



THE REPUBLIC OF KIRIBATI

PROCUREMENT ACT 2002

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REPUBLIC OF KIRIBATI
(No. 10 of 2002)

I assent,


Beretitenti,
16/10/2002

AN ACT TO REGULATE PROCUREMENT OF GOODS, CONSTRUCTION
AND SERVICES; AND FOR CONNECTED PURPOSES

Commencement:
2002

PART I
GENERAL PROVISIONS

Short title

1. This Act may be cited as the Procurement Act 2002.

Application

2.(1) This Act applies to all procurement by procuring entities, except as otherwise provided in subsection (2) of this section.

(2) Subject to the provisions of subsection (3) of this section, this Act does not apply to:

- (a) procurement involving national defense or national security;
- (b) procurement that may be otherwise restricted by the Plant and Quarantine Ordinance (Cap. 72); or
- (c) procurement of a type excluded by the procurement regulations.

(3) This Act applies to the types of procurement referred to in subsection (2) of this section where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

Interpretation

3. In this Act, unless the context otherwise requires -

"Central Procurement Review Board (CPRB)" means the board chaired by the Chief Procurement Officer to consider procurement of goods and services worth over AU\$50,000;

"Chief Procurement Officer" means the official appointed by the Beretitenti, acting in accordance with the advice of the Cabinet, to serve as the final approving officer for any Procurement subject to this Act;

"Construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself;

"Currency" includes monetary unit of account;

"Goods" means objects of every kind and description including raw materials, products 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;

"Ministry Procurement Review Committee (MPRC)" means the committee chaired by the Permanent Secretary of the procuring ministry to consider procurement of goods and services of worth between \$5,000 and \$50,000;

"Procurement" means the acquisition by any means of goods, construction or services;

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

"Procurement Support Unit" means a unit within the Ministry of Finance responsible for record keeping of all procurement proceedings, advising review bodies on procurement matters, and providing training to procurement staff;

"Procuring entity" means any governmental department, agency, organ or other unit, or any subdivision thereof, in Kiribati that engages in procurement;

"Procuring Ministry" means a government ministry or department doing the procurement of goods and services;

"Procuring Officer" means staff of the procuring ministry responsible for purchasing of goods and services;

"Services" means any object of procurement other than goods or construction;

"Supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

"Tender security" means a security provided to the procuring entity to secure the fulfillment of any obligation referred to in section 32 (1) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange.

Procurement regulations

4. The Minister of Finance and Economic Planning is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Act.

Public accessibility of legal texts

5. The text of this Act, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Act, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

Qualifications of suppliers and contractors

- 6.(1) (a) This section applies to the determination by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings;
- (b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the following criteria as the procuring entity considers appropriate and records for future reference in the particular procurement proceedings:
- (i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;
 - (ii) That they have legal capacity to enter into the procurement contract;

- (iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;
- (iv) That they have fulfilled their obligations to pay taxes and social security contributions in Kiribati;
- (v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ten (10) years preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(2) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in subsection (1).

(3) Any requirement established pursuant to this section shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this section.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations. This information should be recorded for future reference.

(5) Subject to sections 8(1), 34(4)(d) and 39(2), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.

(6) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false.

- (b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete.
- (c) Other than in a case to which sub-subsections (a) of this section applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

Pre-qualification proceedings

7.(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to Parts III, IV or V, suppliers and contractors that are qualified. The provisions of section 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The pre-qualification documents shall include, at a minimum:

- (a) The following information:
 - (i) Instructions for preparing and submitting prequalification applications;
 - (ii) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;
 - (iii) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
 - (iv) The manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

- (v) Any other requirements that may be established by the procuring entity in conformity with this Act and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings; and
- (b) (i) In proceedings under Part III, the information required to be specified in the invitation to tender by section 25 (1) (a) to (e), (h) and, if already known, (j);
- (ii) In proceedings under Part IV, the information referred to in section 38 (a), (c), if already known, (g), (p) and (s).

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to

demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Participation by suppliers or contractors

8.(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of Act, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to subsection (1) of this section shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to subsection (1) of this section, it shall so declare to them.

Form of communications

9.(1) Subject to other provisions of this Act and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Act to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers or contractors and the procuring entity referred to in sections 7 (4) and (6), 12 (3), 31 (2) (a), 32 (1) (d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

Rules concerning documentary evidence provided by suppliers or contractors

10. If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement

proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the Acts of this State relating to the legalization of documents of the type in question.

Record of procurement proceedings

11.(1) The procuring entity and the secretariat of the CPRB shall maintain records of the procurement proceedings containing, at a minimum, the following information:

- (a) a brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;
- (b) the names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;
- (c) information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;
- (d) the price, or the basis for determining the price, and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract, where these are known to the procuring entity;
- (e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to sections 34 (4) (d) and 39 (2);
- (f) if all tenders, proposals, offers or quotations were rejected pursuant to section 12, a statement to that effect and the grounds therefor, in accordance with section 12 (1);
- (g) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;
- (h) the information required by section 15(2) and (3), if a tender, proposal, offer or quotation was rejected pursuant to that provision;
- (i) in procurement proceedings involving the use of a procurement method pursuant to subsections (2) or paragraphs (a) or (b) or subsection (3) of section 18, the statement required under section 18 (4) of the grounds and

circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

- (j) in the procurement of services by means of Part IV, the statement required under section 41 (2) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;
- (k) in procurement proceedings involving direct solicitation of proposals for services in accordance with section 37 (3), a statement of the grounds and circumstances on which the procuring entity relied to justify the direct solicitation;
- (l) in procurement proceedings in which the procuring entity, in accordance with section 8 (1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;
- (m) a summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to section 33 (3), the portion of the record referred to in paragraphs (a) and (b) of subsection (1) of this section shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to section 33 (3), the portion of the record referred to in paragraphs (c) to (g), and (m), of subsection (1) of this section shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in paragraphs (c) to (e), and (m), may be ordered at an earlier stage by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

- (a) information if its disclosure would be contrary to Act, would impede Act enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;
- (b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in subsections (1) (e).

(4) The procuring entity and the secretariat of the CPRB shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present section.

Rejection of all tenders, proposals, offers or quotations

12.(1) Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less and if so specified in the solicitation documents or other documents for solicitation of proposals, offers or quotations, the procuring entity may reject all tenders, proposals, offers or quotations at any time prior to the acceptance of a tender, proposal, offer or quotation. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender, proposal, offer or quotation, the grounds for its rejection of all tenders, proposals, offers or quotations, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking subsection (1) of this section, towards suppliers or contractors that have submitted tenders, proposals, offers or quotations.

(3) Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations.

Entry into force of the procurement contract

13.(1) In tendering proceedings, acceptance of the tender and entry into force of the procurement contract shall be carried out in accordance with section 36.

(2) In all the other methods of procurement, the manner of entry into force of the procurement contract shall be notified to the suppliers or contractors at the time that proposals, offers or quotations are requested.

Public notice of procurement contract awards

14.(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by subsection (1).

(3) Subsection (1) is not applicable to awards where the contract price is less than Fifty thousand Australian dollars (A\$50,000).

Inducements from suppliers or contractors

15.(1) For purposes of this section, the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person serving under any local government council or other public body.

(2) Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it, gives or agrees to give or offers any gift or consideration, directly or indirectly, to any agent of the procuring entity as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the Procuring Entity's affairs or business, or for showing of forbearing to show favour or disfavour to any person in relation to the Procuring entity's affairs or business.

(3) Rejection of a tender, proposal, offer or quotation pursuant to this section and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor and the Attorney General's Office for any action that may be required under the Penal Code.

Rules concerning description of goods, construction or services

16.(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking or labeling or conformity certification, and symbols and terminology, or description of services, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

(2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of goods, construction or services shall be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the

prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations;

- (b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

Language

17. The pre-qualification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in English, except where I-Kiribati is otherwise indicated in case:

- (a) the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to section 8 (1), or
- (b) the procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested.

PART II

METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Methods of procurement

18.(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to sections 19, 20, 21 or 22.

(3) In the procurement of services, a procuring entity shall use the method of procurement set forth in chapter IV, unless the procuring entity determines that:

- (a) it is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the services to be procured; or
- (b) it would be more appropriate, subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the

Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, to use a method of procurement referred to in sections 19 to 22, provided that the conditions for the use of that method are satisfied.

(4) If the procuring entity uses a method of procurement pursuant to subsection (2) or paragraphs (a) or (b) of subsection (3), it shall include in the record required under section 11 a statement of the grounds and circumstances on which it relied to justify the use of that method.

Conditions for use of two-stage tendering, request for proposals or competitive negotiation

19.(1) Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, a procuring entity may engage in procurement by means of two-stage tendering in accordance with section 46, or request for proposals in accordance with section 48, or competitive negotiation in accordance with section 49, in the following circumstances:

- (a) it is not feasible for the procuring entity to formulate detailed specifications for the goods or construction or, in the case of services, to identify their characteristics and, in order to obtain the most satisfactory solution to its procurement needs,
 - (i) it seeks tenders, proposals or offers as to various possible means of meeting its needs; or,
 - (ii) because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;
- (b) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;
- (c) when the procuring entity applies this Act, pursuant to section 1 (3), to procurement involving national defense or national security and determines that the selected method is the most appropriate method of procurement; or,
- (d) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to sections 12, 15 or 34 (3), and when, in the judgement of the procuring

entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, the procuring entity may engage in procurement by means of competitive negotiation also when:

- (a) there is an urgent need for the goods, construction or services, and engaging in tendering proceedings would, therefore, be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,
- (b) owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods.

Conditions for use of restricted tendering

20. Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with section 47, when:

- (a) the goods, construction or services, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors; or
- (b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, construction or services to be procured.

Conditions for use of request for quotations

21.(1) Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, a procuring entity may engage in procurement by means of a request for quotations in accordance with section 50 for the procurement of readily available goods or services that are not specially produced or provided to the particular specifications 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 amount set forth in the procurement regulations.

- (2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking subsection (1) of this section.

Conditions for use of single-source procurement

22.(1) Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, a procuring entity may engage in single-source procurement in accordance with section 51 when:

- (a) the goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;
- (b) there is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;
- (c) owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;
- (d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;
- (e) the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or
- (f) the procuring entity applies this Act, pursuant to section 2(3), to procurement involving national defense or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in sections 34(4)(c)(iii) or 39(1)(d), provided that procurement from no other supplier or contractor is capable of promoting that policy.

PART III TENDERING PROCEEDINGS

A. SOLICITATION OF TENDERS AND OF APPLICATION TO PREQUALIFY

Domestic tendering

23. In procurement proceedings in which:

- (a) participation is limited solely to domestic suppliers or contractors pursuant to section 8(1), or
- (b) The procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested in submitting tenders,

the procuring entity shall not be required to employ the procedures set out in sections 24(2), 25(1)(h), 25(1)(i), 25(2)(c), 25(2)(d), 27(j), 27(k), 27(s) and 32(1)(e) of this Act.

Procedures for soliciting tenders or applications to prequalify

24.(1) For procurement of value greater than \$50,000, a procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be posted on the local community board in a conspicuous location and published in the local press.

(2) Subject to subsection (1) of this section, the invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

(3) Subject to subsection (1) of this section, where technically feasible, the invitation to tender or invitation to prequalify shall be posted, in a language customarily used in international trade, on any official internet web site maintained by the government.

Contents of invitation to tender and invitation to prequalify

25. (1) The invitation to tender shall contain, at a minimum, the following information:

- (a) The name and address of the procuring entity;
- (b) The nature and quantity, and place of delivery of the goods to be supplied, 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;
- (c) The desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;
- (d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with section 6 (1) (b);
- (e) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to section 8 (1), as the case may be;
- (f) The means of obtaining the solicitation documents and the place from which they may be obtained;
- (g) The price, if any, charged by the procuring entity for the solicitation documents;
- (h) The currency and means of payment for the solicitation documents;
- (i) The language or languages in which the solicitation documents are available; and
- (j) The place and deadline for the submission of tenders.

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in subsections (1) (a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

- (a) The means of obtaining the prequalification documents and the place from which they may be obtained;
- (b) The price, if any, charged by the procuring entity for the prequalification documents;

- (c) The currency and terms of payment for the prequalification documents;
- (d) The language or languages in which the prequalification documents are available; and
- (e) The place and deadline for the submission of applications to prequalify.

Provision of solicitation documents

26. The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

Contents of solicitation documents

27. The solicitation documents shall include, at a minimum, the following information:

- (a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of section 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to section 34 (6);
- (c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (d) The nature and required technical and quality characteristics, in conformity with section 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;
- (e) The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria

other than price to be used pursuant to section 34 (4) (b), (c) or (d) and the relative weight of such criteria;

- (f) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
- (g) If alternatives to the characteristics of the goods, construction, services, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;
- (h) If suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted;
- (i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods, construction or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes;
- (j) The currency or currencies in which the tender price is to be formulated and expressed;
- (k) The language or languages, in conformity with section 29, in which tenders are to be prepared;
- (l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;
- (m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;
- (n) The manner, place and deadline for the submission of tenders, in conformity with section 30;
- (o) The means by which, pursuant to section 28, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to

whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

- (p) The period of time during which tenders shall be in effect, in conformity with section 31;
- (q) The place, date and time for the opening of tenders, in conformity with section 33;
- (r) The procedures to be followed for opening and examining tenders;
- (s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to section 34 (5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;
- (t) References to this Act, the procurement regulations and other Acts and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under section 52 or give rise to liability on the part of the procuring entity;
- (u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;
- (v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;
- (w) Notice of the right provided under section 52 of this Act to seek review of an act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;
- (x) If the procuring entity reserves the right to reject all tenders pursuant to section 12, a statement to that effect;
- (y) Any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to section 36, and approval by a higher authority or the Government and the estimated period

of time following the dispatch of the notice of acceptance that will be required to obtain the approval; and,

- (z) Any other requirements established by the procuring entity in conformity with this Act and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Clarifications and modifications of solicitation documents

28.(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, 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. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

B. SUBMISSION OF TENDERS

Language of tenders

29. Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

Submission of tenders

30.(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to section 28, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) Subject to paragraph (b), a tender shall be submitted in writing, signed and in a sealed envelope;

(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in paragraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality; and,

(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Period of effectiveness of tenders; modification and withdrawal of tenders

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

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

- (b) Suppliers or contractors 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. A supplier or contractor 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.

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

Tender securities

32.(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

- (a) The requirement shall apply to all such suppliers or contractors;
- (b) The solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;
- (c) Notwithstanding the provisions of paragraphs (b) of this subsections, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in Kiribati if the tender security and the issuer otherwise conform to requirements set forth in the solicitation documents;
- (d) Prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;
- (e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness; and,
- (f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any

requirement that refers directly or indirectly to conduct by the supplier or contractor submitting the tender shall not relate to conduct other than:

- (i) Withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;
- (ii) Failure to sign the procurement contract if required by the procuring entity to do so;
- (iii) Failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) 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 document, after whichever of the following that occurs earliest:

- (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 termination of the tendering proceedings without the entry into force of a procurement contract; and,
- (d) The withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

C. EVALUATION AND COMPARISON OF TENDERS

Opening of tenders

33.(1) Tenders shall be opened at a meeting of the Central Procurement Review Board (CPRB) or Ministry Procurement Review Committee (MPRC) whichever is applicable at time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.

- (3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by section 11.

Examination, evaluation and comparison of tenders

34. (1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.
- (b) Notwithstanding paragraph (a) of this subsection, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.
- (2) (a) Subject to paragraph (b) of this subsection, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents.
- (b) 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 forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.
- (3) The procuring entity shall not accept a tender:
- (a) If the supplier or contractor that submitted the tender is not qualified;
- (b) If the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to subsections (1) (b) of this section;
- (c) If the tender is not responsive; and
- (d) In the circumstances referred to in section 15.

- (4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in paragraphs (b) of this subsections, in accordance with the procedures and criteria set forth in the solicitation documents. The procuring entity shall then present findings to the CPRB or MPRC whichever one is applicable. No criterion shall be used that has not been set forth in the solicitation documents.
- (b) The successful tender shall be:
- (i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to paragraph (d) of this subsection; or
 - (ii) If the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.
- (c) In determining the lowest evaluated tender in accordance with paragraph (b)(ii) of this subsection, the procuring entity may consider only the following:
- (i) the tender price, subject to any margin of preference applied pursuant to paragraph (d) of this subsection;
 - (ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services; and,
 - (iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of Kiribati, the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills; and

(iv) national defense and security considerations.

(d) If authorized by the procurement regulations, subject to the approval of the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to section 27(s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to section 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to subsection (4) (b) of this section to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of section 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with subsection (6) of this section but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with subsection (4) of this section, from among the remaining tenders, subject to the right of the procuring entity, in accordance with section 12(1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in section 11.

Prohibition of negotiations with suppliers or contractors

35. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

Acceptance of tender and entry into force of procurement contract

36.(1) Subject to sections 12(1) and 34 (7), the tender that has been ascertained to be the successful tender pursuant to section 34 (4)(b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender prior to due date of tender.

(2) (a) Notwithstanding the provisions of subsection (4) of this section, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in subsection (1) of this section is dispatched to the supplier or contractor.

(b) Subject to subsection (3) of this section, where a written procurement contract is required to be signed pursuant to paragraph (a) of this subsection, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in subsection (1) of this section is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(3) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to section 31(1) or the period of effectiveness of tender securities that may be required pursuant to section 32(1).

(4) Except as provided in subsections (2)(b) and (3) of this section, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in subsection (1) of this section is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by section 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the

performance of the contract, the procuring entity and the CPRB or MPRC whichever one is applicable shall select a successful tender in accordance with section 34(4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with section 12(1), to reject all remaining tenders. The notice provided for in subsection (1) of this section shall be given to the supplier or contractor that submitted that tender.

(6) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

PART IV

PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES

Notice of solicitation of proposals

37.(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing a notice seeking expression of interest in submitting a proposal or in prequalifying, as the case may be, to be posted on the local community board in a conspicuous location and published in the local press. The notice shall contain, at a minimum, the name and address of the procuring entity, a brief description of the services to be procured, the means of obtaining the request for proposals or prequalification documents and the price, if any, charged for the request for proposals or for the prequalification documents.

(2) The notice shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation except where participation is limited solely to domestic suppliers or contractors pursuant to section 8(1) or where, in view of the low value of the services to be procured, the procuring entity decides that only domestic suppliers or contractors are likely to be interested in submitting proposals.

(3) Subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, where direct solicitation is necessary for reasons of economy and efficiency, the procuring entity need not apply the provisions of subsections (1) and (2) of this section in a case where:

- (a) the services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors;

(b) the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or,

(c) direct solicitation is the only means of ensuring confidentiality or is required by reason of the national interest, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice or, in cases in which subsection (3) of this section applies, directly to participating suppliers or contractors. The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any.

Contents of requests for proposals for services

38. The request for proposals shall include, at a minimum, the following information:

- (a) the name and address of the procuring entity;
- (b) the language or languages in which proposals are to be prepared;
- (c) the manner, place and deadline for the submission of proposals;
- (d) if the procuring entity reserves the right to reject all proposals, a statement to that effect;
- (e) the criteria and procedures, in conformity with the provisions of section 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to section 7 (8);
- (f) the requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (g) the nature and required characteristics of the services to be procured to the extent known, including, but not limited to, the location where the services

- are to be provided and the desired or required time, if any, when the services are to be provided;
- (h) whether the procuring entity is seeking proposals as to various possible ways of meeting its needs;
 - (i) if suppliers or contractors are permitted to submit proposals for only a portion of the services to be procured, a description of the portion or portions for which proposals may be submitted;
 - (j) the currency or currencies in which the proposal price is to be formulated or expressed, unless the price is not a relevant criterion;
 - (k) the manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes, unless the price is not a relevant criterion;
 - (l) the procedure selected pursuant to section 41(1) for ascertaining the successful proposal;
 - (m) the criteria to be used in determining the successful proposal, including any margin of preference to be used pursuant to section 39(2), and the relative weight of such criteria;
 - (n) the currency that will be used for the purpose of evaluating and comparing proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;
 - (o) if alternatives to the characteristics of the services, contractual terms and conditions or other requirements set forth in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;
 - (p) the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;
 - (q) the means by which, pursuant to section 40, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to

if any, whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

various proposals for or of the portion to be formulated or expressed elements of transportation process the price of the proposal, including 39(2), and und compared the conversion rate published date will

(r) the terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(s) references to this Act, the procurement regulations and other Acts and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under section 52 or give rise to liability on the part of the procuring entity;

(t) notice of the right provided under section 52 to seek review of an act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(u) any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance, that will be required to obtain the approval; and

(v) any other requirements established by the procuring entity in conformity with this Act and the procurement regulations relating to the preparation and submission of proposals and to other aspects of the procurement proceedings.

Criteria for the evaluation of proposals

39.(1) The procuring entity shall establish criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals. Those criteria shall be notified to suppliers or contractors in the request for proposals and may concern only the following:

(a) the qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;

contractors may be invited to submit proposals as

- (c) the proposal price, subject to any margin of preference applied pursuant to subsection (2) of this section, including any ancillary or related costs;
- (d) the effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of Kiribati and the budget, the extent of participation by local suppliers and contractors, the economic development potential offered by the proposal, including domestic investment or other business activity, the encouragement of employment, the transfer of technology, the development of managerial, scientific and operational skills and the countertrade arrangements offered by suppliers or contractors; and,
- (e) national defense and security considerations.

(2) If authorized by the procurement regulations and subject to approval by the Chief Procurement Officer for purchases of value greater than \$50,000 or the Permanent Secretary of the procuring ministry for purchases of value \$50,000 and less, in evaluating and comparing the proposals, a procuring entity may grant a margin of preference for the benefit of domestic suppliers of services, which shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

Clarification and modification of requests for proposals

40.(1) A supplier or contractor may request a clarification of the request for proposals from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the request for proposals that is received by the procuring entity within a reasonable time prior to the deadline for the submission of proposals. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its proposal and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the request for proposals.

(2) At any time prior to the deadline for submission of proposals, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the request for proposals by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the request for proposals and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors participating in the procurement proceedings, so as to enable

those suppliers or contractors to take the minutes into account in preparing their proposals.

Choice of selection procedure

41.(1) The procuring entity, in ascertaining the successful proposal, shall use the procedure provided for in sections 42 (2)(a), 42(2) (b), 43 or 44 that has been notified to suppliers or contractors in the request for proposals.

(2) The procuring entity shall include in the record required under section 11 a statement of the grounds and circumstances on which it relied to justify the use of a selection procedure pursuant to subsection (1) of this section.

(3) Nothing in this chapter shall prevent the procuring entity from resorting to an impartial panel of external experts in the selection procedure.

Selection procedure without negotiation

42.(1) Where the procuring entity, in accordance with section 41 (1), uses the procedure provided for in this section, it shall establish a threshold with respect to quality and technical aspects of the proposals in accordance with the criteria other than price as set out in the request for proposals and rate each proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold.

(2) The successful proposal shall then be:

(a) the proposal with the lowest price; or

(b) the proposal with the best combined evaluation in terms of the criteria other than price referred to in subsections (1) of this section and the price.

Selection procedure with simultaneous negotiations

43.(1) Where the procuring entity, in accordance with section 41 (1), uses the procedure provided for in this section, it shall engage in negotiations with suppliers or contractors that have submitted acceptable proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all such suppliers or contractors.

(2) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

pursuant to sections 43 or 44 shall be confidential and, subject to section 11, one party to the negotiations shall not reveal to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

PART V

PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT

Two-stage tendering

46.(1) The provisions of Part III of this Act shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this section.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods, construction or services as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to sections 12, 15 or 34 (3) concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction or services to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Act. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in section 34(4)(b).

Restricted tendering

47.(1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in section 20(a), it shall solicit tenders from all suppliers and contractors from whom the goods, construction or services to be procured are available.

(b) When the procuring entity engages in restricted tendering on the grounds referred to in section 20(b), it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be posted on the local community board in a conspicuous location and published in the local press.

(3) The provisions of Part III of this Act, except section 24, shall apply to restricted tendering proceedings, except to the extent that those provisions are derogated from in this section.

Request for proposals

48.(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

- (a) the relative managerial and technical competence of the supplier or contractor;
- (b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and
- (c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

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

- (b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;
- (c) the criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal; and
- (d) the desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in subsection (3) of this section, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) ~~The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.~~

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

- (a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;
- (b) subject to section 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party; and
- (c) the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

- (a) only the criteria referred to in subsection (3) of this section as set forth in the request for proposals shall be considered;
- (b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price; and,
- (c) the price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

Competitive negotiation

49.(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in section 11(2) and (3), one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity, through the CPRB or MPRC whichever one is applicable, shall select the successful offer on the basis of such best and final offers.

Request for quotations

50.(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

Single-source procurement

51. In the circumstances set forth in section 22 the procuring entity may procure the goods, construction or services by soliciting a proposal or price quotation from a single supplier or contractor.

PART VI REVIEW

Right to review

52.(1) Subject to subsections (2) of this section, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Act may seek review in accordance with sections 53 to 56.

(2) The following shall not be subject to the review provided for in subsections (1) of this section:

- (a) the selection of a method of procurement pursuant to sections 18 to 22;
- (b) the choice of a selection procedure pursuant to section 41(1);
- (c) the limitation of procurement proceedings in accordance with section 8 on the basis of nationality;
- (d) a decision by the procuring entity under section 12 to reject all tenders, proposals, offers or quotations;
- (e) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to section 48 (2); and
- (f) an omission referred to in section 27(t) or section 38(s).

Review by the Minister

53. (1) Unless the procurement contract has already entered into force, a complaint shall in the first instance, be submitted in writing to the Minister for purchases of value greater than \$50,000 or the Chief Procurement Officer of the procuring ministry for purchases of value \$50,000 and less.
- (2) The Minister for purchases of value greater than \$50,000 or the Chief Procurement Officer of the procuring ministry for purchases of value \$50,000 and less shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.
- (3) The Minister for purchases of value greater than \$50,000 or the Chief Procurement Officer of the procuring ministry for purchases of value \$50,000 and less need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.
- (4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the Minister for purchases of value greater than \$50,000 or the Chief Procurement Officer of the procuring ministry for purchases of value \$50,000 and less shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:
- (a) state the reasons for the decision; and
 - (b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.
- (5) If the Minister for purchases of value greater than \$50,000 or the Chief Procurement Officer of the procuring ministry for purchases of value \$50,000 and less does not issue a decision by the time specified in subsection (4) of this section, the supplier or contractor submitting the complaint is entitled immediately thereafter to institute proceedings under section 56. Upon the institution of such proceedings, the competence of Head of the Procuring Entity to entertain the complaint ceases.
- (6) The decision of the Minister shall be final unless proceedings are instituted under section 56. The decision of the Chief Procurement Officer for purchases of value between \$50,000 and less should be referred to the Minister should there be complaints associated with such procurement.

Certain rules applicable to review proceedings

54.(1) Promptly after the submission of a complaint under section 53, the Chief Procurement Officer, through the secretariat, shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the Minister shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to Act, would impede Act enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

Suspension of procurement proceedings

55.(1) The timely submission of a complaint under section 53 suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under section 53 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in subsection (1) of this section.

(3) The Minister may extend the suspension provided for in subsection (1) of this section in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this section shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed.

The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

- (5) Any decision by the procuring entity under this section and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

Judicial review

56. The Civil Court of Appeals has jurisdiction over actions pursuant to section 52 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit under section 53.

PART VII

GOVERNMENT OWNED COMPANIES AND STATUTORY CORPORATIONS

Definition

57. In this part-

- (a) "capital equipment" means assets of a Government owned company or a statutory corporation with a life span extending over 12 months, excluding its trading stocks;
- (b) "Government owned companies" means any company incorporated under the Companies Ordinance (Cap.10A) in which all the shares or the majority of shares in the company are held by or on behalf of the Government;
- (c) "Statutory corporation" means any of the following statutory corporations-
- (i) Broadcasting and Publications Authority
 - (ii) Development Bank of Kiribati
 - (iii) Kiribati Housing Corporation
 - (iv) Kiribati Insurance Corporation
 - (v) Kiribati Ports Authority
 - (vi) Provident Fund Board
 - (vii) Public Utilities Board

Act binding

58. This Act shall bind all Government owned companies and statutory corporations.

Procuring entity

59 (1) The procuring entity for purchases of capital equipment \$50,000 and less shall be the Board of a Government owned company or a statutory corporation and the provisions of this Act relating to the Permanent Secretary of the procuring ministry for purchases of

value \$50,000 and less shall apply mutafis mutandis to the Board of a Government owned company or a statutory corporation.

(2) The procuring entity in respect of a Government owned company and a statutory corporation for purchases of capital equipment greater than \$50,000 shall be the Chief Procurement Officer.

THE PROCUREMENT CODE

EXPLANATORY MEMORANDUM

This Act seeks to establish a new law to govern the way the government procurement system is to operate in such a manner which will promote economy and efficiency in government procurement, open competition and an equitable participation of the private sector, and transparency in the procedures relating to government procurement.

Section 1 relates to applicability of this Act to all government procurement except to procurement involving national defense or national security, procurement restricted by the Plant and Quarantine Ordinance (Cap. 72), and those excluded by the procurement regulations.

Section 6 provides the qualification criteria for suppliers or contractors interested to take part in the procurement proceedings.

Section 7 explains the procedures to be followed for pre-qualification of potential suppliers or contractors.

Section 8 provides that there should be no discrimination on the basis of nationality otherwise it should be clearly highlighted to suppliers or contractors the contrary.

Section 11 relates to safe keeping of records of the procurement proceedings and discusses what information should not be disclosed.

Section 12 allows the procuring entity to reject all tenders, proposals, offers or quotation before acceptance or selection of the successful bidder.

Section 15 gives the CPO and the PS of the procuring ministry the right to reject a tender, proposal, offer or quotation in the event that the supplier or contractor is involved either directly or indirectly in giving of gift so as to gain favour from the procuring entity.

Sections 20, 21 & 22 explain the conditions for use of the restricted tendering, request for quotation and single source procurement.

Section 23 exempts domestic suppliers or contractors and low value of goods, construction or service from the tender or pre-qualification proceedings.

Sections 24, 25, 26 and 27 outlines the procedures for soliciting and inviting tenders and applications to pre-qualify.

Section 28 explains how suppliers could request for solicitation documents from the procuring entity and the response expected of the procuring entity to provide the clarification to suppliers and the necessary action on a timely fashion.

Sections 29, 30, 31 and 32 explains how tenders should be dealt with, that is, deadline for submission, extension of deadline and tender securities.

Sections 33 and 34 explain the procedures for examination, evaluation and comparison of tenders.

Section 35 prohibits negotiations with respect to a tender to take place between the procuring entity and the supplier or contractor before the deadline for submission of tenders.

Sections 37 to 45 explain the procedures to be followed for the procurement of services from invitation of proposals to selection of successful supplier or contractor.

Sections 46 to 51 explain the various method of procurement. Sections 52 to 56 explain the procedures to be followed for complaint and review.

Titabu Tabane
Attorney General
15 April 2002