals
- large emergency solicitations
- large sole source solicitations
- competitive quotations
- small emergency solicitations
- small sole source solicitations

It should be noted that the regulations would provide for additional procedures for exceptional circumstances, first, when a solicitation is abortive and, second, when a contract is awarded and it is breached or frustrated or some similar situation arises. In these circumstances the normal solicitation procedures listed above would not necessarily apply.

Competitive Sealed Bids

Clause 15 would provide that competitive sealed bids (a more precise equivalent of what has hitherto been called "tendering") is the procedure that **MUST** be used unless one of the other procedures is more appropriate.

A solicitation by competitive sealed bids would normally be required for solicitations for procurements of an amount prescribed to be that for a small procurement or more. Clause 27 would provide that, if a contract is awarded after a solicitation by competitive sealed bids, the contract must be awarded to the qualified bidder who submits the lowest responsive evaluated bid. Whether a bidder is qualified and his bid is responsive is usually quite straightforward. A qualified bidder is one who has the resources to perform the contract and is in good standing with the Government. A responsive bid is one that offers what the bid documents request. For

example, if the bid documents request a car of a certain kind and the bidder offers a truck, the bid is non-responsive and must be rejected.

In competitive sealed bids, the successful bidder cannot be determined until after the bids have been evaluated in accordance with evaluation criteria set out in the bid documents. The Bill would provide that these criteria must be objective. There are many situations in which evaluation criteria are necessary. Here one common example: Assume that the Government wants to purchase a passenger vehicle of a particular description and one bidder offers a Toyota for \$22,000 and another offers a Dodge for \$20,000. In spite of the price, the Dodge is not necessarily the cheapest. The cheapest can only be determined after the fuel consumption and the life cycle maintenance costs have been factored in. Therefore, fuel consumption and maintenance costs must be listed on the solicitation documents as part of the evaluation criteria. If there are no evaluation criteria in the bid documents, then the price will determine the successful bidder. This situation often arises in the case of construction.

Competitive Sealed Proposals

Under clause 16(1), a solicitation by competitive sealed proposals can be made if the responsible authority, upon the approval of the Chief Procurement Officer, determines that it is not either practicable or advantageous to make the procurement by soliciting competitive sealed bids. A solicitation by competitive sealed proposals would normally be for solicitations for small procurements.

In order to determine whether solicitation by competitive sealed bids is practicable, clause 16(2) would set out the criteria, which would include the question of whether there is insufficient time or information to prepare solicitation documents for competitive sealed bids. If there is not sufficient time or information, then competitive sealed proposals is the appropriate procedure.

In order to determine whether solicitation by competitive sealed bids is advantageous, clause 16(3) would set out the criteria, which would include the question as to whether matters such as quality, availability or capability are overriding in relation to price.

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

The evaluation and award of contracts following solicitation by competitive sealed proposals are also different from the other forms of solicitation. Since each proposal will be different, how the proposals are to be compared needs to be set out in the request for proposals so all the offerors' proposals will be fairly treated. Clause 28 would deal with the award of a contract following a request for competitive sealed proposals. To be considered, an offeror, like a bidder in relation to a solicitation by competitive sealed bids, must be qualified and must submit a responsive proposal. The similarity stops there. The request for proposals must set out "evaluation criteria" relating to the relative importance of such factors as quality, availability and capability in relation to price (clause 28(2)). The persons charged with doing the evaluation must scrupulously observe those criteria in the evaluation process. That process may also permit negotiations, the opportunity to revise proposals and the submission of best and final offers (clause 28(1) (b)). To prevent an auction of the contract, clause 28(3) would require that dealings with one offeror may not be disclosed to any other offeror.

Large Emergency Solicitations

Both solicitations by competitive sealed bids and competitive sealed proposals require time to prepare solicitation documents, issue notices, allow bidders to prepare their bids or offerors to prepare their proposals and so on. When a procurement is required urgently because of an emergency situation, the emergency solicitation procedure may be used. Large emergency solicitations can be made where the estimate of the contract amount for the procurement is that prescribed for a small procurement or more.

Clause 17 of the Bill would recognize 2 sorts of emergency solicitations. It will be noted that determining that a solicitation is an emergency solicitation does not necessarily eliminate the need for competition. Rather, it makes the rules applicable to the competition more flexible.

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

The second type emergency is set out in clause 17(1) (b) and would permit the Board to determine—

- whether—

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

The Board would need to consider the relevant circumstances, which are set out in clause 17(3), in making those determinations.

Large Sole Source Solicitations

The Board would have authority to determine whether a procurement is not reasonably available except from a single source.

Small Procurements

The Bill would recognize three types of solicitation for small procurements: competitive quotations, small emergency solicitations and small sole source solicitations. These solicitations would be permitted when the estimate of the amount of the contract for the procurement is less than that prescribed for a small procurement.

Competitive Quotations

Competitive quotation would be the default procedure for small procurements (clause 20). The procedure for competitive quotations would be set out in the regulations and would provide for written and oral requests for quotations.

Small Emergency Procurements and Small Sole Source Solicitations

These solicitations parallel the large emergency and large sole source solicitations but the key determinations would be made, not by the Board, but by the responsible authority and the Chief Procurement Officer.

Division 2: Notice of Competitive Sealed Bids (and Proposals and Invitations to Pre-qualify and Opening of Bids, Proposals and Applications)

This Division would deal with two key elements of a modern procurement system, namely—

- that notices of competitive sealed bids and competitive sealed proposals and of invitations to pre-qualify for them would be made public so that all members of the public can participate in the procurement process
- that bids and proposals would be opened in public and that relevant information would be read out to all in attendance the opening.

The Bill would provide different rules depending on whether the solicitation was confidential or not. Confidentiality limited to solicitations for national defence or national security that the minister responsible for national defence and national security certifies in writing would need to be confidential (clause 3).

The following is summary of the provisions for notices of non-confidential solicitations and invitations to pre-qualify:

Clause 23 would require that such notices and invitations be published in a newspaper of general circulation in Antigua and Barbuda. There is one exception: when applicants have been pre-qualified after a public invitation to pre-qualify, the notice of the solicitation itself would need only be given to those who pre-qualified (clause 23(3)).

Clause 24 would provide for the opening of bids, proposals and applications to pre-qualify. Note that the information that may be read out is different for bids, proposals and applications to prequalify. For example, reading out amounts proposed would be forbidden. Since negotiations may occur with offerors, reading out amounts proposed would undermine the duty to treat each offeror fairly.

Clause 25 and 26 parallel clauses 23 and 24 and would provide for notice and opening of confidential solicitations and notices to pre-qualify in private.

Division 3: Award of Contracts

Clauses 27 to 34 (award of contracts) have been dealt with above in connection with solicitation procedures. They also would provide that all contracts would be awarded by either the Procurement Board or the responsible authority

PART IV: PROCUREMENT BOARD

Clause 35 would establish that the Procurement Board would consist of the Financial Secretary, the Permanent Secretary of the ministry responsible for public works and the Accountant General and 2 public officers appointed by the Minister in charge of Finance. Each member would be allowed appoint a designate to sit on the Board on his behalf.

Clause 36 would make provision for a chairperson, deputy chairperson and interim chairperson and other related matters.

Clause 37 would provide that a majority of the members or their designates would constitute a quorum of the Board.

Clause 38 would permit the chairperson or deputy chairperson to act on behalf of the Board after reasonable consultations with other Board members if there would be substantial prejudice to the Government if no action is taken before the Board can meet. Furthermore, clause 39 would permit "paper" meetings if all members or designates sign a resolution.

Clause 40 would permit the Board to appoint committees of members and non-members to advise the Board.

Clause 41 would set out the other duties and powers of the Board, which fall into 3 classes—

- the approval of centralized solicitations;
- the approval solicitation documents; and
- powers in respect of certain problem areas and awards—
 - to make determinations relating to emergencies under clause 17 and sole source solicitations under clause 18;
 - to make award of contract under clause 27, 28, 29; or
 - to consent or refuse to consent to award of contract under clause 34 after a solicitation by competitive quotations or a small emergency or small sole sources solicitation results in a contract that would exceed the limit prescribed for small procurements;
 - subject to the regulations, in consultation with the Attorney General, to determine the course of action when a solicitation is abortive or when a contract is breached or frustrated or another similar situation arises;
 - in accordance with the regulations, suspend or debar persons from participating in solicitations or from entering into contracts of procurement; and
 - subject to the regulations, to exercise such powers in respect of contract administration as are conferred by regulation on the Board.

Clause 42 would provide for an assessment of the procurement and contract administration under the Bill and the making of an annual report to the Minister.

Clause 43 would provide for the appointment of a public officer as secretary to the Board.

PART V: REVIEW

This part would empower the Ombudsman to review the award of contracts, procurement procedures and complaints made under this Act. It would also make provision for reports, made pursuant to the Ombudsman's investigations, to be submitted to the Minister. It would also require the Minister to lay these reports before the Parliament.

PART VI: REGULATIONS AND MISCELLANEOUS

Clause 48 would give the Cabinet the power to make regulations which would be subject to a negative resolution procedure.

Clause 49 would make provision for transitional matters and clause 46 would permit the Cabinet to make transitional regulations.

Clause 50 would repeal the Tenders Board Act.

Honourable Justin L. Simon QC
Attorney General and Minister responsible for Legal Affairs