No. 39 of 2021

VIRGIN ISLANDS

PUBLIC PROCUREMENT ACT, 2021

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SCHEDULE

I Assent
(Sgd.) John J. Rankin, CMG,
Governor
6th December, 2021

VIRGIN ISLANDS

No. 39 of 2021

An Act to make provision for the regulation of public procurement providing for the fair, equal and equitable treatment of all tenderers and for other connected matters.

[Gazetted 9th December, 2021]

ENACTED by the Legislature of the Virgin Islands as follows:

PART I
PRELIMINARY

Short title and commencement.

1. (1) This Act may be cited as the Public Procurement Act, 2021.

(2) This Act shall come into force on such date as the Minister may, by Notice published in the *Gazette*, appoint.

Interpretation.

2. (1) In this Act, unless the context otherwise requires,

"accepted contract amount" means the amount of the contract price at the signing of the contract;

S.I. No. 87 of 2005

"Central Tenders Board" means the Board established under section 5;

"consultant" means a natural or legal person providing consulting services;

"consulting services" means services which are of an intellectual and advisory nature provided by firms or individuals using their professional skills, study, design and organise specific projects, advise clients, conduct training or transfer knowledge;

"contractor" means the provider of construction of works;

"currency" includes the monetary unit of account;

"direct solicitation" means solicitation addressed directly to one tenderer or a restricted number of tenderers;

"domestic procurement" means procurement limited to tenderers who are belongers or residents of the BVI or to a BVI company where the majority of the issued share capital is directly or indirectly owned by belongers and which is registered in the BVI pursuant to section 47;

"electronic" means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

"framework agreement" means an agreement or other arrangement between one or more procuring entities and one or more tenderers which established the terms and conditions under which the tenderer enters into a contract with the procuring entity in the period during which the agreement or arrangement applies;

"goods" means objects of every kind and description including raw materials, products, computer software, software licences and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves;

"local preference" means a margin of preference for the benefit of goods produced in BVI or labour provided by nationals of BVI in accordance with section 40(2);

"Minister" means the Minister responsible for Finance;

"prescribed" means as prescribed by Regulations;

"pre-qualification" means the procedure set out in section 47 to identify, prior to solicitation, tenderers that are qualified;

"pre-qualification documents" means documents issued by the procuring entity under section 47 that set out the terms and conditions of the pre-qualification proceedings;

"pre-selection" means a procedure to identify, prior to solicitation, a limited number of providers of consulting services that best meet the qualification criteria for the procurement concerned;

"pre-selection documents" means documents issued by the procuring entity that set out the terms and conditions of the pre-selection proceedings;

"procurement" or "public procurement" means the acquisition of goods, construction works or services by a procuring entity;

"procurement contract" means a contract concluded between the procuring entity and a supplier or a contractor at the end of the procurement proceedings;

"Procurement Coordinator" means the public officer appointed as the head of the Procurement Unit;

"procurement involving classified information" means procurement in which the procuring entity may be authorised to take measures and impose requirements for the protection of classified information;

"Procurement Appeals Board" means an Appeals Board appointed pursuant to section 27;

"procuring entity" means any Government Ministry, Department, Unit or Agency, or any subdivision or multiplicity thereof, that engages in procurement;

"Procurement Unit" means the Procurement Unit of the Ministry of Finance existing prior to the commencement of this Act;

"publish" includes to publish by electronic means;

"services" means supply of physical services, or other labour, time or effort which may include a tangible end-product produced or supplied as an incident of that labour, time or effort; it may include "consulting services" where the context permits;

"solicitation" means an invitation to tender, present submissions or participate in request for proposals proceedings;

"solicitation document" means a document issued by the procuring entity, including any amendments thereto, that sets out the terms and conditions of the given procurement;

"State-Owned Enterprise" means any legal or corporate entity over which the State exercises a dominant influence by virtue of its ownership of it, its financial participation therein, or the rules which govern it. Such dominant influence shall be deemed to exist where the State holds the majority of the entity's subscribed capital, controls the majority of the votes attaching to shares issued by the entity, or can appoint more than half of the entity's administrative, management or supervisory body.

"submission" means a tender, a proposal, an offer, a quotation and a bid referred to collectively or generically;

"supplier" means the provider for the supply of goods and/or services;

"tender security" means a security required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange and for the avoidance of doubt, the term excludes any security for the performance of the contract;

"tenderer" means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity;

"works" means all works associated with the construction, reconstruction, demolition, repair, maintenance or renovation of a building or structure, or any construction works such as railways, roads, highways, site preparation, excavation, installation of equipment and materials, decoration, as well as physical services incidental to works, if the value of those services does not exceed that of the works themselves; and

"written" or "in writing" means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means.

(2) For the purpose of this Act, direct solicitation does not include solicitation addressed to a limited number of tenderers following pre-qualification or pre-selection proceedings.

Application and Objectives.

3. (1) This Act applies to all procuring entities and subject to subsection (2) all State-Owned Enterprises.

(2) Notwithstanding subsection (1), a State-Owned Enterprise may conduct procurement in accordance with its own procurement rules and regulations where those rules and regulations have been determined by the Financial Secretary to be consistent with this Act.

(3) Public procurement covers all procurement except for procurement of the following works, goods and services:

(a) works, goods and services of a sensitive nature for use in national security or defence;

(b) services for

(i) advertising;

(ii) cultural events;

(iii) employment in the Public Sector;

(iv) financial instruments;

(v) legal work;

(vi) medical work or facilities;

(vii) pension funds;

(viii) travel and accommodation;

(ix) ministerial advisers;

(c) goods and works

(i) artwork;

(ii) existing buildings;

(iii) international commodities; and

(iv) land.

(4) In applying this Act, procuring entities and State-Owned Enterprises shall seek to

(a) maximise, the economy and efficiency in public procurement;

(b) foster and encourage participation in public procurement proceedings by tenderers thereby promoting international trade;

(c) promote competition among tenderers for the supply of the subject matter of the public procurement;

(d) provide for the fair, equal and equitable treatment of all tenderers;

(e) ensure that BVI tenderers are provided with ample procurement opportunities in order to encourage and support national development;

(f) promote the integrity of, and fairness and public confidence in, the public procurement process;

(g) achieve transparency in the procedures relating to public procurement.

International obligations of the Virgin Islands relating to procurement.

4. To the extent that this Act conflicts with an obligation of the Virgin Islands under or arising out of any

(a) treaty or other form of agreement to which it is a party with one or more other States or Territory; or

(b) agreement entered into by the Virgin Islands with an intergovernmental international financing institution,

the requirements of the treaty or agreement shall prevail, but in all other respects the procurement shall be governed by this Act.

Organisation of public procurement.

5. (1) Subject to any policy direction of the Minister, the Financial Secretary is responsible for the administration of this Act, including implementation of the Government's public procurement policies, particularly with regard to public expenditure.

(2) There is established by this Act a Central Tenders Board which shall comprise

(a) the Financial Secretary or his or her representative, who shall be the Chairperson of the Central Tenders Board;

(b) the Attorney General or his or her representative;

(c) the Director of Public Works or his or her representative;

(d) the Permanent Secretary in the Ministry responsible for the subject matter of the particular tender or his or her representative;

(e) the Permanent Secretary who is, for the time being, a member by virtue of subsection (4) or his or her representative.

(3) For the purposes of subsection (2)(a) to (e), the representative shall be a senior officer, including a Deputy, a Deputy Secretary, an Assistant Secretary or a person approved by the Chairperson of the Central Tenders Board.

(4) For the purposes of subsection (2)(e) membership shall be rotated among the Permanent Secretaries, in such order as may be determined by the Minister.

(5) The Central Tenders Board is responsible for

(a) reviewing the legality of the evaluation of tenders and proposals by a procuring entity exceeding the prescribed threshold amount and making recommendations to Cabinet for the award of such contracts;

(b) the registration and classification of suppliers, contractors and consultants who participate in the public sector procurement system;

(c) recommending policy and legislation to the Financial Secretary on public sector procurement procedures;

(d) promoting and sponsoring the development of procurement professionals;

(e) adopting standard solicitation documents for any method of procurement and any supplemental documents and templates;

(f) causing the establishment and maintenance of a Public Procurement website to provide general procurement information and, at such time as is appropriate, a platform for the conduct of electronic procurement and the development appropriate electronic procurement tools;

(g) reviewing international developments in environmental and sustainable procurement and adopting policies and tools for application in BVI;

(h) advising the Financial Secretary on the consistency with this Act of the procurement rules and regulations of State-Owned Enterprises; and

(i) any other functions the Minister may assign.

(6) The Procurement Unit

(a) is responsible for carrying out the administrative work necessary to support the duties of the Central Tenders Board;

(b) is the national contact point for public sector procurement;

(c) is the designated feedback and reporting mechanism for the public sector procurement system;

(d) advises the Central Tenders Board on the development of policy, legislation, and procedure related to the public sector procurement system;

(e) carries out procurement in accordance with subsection (10);

(f) oversees procurement carried out by the Procurement Committee; and

(g) is responsible for any other functions as may be prescribed.

(7) The Procurement Coordinator shall be the head of the Procurement Unit and secretary to the Central Tenders Board.

(8) Subject to the provisions of the schedule to this Act and to such Regulations as may be prescribed, the Central Tenders Board shall regulate its own proceedings. Schedule

(9) Subject to subsection (10), a procuring entity shall engage in the procurement of goods, works or services with an estimated value not exceeding the prescribed threshold.

(10) For the procurement of goods, works or services with an estimated value exceeding the prescribed threshold amount, the Procurement Unit shall conduct the procurement on behalf of any Government Ministry, department or any other agency.

(11) Each Government Ministry, department or other agency shall establish a Procurement Committee mandated to

(a) develop an annual procurement plan for submission to the Procurement Unit;

(b) act in compliance with relevant policies, guidelines and procedures;

(c) effect objective evaluation processes with respect to quotations, tenders and requests for proposals;

(d) facilitate response to contractor inquiries;

(e) maintain proper records of Committee meetings, including records of the procurement; and

(f) ensure compliance with reporting obligations.

PART II
METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE: SOLICITATION AND NOTICES OF PROCUREMENT

Methods of procurement.

6. (1) The procuring entity may conduct procurement of goods, works and services by means of

(a) open tendering which may be conducted in one or two stages and with or without pre-qualification;

(b) restricted tendering;

(c) request for quotations;

(d) request for proposals without negotiation;

(e) request for proposals with consecutive negotiations; and

(f) single source procurement,

subject to such requirements and conditions as may be prescribed for the appropriate use of each method of procurement.

(2) Open tendering may be held in two stages in the following cases:

(a) when it is not feasible to define fully the technical or contractual aspects of the procurement to elicit competitive tenders; and

(b) when, because of the complex nature of the goods, works or services to be procured, the contracting entity wishes to consider various technical or contractual solutions, and to discuss with tenderers the relative merits of those variants before deciding on the final technical or contractual specifications.

(3) The procuring entity shall procure consulting services using either the request for proposals without negotiation method or the request for proposals with consecutive negotiations in the prescribed manner.

(4) The procuring entity may procure consulting services from individual consultants based on relevant experience, qualifications and capability to provide the services and selection may be made competitively by comparing those attributes.

(5) In some circumstances, individual consultants may be selected on a single source basis with due justification subject to such requirements and conditions as may be prescribed for the appropriate use of individual consultants.

(6) The procuring entity may engage in such framework agreement procedure as may be prescribed.

General rules applicable to the selection of a procurement method.

7. (1) Except as otherwise provided for in section 8, a procuring entity shall conduct procurement by means of open tendering.

(2) A procuring entity may use a method of procurement other than open tendering only in accordance with section 8 and shall select the other method of procurement to accommodate the circumstances of the procurement concerned and shall seek to maximise competition to the extent practicable.

(3) If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under section 54 a statement of the reasons and circumstances upon which it relied to justify the use of that method.

Conditions for the use of methods of procurement under Part IV.

8. (1) The procuring entity may engage in procurement by means of restricted tendering in accordance with section 22 when

(a) the subject matter of the procurement, by reason of its highly complex or specialised nature, is available only from a limited number of tenderers; or

(b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

(2) A procuring entity may engage in procurement by means of a request for quotations in accordance with section 23 for the procurement of routine works and maintenance or readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the prescribed threshold amount.

(3) A procuring entity may engage in single source procurement in accordance with section 24 in the following exceptional circumstances

(a) where, for reasons of extreme urgency brought about by unforeseeable events not attributable to the procuring entity,

the products or services could not be obtained in time by means of open or restricted tendering;

(b) for additional deliveries of goods or services by the original supplier, to whom the contract was awarded under a competitive process, where

(i) a change of supplier would compel the contracting entity to procure equipment or services not meeting requirements of inter-changeability with already existing equipment or services procured under the initial procurement and such separation would cause significant inconvenience or substantial duplication of costs to the contracting entity; or

(ii) where no advantage would be gained by further competition,

except that the total value of contracts awarded for the additional services shall not exceed fifty percent of the amount of the original contract;

(c) the subject matter of, the procurement

(i) is for proprietary goods or services obtainable from only a single source; or

(ii) is available only from a particular tenderer, or a particular tenderer has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;

(d) the procuring entity determines that the use of any other method of procurement is not appropriate for the protection of the national security of the Virgin Islands;

(e) where there is an emergency and the products or services cannot be obtained by the procuring entity, in time by means of open or restricted tendering; or

(f) for assignments with an estimated value not exceeding $15,000.

(4) For the purposes of paragraph (e), procurement during an emergency shall, as far as possible, be limited to the period of the emergency.

(5) In this section, emergency includes

(a) a declared period of public emergency;

(b) a public health emergency, including a pandemic;

(c) natural disasters; or

(d) any other exceptional circumstances which the Cabinet may prescribe.

Conditions for the use of methods of procurement under Part V.

9. (1) The procuring entity may engage in the procurement of consulting services by means of request for proposals without negotiation in accordance with section 25 where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of the quality and technical aspects of the proposals.

(2) A procuring entity may engage in the procurement of consulting services by means of request for proposals with consecutive negotiations in accordance with section 26 where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of the quality and technical aspects of the proposals, and it assesses that consecutive negotiations with consultants are needed in order to ensure that the financial terms and conditions of the procurement contract are acceptable to the procuring entity.

Solicitation in open tendering.

10. (1) An invitation to tender in open tendering shall be published in the prescribed manner.

(2) The invitation shall also be published internationally, so as to be widely accessible to international tenderers.

(3) This section shall not apply where the procuring entity engages in pre-qualification proceedings in accordance with section 47.

(4) The procuring entity shall not be required to cause the invitation to be published in accordance with subsection (2) in the case of domestic procurement in accordance with section 37.

Solicitation in restricted tendering, request for quotations and single source.

11. (1) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified

(a) in section 8(1)(a), it shall solicit tenders from all tenderers from which the subject matter of the procurement is available;

(b) in section 8(1)(b), it

(i) shall select tenderers from which to solicit tenders in a non-discriminatory manner and in a sufficient number to ensure effective competition; and

(ii) may in the case of works select such tenderers from among those registered under the Contractors' Registration and Classification System referred to in section 47(1).

(2) Where the procuring entity engages in procurement by means of request for quotations in accordance with section 8(2), it shall request quotations from as many tenderers as practicable, but from at least three.

(3) Where the procuring entity engages in single source procurement in accordance with section 9(2), it shall solicit a proposal or price quotation from a single tenderer.

Solicitation in request for proposals proceedings.

12. (1) An invitation to participate in request for proposals proceedings shall be published in accordance with section 10(1) and (2), except where

(a) the procuring entity engages in direct solicitation under the conditions set out in subsection (2); or

(b) the procuring entity decides not to cause the invitation to be published in accordance with section 10(2) in the circumstances referred to in section 10(4).

(2) The procuring entity shall include in the record required under section 54 a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings.

PART III
OPEN TENDERING

Procedures for soliciting tenders.

13. The procuring entity shall solicit tenders by causing an invitation to tender to be published in accordance with section 10.

Contents of invitation to tender.

14. The invitation to tender shall include the following information:

(a) the name and address of the procuring entity;

(b) a summary of the principal requirements; and

(c) any other relevant information as may be prescribed.

Provision of solicitation documents.

15. (1) The procuring entity shall provide the solicitation documents to each tenderer that responds to the invitation to tender in accordance with the procedures and requirements specified therein and if pre-qualification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each tenderer that has been pre-qualified and that pays the price, if any, charged for those documents.

(2) The procuring entity shall set out in the solicitation documents the final time and date by which tenders are to be submitted taking into account the time required for the tenderers to prepare and submit their tenders.

(3) The period between receipt of the solicitation documents and the date for submission of tenders shall be no less than that prescribed and shall be the same for all tenderers.

(4) The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of producing and providing them to tenderers.

Contents of solicitation documents.

16. The solicitation documents shall include at least the following information:

(a) instructions for preparing tenders;

(b) the technical requirement of the procurement;

(c) the location and time of completion or delivery;

(d) the manner, date, place and time for submission of tenders;

(e) the criteria that will be applied in the ascertainment of the qualifications of tenderers;

(f) the criteria for evaluation of tenders including any margin of local preference;

(g) the terms and conditions of the procurement contract; and

(h) any other relevant information as may be prescribed.

Presentation of tenders.

17. (1) Tenders shall be presented in the manner, at the place and by the deadline specified in the solicitation documents.

(2) A tender shall be presented in writing, and

(a) if in paper form, signed and placed in a sealed envelope; or

(b) if in any other form, according to the requirements specified by the procuring entity in the solicitation documents, which shall ensure at least a similar degree of authenticity, security, integrity and confidentiality.

(3) The procuring entity shall provide to the tenderer a receipt showing the date and time when its tender was received.

(4) The procuring entity shall preserve the security, integrity and confidentiality of a tender and shall ensure that the content of the tender is examined only after it is opened in accordance with this Act.

(5) A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the tenderer that presented it.

Period of effectiveness of tenders: modification and withdrawal of tenders.

18. (1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request tenderers to extend the period for an additional specified period of time and a tenderer may refuse the request without forfeiting its tender security.

(3) Tenderers that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders and a tenderer whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(4) Unless otherwise stipulated in the solicitation documents, a tenderer may modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security and the modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for presenting tenders.

Opening tenders.

19. (1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders and they shall be opened at the place and in accordance with the manner and procedures specified in the solicitation documents.

(2) All tenderers that have presented tenders, or their representatives, shall be permitted by the procuring entity to attend the opening of tenders.

(3) The name and address of each tenderer whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to tenderers that have presented tenders but that are not present or represented at the opening of tenders, and included immediately in the record of the procurement proceedings required by section 54.

Examination and evaluation of tenders.

20. (1) Subject to subsection (2), the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with section 16.

(2) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender and any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

(3) The procuring entity shall reject a tender

(a) if the tenderer that presented the tender is not qualified;

(b) if the tenderer that presented the tender does not accept a correction of an arithmetical error made pursuant to section 45;

(c) if the tender is not responsive;

(d) in the circumstances referred to in section 49 or 50.

(4) The procuring entity shall evaluate the tenders that have not been rejected in order to ascertain the successful tender, as defined in subsection (5), in accordance with the criteria and procedures set out in the solicitation documents and no criterion or procedure shall be used that has not been set out in the solicitation documents.

(5) The successful tender shall be

(a) where price is the only award criterion, the tender with the lowest tender price; or

(b) where there are price and other award criteria, the most advantageous tender ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with section 40.

(6) When tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders, the tender prices of all tenders shall be converted to the currency specified in the solicitation documents according to the prescribed rates set out in those documents.

(7) Where it has engaged in pre-qualification proceedings pursuant to section 49, the procuring entity may require the tenderer presenting the tender that has been found to be the successful tender pursuant to subsection (5) to demonstrate its qualifications again, in accordance with criteria and procedures conforming to section 38 and the criteria and procedures to be used for such further demonstration shall be set out in the solicitation documents and where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

(8) If the tenderer presenting the successful tender is requested to demonstrate its qualifications again pursuant to subsection (7) but fails to do so, the procuring entity shall reject that tender and shall select the next successful tender from among those remaining in effect, in accordance with subsection (4), subject to the right of the procuring entity to cancel the procurement in accordance with section 48.

Prohibition of negotiations with tenderers.

21. With the exception of the circumstance in which all tenders have been rejected because all submitted prices are substantially higher than the existing budget thereby allowing for the possibility of negotiations with the tenderer which had submitted the lowest price on the scope of the procurement, no price negotiations shall take place between the procuring entity and a tenderer with respect to a tender presented by the tenderer.

PART IV
PROCEDURES FOR RESTRICTED TENDERING, REQUESTS FOR QUOTATIONS AND SINGLE SOURCE PROCUREMENT

Restricted tendering.

22. (1) The procuring entity shall solicit tenders in accordance with section 11(1).

(2) Except for sections 13 to 15, Part III, shall apply to restricted tendering proceedings.

Request for quotations.

23. (1) The procuring entity shall request quotations in accordance section 11(2) and each tenderer from which a quotation is requested shall be informed whether any elements other than the charges for the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each tenderer is permitted to give only one price quotation and is not permitted to change its quotation and no negotiations shall take place between the procuring entity and a tenderer with respect to a quotation presented by the tenderer.

(3) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations.

Single source procurement.

24. (1) Section 11(3) shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single tenderer.

(2) The procuring entity shall engage in negotiations with the tenderer from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.

PART V
PROCEDURES FOR REQUESTS FOR PROPOSALS WITHOUT NEGOTIATION AND REQUESTS FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS

Request for proposals without negotiation.

25. (1) The procuring entity shall solicit proposals by causing an invitation to participate in the request for proposals without negotiation proceedings to be published in accordance with section 12(1), unless an exception provided for in that section applies.

(2) The information which shall be included in the invitation, the contents of the request for proposals and the procedures for evaluating the proposals submitted shall be as prescribed.

Request for proposals with consecutive negotiations.

26. (1) Section 25(1) and (2) shall apply *mutatis mutandis* to procurement conducted by means of request for proposals with consecutive negotiations, except to the extent that those provisions are derogated from in this section.

(2) Proposals whose technical, quality and performance characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive and the procuring entity shall rank each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals and in accordance with the prescribed procedures

PART VI
CHALLENGE PROCEEDINGS

Procurement Appeals Board.

27. (1) There is established by this Act, for the purposes of hearing and determining an application for review under sections 30 and 31, a Procurement Appeals Board.

(2) The Appeals Board shall comprise three persons, appointed by the Minister one of whom shall be an Attorney-at-Law who is practising or has practised for a period of not less than ten years, and who shall be the Chairperson.

(3) A member of the Appeals Board shall be appointed on such terms and conditions as may be prescribed and the Board shall operate in accordance with such rules of procedure as may be prescribed.

(4) The Minister shall within 7 days of receipt of a request for a review refer the request to the Procurement Appeals Board.

(5) Within 28 days of receiving the referral, the Appeals Board shall hear and determine the application for review.

(6) The Minister may extend the period referred to in subsection (5).

Right to challenge and appeal.

28. (1) A tenderer that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity may challenge the decision or action concerned.

(2) Challenge proceedings may be made by way of an application for reconsideration to the procuring entity under section 30, an application for review by a Procurement Appeals Board or an appeal to the High Court.

(3) A tenderer may appeal any decision taken in challenge proceedings in the High Court.

(4) Notwithstanding subsections (1), (2) and (3), a decision by the procuring entity to reject all tenders, proposals and or offers prior to acceptance is not subject to challenge and review.

(5) Any challenge brought under this section shall be brought no later than ten days after the notification referred to in section 51(2).

Effect of a challenge.

29. (1) The procuring entity shall not take any step that would bring into force a procurement contract or framework agreement in the procurement proceedings concerned

(a) where it receives an application for reconsideration within the prescribed time limits;

(b) where it receives notice of an application for review from the Procurement Appeals Board; or

(c) where it receives notice of an appeal from the High Court.

(2) The prohibition referred to in subsection (1) shall lapse upon the expiration of the prescribed period of time, after the decision of the procuring entity, the Procurement Appeals Board or the High Court has been communicated to the applicant or appellant, as the case may be, to the procuring entity, where applicable, and to all other participants in the challenge proceedings.

(3) The procuring entity may at any time request the Procurement Appeals Board or the High Court to authorise it to enter into the procurement contract or framework agreement on the ground that urgent public interest consideration so justify.

(4) The Procurement Appeals Board, upon consideration of such a request, or of its own motion, may authorise the procuring entity to enter into the procurement contract or framework agreement where it is satisfied that urgent public interest considerations so justify.

(5) The decision of the Procurement Appeals Board and the reasons therefor shall be made part of the record of the procurement proceedings, and shall promptly be communicated to the procuring entity, to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.

Application for reconsideration before the procuring entity.

30. (1) A tenderer may apply to the procuring entity for a reconsideration of a decision or an action taken by the procuring entity in the procurement proceedings.

(2) An application for reconsideration shall be submitted to the procuring entity, in writing, within the prescribed time period and in accordance with the prescribed procedures.

(3) In taking its decision on an application that it has entertained, the procuring entity may overturn, correct, vary or uphold any decision or action taken in the procurement proceedings to which the application relates.

(4) The decision of the procuring entity shall be issued within the prescribed time period after receipt of the application and the procuring entity shall immediately thereafter communicate the decision to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.

(5) If the procuring entity does not communicate its decision to the applicant in accordance with the requirements of subsections (4) and (6), the applicant is entitled immediately thereafter to commence proceedings with the Procurement Appeals Board and where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.

(6) All decisions of the procuring entity under this section shall be in writing, shall state the action taken and the reasons therefor, and shall promptly be made part of the record of the procurement proceedings, together with the application received by the procuring entity under this section.

Application for review before the Procurement Appeals Board.

31. (1) A tenderer may apply to the Procurement Appeals Board for review of the decision taken by the procuring entity or of the failure of the procuring entity to issue a decision under section 30 within the prescribed time.

(2) An application for review shall be submitted to the Procurement Appeals Board, in writing, within the prescribed time period and in accordance with the prescribed procedures.

(3) The decision of the Procurement Appeals Board shall be issued within the prescribed time period after receipt of the application and the Procurement Appeals Board shall immediately thereafter communicate the decision to the procuring entity, to the applicant, to all other participants in the application for review and to all other participants in the procurement proceedings.

(4) All decisions of the Procurement Appeals Board under this section shall be in writing, shall state the action taken and the reasons therefor and shall promptly be made part of the record of the procurement proceedings, together with the application received by the Procurement Appeals Board.

Rights of participants in challenge proceedings.

32. (1) Any tenderer participating in the procurement proceedings to which the application relates, as well as any governmental authority whose interests are or could be affected by the application, shall have the right to participate in challenge proceedings under this Act and a tenderer duly notified of the proceedings that fails to participate in such proceedings is barred from subsequently challenging under sections 30 and 31 the decisions or actions that are the subject matter of the application.

(2) The procuring entity shall have the right to participate in challenge proceedings under section 31.

(3) The participants in challenge proceedings under this Act shall have the right

(a) to be present, represented and accompanied at all hearings during the proceedings;

(b) to be heard;

(c) to present evidence, including witnesses;

(d) to request that any hearing take place in public; and

(e) to seek access to the record of the challenge proceedings subject to section 33.

Confidentiality in challenge proceedings.

33. No information shall be disclosed in challenge proceedings and no public hearing under sections 30 and 31 shall take place if doing so would, in the view of the Procurement Appeals Board

(a) impair the protection of the national security of the Virgin Islands;

(b) be contrary to law;

(c) impede law enforcement;

(d) prejudice the legitimate commercial interests of the tenderers; or

(e) impede fair competition.

PART VII
MISCELLANEOUS PROVISIONS

Publication of legal texts.

34. (1) This Act, any regulations made under this Act and other legal texts of general application in connection with procurement covered by this Act, shall be promptly made accessible to the public and systematically maintained as prescribed.

(2) The Financial Secretary shall make available to the public any judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Act.

Information on possible forthcoming procurement.

35. (1) Procuring entities shall publish information regarding planned procurement activities for forthcoming months or years in accordance with the regulations.

(2) Procuring entities may also publish an advance notice of possible future procurement in accordance with the regulations.

(3) Publication under this section does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on tenderers.

Communications in procurement.

36. (1) Any document, notification, decision or other information generated in the course of a procurement and communicated as required by this Act or regulations, including in connection with challenge proceedings under Part VI or in the course of a meeting, shall be in writing.

(2) Where such document, notification, decision or other information is provided by electronic means, a record of its content shall for the purpose of the record of procurement proceedings under section 54 be converted into a medium which permits inspection and copying.

(3) Direct solicitation and communication of information between tenderers and a procuring entity may be made other than in writing, on the condition that immediately thereafter confirmation of the communication is given to the recipient of the communication in writing and provided in the record of procurement proceedings under section 54.

(4) The procuring entity, when first soliciting the participation of tenderers in the procurement proceedings, shall specify

(a) any requirement of form;

(b) in procurement involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;

(c) the means to be used to communicate information by or on behalf of the procuring entity to a tenderer or to any person, or by a tenderer to the procuring entity or other entity acting on its behalf;

(d) the means to be used to satisfy all requirements under this Act for information to be in writing or for a signature; and

(e) the means to be used to hold any meeting of tenderers.

(5) The procuring entity may use only those means of communication that are in common use by tenderers in the context of the particular procurement and in any meeting held with tenderers, the procuring entity shall use only those means that ensure in addition that tenderers can fully and contemporaneously participate in the meeting.

(6) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of the information concerned.

Participation by tenderers.

37. (1) Tenderers shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to use domestic procurement.

(2) Except when authorised or required to do so by regulations or any other enactment, the procuring entity shall establish no other requirement aimed at

limiting the participation of tenderers in procurement proceedings that discriminates against or among tenderers or against categories thereof.

(3) The procuring entity, when first soliciting the participation of tenderers in the procurement proceedings, shall declare whether the participation of tenderers in the procurement proceedings is limited pursuant to this section and on which ground and any such declaration may not later be altered.

(4) A procuring entity that decides to limit the participation of tenderers in procurement proceedings pursuant to this section shall include in the record of the procurement proceedings a statement of the reasons and circumstances on which it relied.

(5) The procuring entity shall make available to any person, upon request, its reasons for limiting the participation of tenderers in the procurement proceedings pursuant to this section.

Qualifications of tenderers.

38. (1) This section applies to the ascertainment by the procuring entity of the qualifications of tenderers at any stage of the procurement proceedings.

(2) Tenderers shall meet such criteria as the laws of the Virgin Islands require and the procuring entity considers appropriate and relevant in the circumstances of the particular procurement and must possess the necessary professional, technical, financial and managerial resources and competence required to complete the contract.

(3) Subject to the right of tenderers to protect their intellectual property or trade secrets, the procuring entity may require tenderers participating in procurement proceedings to provide appropriate documentary evidence or other information to satisfy itself that the tenderers are qualified in accordance with the criteria referred to in subsection (2).

(4) Any requirement established pursuant to this section shall be set out in the pre-qualification or pre-selection documents, if any, and in the solicitation documents and shall apply equally to all tenderers.

(5) A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of tenderers other than those provided for in this Act or otherwise prescribed.

(6) The procuring entity shall evaluate the qualifications of tenderers in accordance with the qualification criteria and procedures set out in the pre-qualification documents, if any, and in the solicitation documents.

(7) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with section 37, the procuring entity shall establish no criterion, requirement or procedure with respect to the

qualifications of tenderers that discriminates against or among tenderers or against categories thereof, or that is not objectively justifiable.

(8) Notwithstanding subsection (5), the procuring entity may require the legalisation of documentary evidence provided by the tenderer presenting the successful submission so as to demonstrate its qualifications for the particular procurement and shall not impose any requirements as to the legalisation of the documentary evidence other than those provided for in the laws of the Virgin Islands relating to the legalisation of documents of the type in question.

(9) The procuring entity shall disqualify a tenderer if it finds at any time that the information submitted concerning the qualifications of the tenderer was false or constituted a misrepresentation or was materially inaccurate or materially incomplete.

(10) Any tenderer participating in the procurement process shall

(a) not be insolvent, in receivership, bankrupt or being wound up;

(b) not have its affairs administered by a court or a judicial officer;

(c) not have any of their directors and officers, convicted of any criminal offence related to professional misconduct or making of false statements or misrepresentations with respect to their qualifications to enter into a procurement contract, within a period of two years preceding the commencement of the procurement process, or not otherwise have been disqualified pursuant to debarment proceedings;

(d) be in good standing with respect to taxes, duties, social security contributions, national health insurance, company registration, or payments due to the Government;

(e) have its business activities suspended; or

(f) be subject to any legal proceedings for any of the foregoing reasons.

Rules concerning the procurement requirement.

39. (1) The pre-qualification or pre-selection documents, if any, and solicitation documents shall set out a description of the subject matter of the procurement.

(2) Where practicable, the descriptions shall

(a) be objective, functional, generic and measurable; and

(b) set out required technical, qualitative and performance characteristics.

(3) The procuring entity shall set out in the solicitation documents

(a) a detailed description of the subject matter of the procurement to be use in the examination of submissions;

(b) the minimum requirements that submissions must meet in order to be considered responsive; and

(c) the manner in which the minimum requirements are to be applied.

(4) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with section 37, no description of the subject matter of a procurement that may restrict the participation of tenderers in or their access to the procurement proceedings, including any restriction based on nationality, shall be included or used in the pre-qualification or pre-selection documents, if any, or in the solicitation documents.

(5) No requirement or reference is to be made in the technical specifications to a particular make or source, or a particular process which characterises the products or services provided by a specific tenderer or to a trademark or name, patent, design or type, specific original, producer or service provider, unless there is no other practical way of describing the procurement requirements, and words such as "or equivalent" are included in the specifications.

Rules concerning evaluation criteria and procedures.

40. (1) Except for the criteria set out in subsection (2), the evaluation criteria shall relate to the subject matter of the procurement and may include the following:

(a) price;

(b) the cost of operating, maintaining and repairing goods or of construction;

(c) the time for delivery of goods, completion of construction or provision of services;

(d) the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the subject matter;

(e) the terms of payment and of guarantees in respect of the subject matter of the procurement;

(f) where relevant in procurement conducted in accordance with sections 25 and 26, the experience, reliability and professional and managerial competence of the tenderer and of the personnel to be involved in providing the subject matter of the procurement.

(2) In addition to the criteria set out in subsection (1), the evaluation criteria may include

(a) any other prescribed criteria;

(b) a criteria authorised or required to be taken into account by virtue of any enactment; or

(b) a margin of preference for the benefit of goods produced in BVI or labour provided by BVI nationals, or any other preference, that is prescribed by regulations or any other enactment and the margin of preference shall be calculated as prescribed.

(3) To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms.

(4) The procuring entity shall set out in the solicitation documents

(a) whether the successful submission will be ascertained on the basis of price, or price and other criteria;

(b) all evaluation criteria established pursuant to this section, including price as modified by any preference;

(c) the relative weights of all evaluation criteria;

(d) the manner of application of the criteria in the evaluation procedure.

(5) In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents and no criterion or procedure shall be used that has not been set out in accordance with this section.

41. (1) A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among tenderers or otherwise avoid its obligations under this Act.

Rules concerning estimation of the value of procurement.

(2) In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement contract or of all procurement contracts envisaged under a framework agreement over its entire duration, taking into account all forms of remuneration.

42. (1) Pre-qualification or pre-selection documents, if any, and solicitation documents shall be formulated in English.

Rules concerning the language of documents.

(2) Applications to pre-qualify or for pre-selection, if any, and submissions may be formulated and presented in the language of the pre-qualification or pre-selection documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.

43. (1) The manner, place and deadline for presenting applications to pre-qualify or for pre-selection shall be set out in the invitation to pre-qualify or for pre-selection and in the pre-qualification or pre-selection documents, as applicable and the manner, place and deadline for presenting submissions shall be set out in the solicitation documents.

Rules concerning applications.

(2) Deadlines for presenting applications to pre-qualify or for pre-selection or for presenting submissions shall be expressed as a specific date and time and shall allow sufficient time for tenderers to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.

(3) If the procuring entity issues a clarification or modification of the pre-qualification, pre-selection or solicitation documents, it shall, prior to the applicable deadline for presenting applications to pre-qualify or for pre-selection or for presenting submissions, extend the deadline if necessary or as required under section 44(4) to afford tenderers sufficient time to take the clarification or modification into account in their applications or submissions.

(4) The procuring entity may, at its absolute discretion, prior to a deadline for presenting applications to pre-qualify or for pre-selection or for presenting submissions, extend the applicable deadline if it is not possible for one or more tenderers to present their applications or submissions by the deadline initially stipulated because of any circumstance beyond their control.

(5) Notice of any extension of the deadline shall be given promptly to each tenderer to which the procuring entity provided the pre-qualification, pre-selection or solicitation documents.

Clarifications and modifications of solicitation documents.

44. (1) A tenderer may in writing request a clarification of the solicitation documents from the procuring entity and the procuring entity shall respond to any request by a tenderer for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting submissions.

(2) The procuring entity shall respond in writing within a time period that will enable the tenderer to present its submission in a timely manner and shall, without identifying the source of the request, communicate the clarification to all tenderers to which the procuring entity has provided the solicitation documents.

(3) At any time prior to the deadline for presenting submissions, the procuring entity may for any reason, whether on its own initiative or as a result of a request for clarification by a tenderer, modify the solicitation documents by issuing an addendum and the addendum shall be communicated promptly to all tenderers to which the procuring entity has provided the solicitation documents and shall be binding on those tenderers.

(4) If as a result of a clarification or modification issued in accordance with this section, the information published when first soliciting the participation of tenderers in the procurement proceedings becomes materially inaccurate, the procuring entity shall cause the amended information to be published in the same manner and place in which the original information was published and shall extend the deadline for presentation of submissions as provided for in section 43(3).

(5) If the procuring entity convenes a meeting of tenderers, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents and its responses to those requests, without identifying the sources of the requests and the minutes shall be provided promptly to all tenderers to which the procuring entity provided the solicitation documents, so as to enable those tenderers to take the minutes into account in preparing their submissions.

Clarification of qualification information and of submissions.

45. (1) During evaluation, the procuring entity may ask a tenderer for clarification of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.

(2) The procuring entity shall correct purely arithmetical errors that are discovered during the examination of submissions and the procuring entity shall give prompt notice of any such correction to the tenderer that presented the submission concerned. The submission of any tenderer that does not accept an accurate correction shall be rejected.

(3) No substantive change to qualification information or to a submission, including changes aimed at making an unqualified tenderer qualified or an unresponsive submission responsive, shall be sought, offered or permitted.

(4) No negotiations shall take place between the procuring entity and a tenderer with respect to qualification information or submissions, nor shall any change in price be made pursuant to a clarification that is sought under this section.

(5) Subsection (4) shall not apply to proposals submitted under sections 25 and 26.

(6) All communications generated under this section shall be included in the record of the procurement proceedings.

Tender securities.

46. (1) When the procuring entity requires tenderers presenting submissions to provide a tender security the requirement shall apply to all tenderers.

(2) A contractor or supplier which has been awarded a contract and refuses to sign and execute a contract for which a performance security is required will forfeit its tender security.

(3) The procuring entity shall make no claim to the amount of the tender security and shall promptly return, or procure the return of, the tender security after the earliest of the following events:

(a) the expiry of the tender security;

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) the cancellation of the procurement;

(d) the withdrawal of a tender submission prior to the deadline for presenting submissions.

Contractors' Registration and Pre-qualification proceedings.

47. (1) For domestic procurement, the procuring entity may select qualified contractors from the Contractors Registration and Classification System to submit tenders for undertaking certain categories of work without using the pre-qualification procedures specified in subsections (2), (3), (4), (5), (6), (7), (8), (9), (10) and (11) and the selection of contractors from the Contractors Registration and Classification System is determined by the type, cost and complexity of the work to be undertaken and the prescribed procedures for its use.

(2) The procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to solicitation, tenderers that are qualified and section 38 shall apply to pre-qualification proceedings.

(3) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in the prescribed publication

and unless decided otherwise by the procuring entity in the circumstances referred to in section 10(4), the invitation to pre-qualify shall also be published internationally, so as to be widely accessible to international tenderers.

(4) The invitation to pre-qualify shall include the following information:

(a) the name and address of the procuring entity;

(b) a summary of the main terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including

(i) the nature, quantity and place of delivery of the goods to be supplied;

(ii) the nature and location of the construction to be effected or the nature of the services and the location where they are to be provided;

(iii) the desired or required time for the supply of the goods; and

(iv) the completion of the construction or the provision of the services; and

(c) such other information as may be prescribed.

(5) The procuring entity shall provide a set of pre-qualification documents to each tenderer that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents and the price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to tenderers.

(6) The pre-qualification documents shall include such information as may be prescribed.

(7) The procuring entity shall respond to any request by a tenderer for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting applications to pre-qualify and the procuring entity shall respond within a time period that will enable the tenderer to present its application to pre-qualify in a timely manner and the response to any request that might reasonably be expected to be of interest to other tenderers shall, without identifying the source of the request, be communicated to all tenderers to which the procuring entity has provided the pre-qualification documents.

(8) The procuring entity shall take a decision with respect to the qualifications of each tenderer presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents.

(9) Only tenderers that have been pre-qualified are entitled to participate further in the procurement proceedings.

(10) The procuring entity shall promptly notify each tenderer presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any person, upon request, the names of all tenderers that have been pre-qualified.

(11) The procuring entity shall upon request promptly communicate to each tenderer that has not been pre-qualified the reasons therefor.

(12) For the purposes of subsection (1), the Financial Secretary on the recommendation of the Central Tenders Board shall maintain a list to be approved by the Minister, of pre-qualified contractors for the procurement of services, including construction works.

Cancellation of the procurement.

48. (1) The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission is accepted, under the circumstances referred to in section 51(6) and the procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.

(2) The decision of the procuring entity to cancel the procurement and the reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to any tenderer that presented a submission.

(3) The procuring entity shall promptly publish a notice of the cancellation of the procurement in the same manner and place in which the original information regarding the procurement proceedings was published, and return any tenders or proposals that remain unopened at the time of the decision to the tenderers that presented them.

(4) The procuring entity shall incur no liability, solely by virtue of its invoking subsection (1), towards tenderers that have presented submissions.

Rejection of abnormally low submissions.

49. (1) The procuring entity may reject a submission if the procuring entity has determined that the price, in combination with other constituent elements of the submission, is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the tenderer that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) requested in writing from the tenderer details of the submission that give rise to concerns as to the ability of the tenderer to perform the procurement contract; and

(b) taken account of any information provided by the tenderer following this request and the information included in the submission, but continues, on the basis of all such information, to hold concerns.

(2) The decision of the procuring entity to reject a submission in accordance with this section, the reasons for that decision, and all communications with the tenderer under this section shall be included in the record of the procurement proceedings and the decision of the procuring entity and the reasons therefor shall be promptly communicated to the tenderer concerned.

Exclusion of a tenderer from the procurement proceedings.

50. (1) A procuring entity shall exclude a tenderer from the procurement proceedings if it determines that

(a) during the procurement procedure the tenderer has engaged in corrupt or fraudulent behaviour contrary to any enactment;

(b) the tenderer has an unfair competitive advantage or a conflict of interest.

(2) Any decision of the procuring entity to exclude a tenderer from the procurement proceedings under this section and the reasons therefor shall be included in the record of the procurement proceedings and promptly communicated to the tenderer concerned.

Acceptance of the successful submission and entry into force of the procurement contract.

51. (1) The procuring entity shall accept the successful submission unless

(a) the tenderer presenting the successful submission is disqualified in accordance with section 38;

(b) the procurement is cancelled in accordance with section 48(1);

(c) the submission found successful at the end of evaluation is rejected as abnormally low under section 49; or

(d) the tenderer presenting the successful submission is excluded from the procurement proceedings on the grounds specified in section 50.

(2) The procuring entity shall promptly notify each tenderer that presented submissions of its decision to accept the successful submission and the notice shall contain, at a minimum, the following information:

(a) the name and address of the tenderer presenting the successful submission;

(c) the accepted contract amount or, where the successful submission was ascertained on the basis of price and other criteria, the accepted contract amount and a summary of other characteristics and relative advantages of the successful submission;

(d) the right to bring challenge procedures under Part IV within ten working days of the notice; and

(e) any other prescribed information.

(3) Subsection (2) shall not apply to the award of a procurement contract where the accepted contract amount is less than the prescribed threshold or in the event of urgency.

(4) Promptly after the successful submission was ascertained, the procuring entity shall dispatch the letter of acceptance of the successful submission to the tenderer that presented that submission, unless the Procurement Appeals Board or the High Court orders otherwise.

(5) No contract may be signed or concluded before ten working days from receipt of the letter of acceptance.

(6) Where the solicitation documents require the tenderer whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the solicitation document, the competent signatory acting on behalf of the procuring entity and the tenderer concerned shall sign the procurement contract within a reasonable period of time after the letter of acceptance is dispatched to the tenderer concerned.

(7) If the tenderer whose submission has been accepted fails to sign any written procurement contract as required or fails to provide any required security for the performance of the contract, the procuring entity may either cancel the procurement or decide to select the next successful submission from among those remaining, in accordance with the criteria and procedures set out in this Act and in the solicitation documents and, in the latter case, this section shall apply *mutatis mutandis* to such submission.

(8) Written notices and letters under this section are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to

the tenderer or conveyed to an appropriate authority for transmission to the tenderer by any reliable means specified in accordance with this Act.

(9) Upon the entry into force of the procurement contract, notice of the procurement contract shall be given promptly to other tenderers, specifying the name and address of the tenderer that has entered into the contract and the accepted contract amount.

Public notice of the award of a procurement contract or framework agreement.

52. (1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name of the tenderer to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the accepted contract amount.

(2) Subsection (1) shall not apply to awards where the contract price is less than the prescribed threshold amount and the procuring entity shall publish a cumulative notice of such awards from time to time but at least once per year.

(3) The Cabinet shall prescribe the manner of publication of the notices required under this section.

Confidentiality.

53. (1) In its communications with tenderers or with any person, the procuring entity shall not disclose any information if non-disclosure of such information is necessary for the protection of the national security of the Virgin Islands or if disclosure of such information would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the tenderers or would impede fair competition, unless disclosure of that information is ordered by the High Court and, in such case, subject to the conditions of such an order.

(2) Other than when providing or publishing information pursuant to section 51(2) and (8) and to sections 52, 54 and 19, the procuring entity shall treat applications to pre-qualify or for pre-selection and submissions in such a manner as to avoid the disclosure of their contents to competing tenderers or to any other person not authorised to have access to this type of information.

(3) Any discussions, communications, negotiations or dialogue between the procuring entity and a tenderer pursuant to section 26 shall be confidential and unless required by law or ordered by the High Court, no party to any such discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party.

(4) Subject to the requirements in subsection (1), in procurement involving classified information, the procuring entity may

(a) impose on tenderers requirements aimed at protecting classified information; and

(b) demand that tenderers ensure that their sub-contractors comply with requirements aimed at protecting classified information.

Documentary record of procurement proceedings.

54. (1) The procuring entity shall maintain a record of the procurement proceedings that includes such information as may be prescribed.

(2) Portions of the record referred to in subsection (1) shall, on request, be made available to any person after the successful submission has been accepted or the procurement has been cancelled.

(3) Subject to subsection (4), or except as disclosed pursuant to section 19, portions of the record referred to in subsection (1) shall, after the decision on acceptance of the successful submission has become known to them, be made available, upon request, to tenderers that presented submissions.

(4) Except when ordered to do so by the High Court, and subject to the conditions of such an order, the procuring entity shall not disclose

(a) information from the record of the procurement proceedings if its non-disclosure is necessary for the protection of the national security of the Virgin Islands or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the tenderers or would impede fair competition;

(b) information relating to the examination and evaluation of submissions, other than in summary and as may be prescribed.

Integrity and code of conduct.

55. (1) All public officers or other persons employed by a procuring entity, members of the Procurement Unit and Central Tenders Board and any other person with the ability to influence any public procurement, including in the

(a) planning or conduct of public procurement proceedings or contract management;

(b) making of a decision, approval, determination or recommendation; or

(c) the preparation of any solicitation document

are subject to the provisions of subsection (2) and to any disciplinary or legal sanctions that may ensue under any enactment.

(2) In exercising their duties, the persons identified in subsection (1) shall

(a) act diligently, impartially, conscientiously and fairly in accordance with the procedures set out this Act;

(a) at all times act in the public interest;

(b) avoid conflicts of interest, whether actual, perceived or potential;

(c) not commit or abet any corrupt or fraudulent practice, including the solicitation or acceptance of improper inducements; and

(d) subject to this Act, not disclose any information relating to procurement proceedings and to tenders.

(3) The Financial Secretary shall issue a code of conduct for officers and employees of procuring entities which shall include at least the following:

(a) measures for the prevention of conflicts of interest in procurement;

(b) certificates declaring an absence of conflicts of interest to be signed by officers exercising specified roles in the procurement function;

(c) where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in

(i) particular procurements;

(ii) screening procedures; and

(iii) training requirements.

(4) The Financial Secretary shall cause the code of conduct and all amendments to the Code to be published and otherwise be made accessible to the public.

Regulations.

56. (1) The Cabinet may make regulations not inconsistent with this Act, for giving effect to the provisions of this Act.

(2) Without limiting the generality of subsection (1), the regulations may

(a) provide for the issuing of directives which govern the public procurement process;

(b) provide for recording, filing and preserving all documents relating to the procurement proceedings;

(c) provide for the manner of procuring goods and services during a public emergency for the purposes of section 8(3)(e); and

(d) prescribing anything that is required to be prescribed by this Act.

Repeals and savings.

57. (1) Section 44(1)(b) of the Public Finance Management Act is repealed.

(2) Notwithstanding subsection (1), any Regulations made under the repealed subsection to govern the Central Tenders Board and the procurement process shall, until revoked, continue to be in force to the extent that the Regulations are not inconsistent with this Act. No. 2 of 2004.

Transitional provisions.

58. (1) A tender contract existing at the date of commencement of this Act continues to be administered in terms of and governed by the existing law governing such tender, as if this Act has never been enacted.

(2) An invitation to tender that has been advertised before the date of commencement of this Act, whether the tender advertisement has been closed or not, the tendering shall be dealt with in terms of this Act.

(3) If, at the date of commencement of this Act, a matter relating to public procurement is pending before any court or the Central Tenders Board pursuant to the existing law governing such matter, that matter shall continue to be dealt with and brought to a conclusion as if this Act had not been enacted.

SCHEDULE

[Schedule 5(7)]

OPERATION AND PROCEDURES OF THE CENTRAL TENDERS BOARD

Quorum.

1. Any three members present at a meeting of the Board shall constitute a quorum of the Board.

Decisions of the Board.

2. (1) Decisions of the Board shall be by a majority of the members or delegates present and voting, and in the event of an equality of votes, the chairperson has a second or casting vote.

(2) A decision of the majority of the members or designates present and able to vote is a decision of the Board.

Frequency, place, day and time of Board meetings.

3. (1) The Board shall meet as often as may be necessary to perform its duties and exercise its powers in an expeditious manner.

(2) A meeting of the Board shall be held on the days and at the times that the chairperson may determine.

Notice of Board meeting.

4. (1) The chairperson shall cause written notice of the place, day, time and agenda of the meeting of the Board to be given to each member, and to each designate, known to the chairperson to be attending the meeting, not less than seventy-two hours before the time scheduled for the holding of the meeting, unless the member or designate waives notice of the meeting in writing.

(2) Notice shall be given to a member or designate by

(a) handing a copy of the notice to the member or designate;

(b) leaving a copy of the notice at the office of the member or designate;

(c) e-mailing a copy of the notice to the member or designate at the e-mail address of the member or, as the case may be, the designate; or

(d) any other means approved by resolution of the Board.

Waiver of notice.

5. A member or designate may in writing waive notice of a meeting.

Decision of chairperson.

6. The decision of the person presiding at a meeting of the Board is final on the following matters

(a) the agenda for a meeting;

(b) the conduct of the meeting.

Passed by the House of Assembly this 3rd day of November, 2021.

(Sgd.) Julian Willock,
Speaker.

(Sgd.) Phyllis Evans,
Clerk of the House of Assembly.