NITIJELA OF THE REPUBLIC OF THE MARSHALL ISLANDS
44TH CONSTITUTION REGULAR SESSION, 2023

Republic of the Marshall Islands
Jepilpilin Ke Ejukaan

PROCUREMENT CODE ACT, 2023

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PROCUREMENT CODE ACT, 2023

AN ACT to provide a legal framework for public procurement of Goods, Services and Works; to repeal the Procurement Code of 1988; and to provide for matters related thereto.

BE IT ENACTED BY THE NITIJELA OF THE REPUBLIC OF THE MARSHALL ISLANDS

§101. Short title.

This Act may be cited as the Procurement Code Act, 2023.

§102. Interpretation.

(a) "Accountability" means public officers are held responsible for carrying out a defined set of duties or tasks, and for conforming with rules and standards applicable to their posts;

(b) "Act or Chapter" means the Public Procurement Act, 2023;

(c) "Bidder" or "Offeror" means a person, commercial company or other organization, which offers to provide goods, works, or services in response to a request from a public organization;

(d) "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity;

(e) "Capacity" refers to the ability to meet obligations and objectives based on existing administrative, financial, human and infrastructure resources;

(f) "Chief Procurement Officer" means the person holding the position created in Section 107 of the Act;

(g) "Collusion" involves a horizontal relationship between bidders in a public procurement, who conspire to remove the element of competition from the process by raising or fixing the prices and reducing output in order to increase profits;

(h) "Complaint" means for the purpose this Act, a written statement by an aggrieved Bidder concerning any unresolved disagreement or controversy arising out of the solicitation or award of a Government contract filed in accordance with Section 130 of the Act;

(i) "Confidential information" means any information which is available to an employee only because of the employee's status as an employee of this Government and is not a matter of public knowledge or available to the public on request;

(j) "Construction" has the same meaning as "Works";

(k) "Consulting services" means services of an intellectual or advisory nature provided by a consultant;

(l) "Contract" means a written agreement between parties mutually agreed and legally enforceable to deliver goods, works or services. It includes all types of Government written agreements, regardless of what they may be called, for the procurement of goods, works, and services;

(m) "Contractor" means any legal person who has signed contract for goods, works, or services with a Procuring Entity;

(n) "Corruption" refers to the abuse of public or private office for personal gain;

(o) "Data" means recorded information, regardless of form or characteristic;

(p) "Debarment" means disqualification of a Person from participating in public procurements for a specified period of time based upon legal finding pursuant to sections 123 and 131 of this Act;

(q) "Designee" means a duly authorized representative of a person holding a superior position;

(q) "Efficiency" refers to achieving maximum output from a given level of resources used to carry out an activity;

(r) "Public Employee" or means an individual drawing a salary from a governmental body, whether appointed or not, and any non-compensated individual performing personal services for any governmental body;

(s) "Equitable" means reasonable, fair and impartial;

(t) "Fair" means free from self-interest, deception, injustice or favoritism;

(u) "Framework Agreement" means an agreement with one or more firms that establishes the terms and conditions that will govern any contract awarded during the term of the Framework Agreement;

(v) "Government" means the executive, legislative and judicial branch of the Government of the Republic of the Marshall Islands and all its political subdivisions, including Local Government Councils;

(w)"Governmental Body" means any department, commission, council, board, bureau, committee, institution, legislative body, agency, statutory corporation, or other establishment or official of the Government, except that it does not include private corporations in which the Government has an interest;

(x) "Grant" means the furnishing by the Government of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract;

(y) "Gratuity" means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received;

(z) "Immediate Family" means a spouse, children, parents, brothers and sisters, and such other relatives as may be designated by the Government Ethics Board;

(aa) "Invitation for Bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids;

(bb) "Memorandum of Agreement" has the same meaning as "Contract"

(cc) "Official Responsibility" means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with

others, either personally or through subordinates, to approve, disapprove, or otherwise direct Government action;

(dd) "Person" means any business, individual, union, committee, club, other organization, or group of individuals;

(ee) "Procurement Cycle" refers to cycle describe in Section 115;

(ff) "Procurement' means the acquisition of Goods, Works, or Services;

(gg) "Procuring Entity" means the ministry or government agency responsible for funding the procurement through the Appropriation Act;

(ii) "Public Funds" means any money received by a public entity from appropriations, taxes, fees, or other returns on investments except that it does not include funds exceeded by private corporations in which the Government has an interest;

(jj) "Public Integrity" refers to the consistent alignment of, and adherence to, shared ethical values, principles and norms for upholding and prioritizing the public interest over private interests in the public sector;

(kk) "Public officer" has the meaning in the Ethics in Government Act, 1993;

(ll) "Public Procurement System" consists of the following elements that are commonly regarded as essential: 1) an adequate legislative framework, supported by regulations to address procedural issues not normally the subject of primary legislation; 2) an adequate institutional and administrative infrastructure (at central, local and regional level); 3) an effective review and accountability regime; 4) an effective sanctions regime; and 5) adequate human, financial and technological resources to support all elements of the system;

(mm) "Request for Proposals" means document, with attachments, that announces a project, describes it, and solicits bids from qualified suppliers to complete it;

(nn) "Responsive Bidder" means a person who has submitted a bid which conforms in all material respect to the Invitation for Bids;

(oo) "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements;

(pp) "Shortlist" means a limited number of pre-qualified or otherwise identified suppliers who will be invited to bid in the procurement of Goods, Works or Services;

(qq) "Specification" is a concise statement of a set of requirements to be satisfied by a product, material or process that indicates whenever appropriate the procedures to determine whether the requirements are satisfied;

(rr) "Supplies" means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land;

(ss) "Suspension" means a temporary status ineligibility to participate in public procurement activities pursuant to Sections 123 and 131 of this Act;

(tt) "Transparency" refers to an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale, data and information related to policies, and the terms of agencies' accountability, are provided to the public in a comprehensible, accessible, and timely manner;

(uu) "Value for money" means the award decision is based not only on minimum price (economy) but on the maximum efficiency and effectiveness;

(vv) "Works" means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real estate property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real estate property;

§103. Purpose and Policies.

(1) This Code shall be construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this Act shall be:

(a) to simplify, clarify, and modernize the law governing procurement by the Government;

(b) to permit the continued development of procurement policies and practices;

(c) to harmonise and conform with international procurement standards and best practices;

(d) to provide for increased public confidence in the procedures followed in public procurement;

(e) to ensure the fair and equitable treatment of all persons who deal with the procurement system of the Government;

(f) to provide increased economy in Government procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Government;

(g) foster effective broad-based competition within the free enterprise system; and

(8) to safeguard for the maintenance of a procurement system of quality and integrity.

§104. Scope and Application of the Act.

(1) This Act shall apply to every expenditure of public funds irrespective of their source by the Government, acting through a governmental body as defined herein, under any contract. This Act shall cover all entities that receive funding through the annual Appropriation Act, including grants to local government councils, state-owned-enterprises, community organizations, and non-profit agencies.

(2) Unless otherwise endorsed by Cabinet or other Act, donor-funded assistance shall work through the Government's procurement system. Exceptions to where the Government's procurement system does not meet the control and reporting requirements of funds provided by bilateral or other agreements from foreign governments, international financing institutions, or other international organizations (collectively, donor). Where there is a conflict between this Act and the donor-funded regulations, the mandatory rules and guidelines of the donor financing agreement shall apply pursuant to an obligation entered into by the Government under any treaty or other form of agreement, but in all other respects, procurement shall be governed by the provisions of this Act.

PART II – PROCUREMENT ORGANIZATION

§105. Roles and Responsibilities of the Minister of Finance on Procurement Policy.

(1) The Minister of Finance is responsible for policy guidance in public procurement.

(2) The Minister gives directions and instructions as appear to the Minister to be necessary and expedient for the proper carrying out of the provisions of this Act.

(3) The Minister proposes and presents to the Cabinet changes in policies and laws on procurement.

§106. Roles and Responsibilities of the Secretary of Finance.

(1) The Secretary of Finance shall be the fiduciary agent of the Republic's financial resources, and other responsibilities, including public procurement, as conferred under this Act and other laws.

(2) In addition to the duties assigned under Article VIII, Section 4 of the Constitution, and the duties specified under this Act, the Secretary of Finance shall:

(a) be in charge of the overall supervision and administration of the public procurement;

(b) advise the Minister on all procurement matters and on matters related to implementation of this Act;

(c) issue regulations, other directives and instructions to heads of agencies, and Procurement Officers of all covered agencies.

§107. Roles and Responsibilities of Chief Procurement Officer

(1) This Act establishes the position of the Chief Procurement Officer under the Secretary of Finance. The Public Service Commission, in consultation with the Secretary of Finance, shall appoint the Chief Procurement Officer. The Chief Procurement Officer shall have the experience and qualifications necessary to perform the duties of his office as set forth herein.

(2) The Chief Procurement Officer shall:

(a) advise the Secretary of Finance on all matters relating to public procurement, regardless of source of funds;

(b) develop government-wide policies and procedures on procurement to standardize procurement operations under endorsement by the Secretary of Finance;

(c) review donor regulations and advise Secretary of Finance of potential conflicts between donor-specific regulations and procedures with this Act and other law;

(d) receive, review, and refer complaints to solicitation and contract award decisions in accordance with Section 130 of this Act, and the regulation;

(e) collect information concerning the type, cost, quality, and quantity of commonly used supplies, services, or construction being procured or used by procuring entities; and

(f) perform any other duties established by Regulation.

(3) Except as otherwise specifically provided in this Act, the Chief Procurement Officer shall, in accordance with regulations:

(a) supervise the procurement of all Goods, Works and Services needed across Government;

(b) exercise general supervision and control over all inventories of supplies belonging to the Government; and

(c) establish and maintain programs for the inspection, testing, and acceptance of Goods and Works.

§108. Roles and Responsibilities of Procuring Entities.

(1) Procuring Entities are those agencies receiving funding through the annual Appropriations Act to acquire Goods, Works, or Services, necessary to implement approved programs or deliver services.

(2) Procuring Entities are responsible for:

(a) preparing procurement plans and cost estimates for inclusion in their annual budget requests;

(b) preparing procurement plans, technical requirements such as drawings, specifications, terms of reference for the Goods, Works or Services, preparing bidding documents,

publishing bid announcements, conducting evaluations, issuing notifications of awards, negotiating, signing contracts, and administering contracts;

(c) All specifications shall seek to promote overall economy for the purpose intended and encourage competition in satisfying the Government 's needs, and shall not be unduly restrictive;

(d) establishing a Bid Review Panel, to be nominated by the Secretary of the Entity, as and when required. The responsibilities of the Panel shall be to receive and evaluate bid offers, and to make award recommendations, in accordance with relevant regulation;

(e) assigning qualified individuals, either government staff or consultants, to act as project managers, subject to Section 1003 of the Government Liability Act of 1980;

(f) assuring that procurements comply with the relevant regulations; and

(g) preparing status reports as required by relevant regulation.

§109. RESERVED

§110. Establishment, Composition and Roles and Responsibilities of the Bid Committee.

(1) This Act establishes the RMI Bid Committee as an administrative oversight body over public procurement as stipulated by Regulation.

(2) The membership of the Committee shall be composed of:

(a) The Chief Secretary (or designee), Chair, voting member;

(b) The Secretary of Finance (or designee), Vice-Chair, voting member;

(c) Chief Procurement Officer, Secretariat, non-voting member;

(d) The Attorney General (or designee), non-voting member;

(e) Public Works Management Unit (PMU), non-voting member, sitting as and when needed; and

(f) Head of the-Responsible Ministry or agency which the procurement relates, voting member.

(3) The roles and responsibilities are to assure that:

(a) award recommendations are based upon a fair and impartial evaluation of bidders' responses to the bid;

(b) the evaluations of bidders' responses conform to the award criteria specified in the tendering documents; and

(c) any conflicts of interest were disclosed prior to the evaluation.

(4) Details shall be prescribed in Regulation.

§111 - §112. RESERVED.

PART III – PROCUREMENT PRINCIPLES AND POLICIES

§113. Principles of Procurement.

All Public Officers and staff and agents of bidders, potential bidders, suppliers, contractors, service providers and consultants shall comply with these procurement principles during procurement proceedings, implementation, and management of contracts awarded, to:

(a) foster effective broad-based competition within the free enterprise system to provide potential suppliers adequate and timely access to information at each stage of the public procurement cycle;

(b) promote fair and equitable treatment for potential suppliers by providing an adequate and timely access to information in each phase of the public procurement cycle;

(c) allow accessibility for all stakeholders, including potential domestic and foreign suppliers, civil society and the general public, to public procurement information notably related to the public procurement system to include procurement plans, calls for tender, award announcements;

(d) ensure accountability by providing visibility of the flow of public funds, from the beginning of the budgeting process throughout the public procurement cycle;

(e) provide for effectiveness in Government procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Government or 'value for money';

(f) adopt to the extent practicable electronic and digital technologies to strengthen oversight of the procurement cycle and to streamline procurement activities;

(g) provide safeguards to preserve integrity of data, to include confidentiality of proprietary information, and disclosure of interests;

(h) recognize the sovereignty of the Government of the Republic of the Marshall Islands (pursuant to Article V, Section 1, paragraph 4 of the Constitution) in terms of international agreements with security and development partners; and

(i) contribute to the socio-economic development of the people.

§114. RESERVED

PART IV—PROCUREMENT CYCLE

§115. Procurement Cycle.

Procurement starts with the needs assessment and ends with contract management and payment. Procurement is placed within the strategic planning, budgeting, financial management, and public service delivery. Integrating procurement into all phases of public financial management and service delivery improves the efficiency and effectiveness of government expenditure and the sustainability of procured assets over time.

§116. Timing and methods.

Pursuant to Section 115, timing and methods shall be set forth in Regulation.

§117. RESERVED.

PART V—SOURCE SELECTION AND CONTRACT INFORMATION

DIVISION 1 – COMPETITIVE BIDDING AND EXCEPTIONS

§118. Methods of Source Selection.

Unless otherwise provided for in Section 119, all Government contracts shall be awarded by competitive sealed bidding.

§119. Defined Exceptions.

Where the Chief Procurement Officer determines that a Government contract is exempted to a competitive sealed bid, the following exception shall apply:

(a) Limited Bid. Where the Goods, Works or Services are only available from a limited number of suppliers or where open bidding would be impractical, the Procuring Entity, with the approval of the Chief Procurement Officer, may issue tendering documents to a shortlist of firms or individuals.

(b) Sole Source. A contract may be awarded for a supply, service, or construction item without competition when, under regulations, the Chief Procurement Officer, the head of a Procurement Entity, or a designee of either officer above the head of a Procurement Entity, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service, or construction item.

(c) Small Purchases. Any procurement not exceeding $50,000, or a lesser amount established by regulation, may be made in accordance with small purchase procedures promulgated in accordance with the Regulation; provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this Section.

(d) Emergency. Notwithstanding any other provision of this Act, the Chief Procurement Officer, the head of a Procuring Entity, or a designee of either officer may make or authorize others to make emergency procurement when there exists a threat to public health, welfare, or safety under emergency conditions as defined in the regulations; provided, that such emergency procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergence and for the selection of the particular contractor shall be included in the contract file.

§120. Competitive Bidding Process to Promulgate in the Regulations and Procurement Manual.

The competitive sealed bidding procedures shall be set forth in the Regulations and the Procurement Manual.

DIVISION 2 – SOURCE SELECTION: QUALIFICATIONS, RESPONSIBILITY AND PREFERENCES.

§121. Solicitation Documents.

(1) The Procuring Entity shall prepare solicitation documents to request bids, quotes or proposals from prospective suppliers to provide Goods, Works or Services. The solicitation documents, regardless of type, shall provide sufficient detail in description of the requirement and other terms and conditions to allow prospective suppliers to prepare a realistic and complete response.

(a) Invitation to Bid, where two or more sources are considered able of supplying the requirement, the requirement is adequately defined in all respects to permit the evaluation of bid against clearly stated criteria; and bids can be submitted on a common pricing basis;

(b) Request for Quote, where the requirement is for Goods and the determination is primarily based upon price:

(c) Request for Proposal, where the Procuring Entity is seeking to obtain professional services to provide advice or consulting or non-consulting services.

(d) Other, as allowed by relevant regulation.

(2) The details shall be prescribed in Regulation.

§121A. Bonds.

(1) Bid security shall be required for all competitive sealed bidding for construction contracts or other contracts as may be required under this Chapter, when the price is estimated by the Procuring Entity to exceed $250,000.

(2) The Cabinet may exempt the required bid security by waiving in part or in its entirety the amount of security in such cases where waiver of such requirement will enable a local qualified firm to undertake such contract won through bidding.

(3) The Secretary of Finance shall promulgate by Regulation the types of bonds, and exemption as per requirements under this Section.

§122. Qualifications and responsibility of the bidders.

(1) The Procuring Entity shall describe the minimum experience, training, and/or certification requirements or qualifications that must be met by all bidders, contractors, suppliers, or employees in order for the bidder to be considered responsible.

(2) Bidders shall be current with their tax payments or have existing agreement tax authorities to be current with their tax payments.

(3) Bidder shall be a registered business and have a physical presence in the Marshall Islands except where donor funded procurement regulations otherwise prescribe.

(4) Bidder shall not be debarred, suspended or sanctioned under Section 131 of this Chapter.

(5) The Secretary of Finance shall promulgate procedures by Regulation as per requirements under this Section.

§123. Disqualifications: Debarment, Suspension, and Sanctions of bidders.

(1) The Chief Procurement Officer, on the advice of the Attorney General, may disqualify a bidder, offeror, or contractor who is determined to be subject to debarment and suspension pursuant to Section 131 of this Chapter.

(2) A bidder or a contractor who is under debarment, suspension or other prohibitions pursuant to this Act or by the United States Government or other donor partner are ineligible to participate in solicitations or contract awards; and

(3) Bidders who are listed for money laundering, human trafficking, terrorist financing, or other international sanctions pursuant to this Act or by the United Nations, the European Union, the United States Government are ineligible to participate in solicitations or contract awards.

§124. Preferences Goods and Services: Marshall Islands Contractors.

All contract bids under Section 118 of this Act, for the procurement of Goods and Services, with a project cost estimated by the Procuring Entity to be $250,000 or less, shall be awarded to the Marshall Islands contractor with the lowest qualified bid; provided, that:

(a) the bid of said Marshall Islands contractor does not exceed 110 percent of the amount of the lowest qualified bid from a non-Marshall Islands contractor for such contract;

(b) Marshallese contractor is capable of executing and completing successfully at a given time;

(c) Marshallese contractor must be a registered business and be physically present in the Marshall Islands and in compliance with the Income Tax Act;

(d) Marshallese contractor is not under sanctions, prohibitions, blacklisted, or violate any laws of the Marshall Islands;

(e) Marshallese contractor is not listed for money laundering, human trafficking, or terrorist financing.

§125. Preference: Construction (Works)- Marshall Islands Contractors and United States Contractors.

(1)All contracts bid under Section 118 of this Act, for the procurement of construction, alteration, or repair of any building or public work with a project cost estimated by the Procuring Entity to be $250,000, or less, shall be awarded to the Marshall Islands contractor with the lowest qualified bid; provided, that:

(a) the bid of said Marshall Islands contractor does not exceed 110 percent of the amount of the lowest qualified bid from a non-Marshall Islands contractor for such contract;

(b) Marshallese contractor is capable of executing and completing successfully at a given time;

(c) Marshallese contractor must be a registered business and be physically present in the Marshall Islands and in compliance with the Income Tax Act;

(d) Marshallese contractor is not under sanctions, prohibitions, blacklisted, or violate any laws of the Marshall Islands;

(e) Marshallese contractor is not listed for money laundering, human trafficking, or terrorist financing.

(2) All contracts bid under Section 118 of this Act, for construction, alteration, or repair of any building or public work with a project cost estimated by the Procuring Entity to be greater than $250,000 shall be awarded to the Marshall Islands Contractor or the United States Contractor with the lowest qualified bid; provided, that:

(a) the bid of such contractor does not exceed 110 percent of the amount of the lowest qualified bid from a non-Marshall Islands or non-United States contractor for such contract;

(b) Marshallese contractor or the United States Contractor is capable of executing and completing successfully at a given time;

(c) Marshallese contractor or the United States Contractor must be a registered business and be physically present in the Marshall Islands, and in compliance with the Income Tax Act;

(c) Marshallese contractor or the United States Contractor is not under sanctions, prohibitions, blacklisted, or violate any laws of the Marshall Islands;

(d) Marshallese contractor or the United States Contractor is not listed for money laundering, human trafficking, or terrorist financing.

(3) The preference provided to United States Contractors under this Section, is made pursuant to the implementation of the agreement

referred to in Section 8 of Nitijela Resolution Number 62 and Section 106(b) of United States Public Law 99-239.

(4) For the purposes of this Section:

(a) "Marshall Islands Contractor" means a natural person who is a citizen of the Marshall Islands or a company or other entity registered and doing business in the Marshall Islands, the assets of which are at least sixty percent (60%) owned and controlled in fact by natural persons who are citizens of the Marshall Islands; and

(b) "United States Contractor" means a natural person who is a citizen of the United States or a company or other entity doing business in the United States, the assets of which are at least sixty percent (60%) owned and controlled in fact by natural persons who are citizens of the United States and/or citizens of the Marshall Islands.

DIVISION 3 – TYPES OF CONTRACTS

§126. Types of Contracts.

(1) Subject to the limitations of this Section, any type of contract may be used which will promote the best interests of the Government. The selection of contract types and arrangements will consider nature, risk, and complexity of the procurement, and other value-for-money considerations. Contracts entered into pursuant to this Act shall define, at minimum: (a) the work to be performed; (b) description of the Goods, Works, and Services to be performed; (c) rights and obligations of the contracting parties; (d) terms of payment; and (e) other relevant terms and conditions.

(2) Framework Agreements. Such a type of contract may be appropriate for the procurement of Goods, Works, or Services under the following circumstances:

(a) frequent reordering is based on the same, or similar requirements, or set of specifications;

(b) where different entities of the Government procure the same Goods, Works, or Services, and aggregating the demand could lead to volume discounts;

(c) planning for Emergency Situations; or

(d) no single firm is considered to have sufficient capacity.

(3) Multi-Term Contracts. Unless otherwise provided by law or agreement, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the Government.

(a) Prior to the utilization of a multi-term contract, the Procuring Entity shall determine in writing (i) that estimated requirements cover the period of the contract and are reasonably firm and continuing; and (ii) that such a contract will serve the best interests of the Government by encouraging effective competition or otherwise promoting economies in Government procurement;

(b) The term of the contract and conditions of renewal or extension, if any, shall be included in the solicitation and reasonable assurance that funds will be available for the first fiscal period at the time of contracting; and

(c) Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled. The contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

(4) The different types of the contracts shall be detailed in the Regulations.

DIVISION 4 – DETERMINATION AND REPORTS

§127. Final Determination.

(1) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets:

(a) the requirements and criteria set forth in the Invitation for Bids pursuant to section 121(1)(a) of this Act; or

(b) the price and the evaluation factors set forth in the Request for Proposals pursuant to Section121(1)(b); or

(c) certain exceptions under Section 119; or

(d) best qualified set forth in request for proposal to provide services contract pursuant to Section 121(1)(c); or

(e) price, criteria, price and qualifications set forth in the regulations.

(2) The determinations made under Subsections (1)(a), or (1)b), or (1)(c), or (1)(d) or (1)(e) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

(3) A bidder, offeror, or a contractor who is aggrieved in connection with the determination made pursuant to subsection (2) of this Section, may complain to the Chief Procurement Officer as set forth under Section 130 of this Act.

§128. Procurement Records.

(1) The Chief Procurement Officer shall maintain a record listing all contracts made under Section 126 of this Act, for a minimum of five (5) years. The record shall contain:

(a) each contractor's name;

(b) the amount and type of each contract; and

(c) a listing of the supplies, services, or construction procured under each contract.

(2) A copy of such record shall be submitted to the Nitijela on an annual basis. The record shall be available for public inspection.

(3) The Chief Procurement Officer shall establish a method of recordkeeping and reporting for procurement-related complaints, their status, and disposition. The Chief Procurement Officer shall submit a report semi-annually to the Minister of Finance, through the Secretary of Finance.

§129. RESERVED.

PART VI – RESOLUTION OF COMPLAINTS, DISPUTES, CONTROVERSIES, REMEDIES, AND ETC

DIVISION 1 – COMPLAINT, DEBAR, SUSPENSION, BREACH OF CONTRACTS.

§130. Authority to resolve complaints to solicitations and awards: Procedures.

(1) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may complain to the Chief Procurement Officer, and submit a copy of the complaint to the head of the Procuring Entity. The complaint shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should have known of the facts giving rise thereto, and shall follow the procedures set forth in the Regulations.

(2) The Chief Procurement Officer shall have the authority to conduct an initial review of the complaint to determine the relevant resolution process. If the procurement concerns a donor-funded project, the Chief Procurement Officer shall refer the complaint to be dealt with under the relevant donor-funded regulation.

(3) The Chief Procurement Officer shall forward the complaint, with any supporting documentation, to the Attorney General. The Attorney General shall review relevant documentation and other facts and circumstances surrounding the complaint. Upon completion of the review, the Attorney General may determine:

(a) The complainant was not injured by the decision and the Government's decision stands;

(b) The complainant was injured by the Government's decision and the procurement action is to be returned for corrective action;

(c) The complainant was injured due to bias, breach of ethics, or criminal action during the evaluation of bids.

(4) If the complaint is not resolved by mutual agreement, the Attorney General shall promptly issue a decision in writing. The decision shall state the reasons for the action taken.

(5) A copy of the decision under Subsection (4) of this Section shall be mailed, emailed or otherwise furnished immediately to the complainant and any other party intervening.

(6) A decision under Subsection (4) of this Section shall be final and conclusive, unless fraudulent, or the complainant who adversely affected by the decision, may commence an action in court in accordance with Section 135 of this Act.

(7) Detailed procedures shall be prescribed in Regulations.

§131. Authority to Debar and Suspend.

(1) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Attorney General, after consultation with the Chief Procurement Officer and the Procuring Entity, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three (3) years. The Attorney-General, after consultation with the Chief Procurement Officer and the Procuring Entity, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three (3) months. The authority to debar or suspend shall be exercised in accordance with regulations promulgated pursuant to this Act.

(2) The causes for debarment or suspension include the following:

(a) conviction for commission of a criminal offense as an incident to obtaining or attempt to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(b) conviction under Marshall Islands statutes for cheating, embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Government contractor;

(c) conviction under Marshall Islands unfair business practices or antitrust statutes arising out of the submission of bids or proposals;

(d) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer or the head of a Procuring Entity to be so serious as to justify debarment action:

(i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

(iii) any other cause the Chief Procurement Officer or the head of a Procuring Entity determines to be so serious and compelling as to affect responsibility as a Government contractor, including debarment by another governmental entity for any cause listed in the Regulations or any disqualification prescribed under 122 of this Chapter; and

(iv) for violation of the ethical standards set forth in Part VII of this Act.

(3) The Attorney General shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken.

(4) A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(5) A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or the debarred or suspended person commences an action in court in accordance with Section 135of this Act.

§132. Authority to resolve contract and breach of contract controversies.

(1) This Section applies to controversies between the Government and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

(2) The Attorney General is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in Subsection (1) of this Section. This authority shall be exercised in accordance with regulations promulgated in accordance with this Act.

(3) If such a controversy is not resolved by mutual agreement, The Attorney-General, after consultation with the Chief Procurement Officer and the Procuring Entity, shall promptly issue a decision in writing. The decision shall state the reasons for the action taken.

(4) A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the contractor.

(5) The decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or the contractor commences an action in court in accordance with Section135of this Chapter.

(6) If the Attorney General does not issue the written decision required under Subsection (3) of this Section within 120 days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

DIVISION 2 – SOLICITATIONS OR AWARDS IN VIOLATIONS OF LAW.

§133. Application of this Division.

The provisions of this Division apply where it is determined administratively, or upon an administrative or judicial review, that a solicitation or award of a contract is in violation of law.

§134. Remedies prior to an award.

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

(a) cancelled; or

(b) revised to comply with the law.

§135. Remedies after an award.

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(a) if the person awarded the contract has not acted fraudulently or in bad faith:

(i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Government; or

(ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

(b) if the person awarded the contract has acted fraudulently or in bad faith:

(i) the contract may be declared null and void; or

(ii) the contract may be ratified and affirmed if such action is in the best interests of the Government, without prejudice to the Government's rights to such damages as may be appropriate.

DIVISION 3 – JURISDICTION OF HIGH COURT: LIMITATIONS ON ACTIONS.

§136. Jurisdiction of the High Court

(1) The High Court shall have jurisdiction over an action between the Government and a bidder, offeror or contract, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with

the Constitution of the Marshall Islands, statutes, regulations, and terms and conditions of the solicitation. The High Court shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.

(2) The High Court shall have jurisdiction over an action between the Government and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the Constitution of the Marshall Islands, statutes, and regulations. The High Court shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for declaratory, injunctive, or other equitable relief.

(3) The High Court shall have jurisdiction over an action between the Government and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether the action is for monetary damages or declaratory, injunctive, or other equitable relief.

(4) In any judicial action under this Section, factual or legal determinations by employees, agents, or other persons appointed by this Act, the Government shall have no finality and shall not be conclusive, notwithstanding any contract provision, regulation, or rule of law to the contrary, except to the extent provided in Section 127 of this Chapter.

§137. Time limitations on actions.

(1) Any action under Section 136(1) of this Chapter, shall be initiated as follows:

(a) within thirty (30) days after the aggrieved person knows or should have known of the facts giving rise to the action; or

(b) within fourteen (14) days after receipt of a final administrative decision pursuant to Section 130(4) of this Chapter.

(2) Any action under Section 136(2) of this Chapter, shall be commenced within six (6) months after receipt of the decision of the Attorney General under Section 131(3) of this Chapter, or the decision of the

Government Ethics Board under Section 149of this Act, whichever is applicable.

(3) The statutory limitations on an action on a contract or for breach of contract shall apply to any action commenced pursuant to Section 136(3) of this Chapter.

PART VII – STANDARDS OF CONDUCT: SANCTIONS AND PENALTIES

§137. Standards of Conduct in Procurement

Pursuant to Section113, Public Officers must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors, and conduct themselves in such a manner as to foster public confidence in the integrity of the Government procurement organization.

§138. Employee Conflict of Interest.

(1)It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

(a) he or she or any member of the employee's immediate family has a financial interest pertaining to the procurement;

(b) a business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or

(c) any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

(2) Where an employee or any member of the employee's immediate family holds a financial interest in a blind trust or a Government-sponsored corporation wherein the Government holds an interest, the employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial interest; provided, that

disclosure of the existence of the blind trust has been made to the Government Ethics Board.

(3) Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the Government Ethics Board for an advisory opinion as to what further participation, if any, the employee may have in the transaction.

(4) Notice of this prohibition shall be provided in accordance with regulations promulgated by the Government Ethics Board.

§139. Employee Disclosure Requirements.

(1) Any employee, who has, or obtains any benefit from, any Government contract with a business in which the employee has a financial interest shall report such benefit to the Government Ethics Board: provided, however, that this Section shall not apply to a contract with a business where the employee's interest in the business has been placed in a disclosed blind trust.

(2) Any employee who knows or should have known of such benefit, and fails to report such benefit to the Government Ethics Board, is in breach of the ethical standards of this Section.

(3) Notice of this requirement shall be provided in accordance with regulations promulgated by the Government Ethics Board.

§140. Gratuities and Kickbacks.

Any person who offer, give, or agree to give any employee or former employee, or any employee or former employee who solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to

any solicitation or proposal thereof, shall be a breach of ethical standards of procurement.

§141. Contingent Fees Prohibited.

(1) It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a Government contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bonafide established commercial selling agencies for the purpose of securing business.

(2) Any person who violates subsection (1) of this Section shall be guilty of an offense punishable under this Act, unless such person, before being awarded a Government contract, shall represent, in writing, that such person has not retained anyone in violation of Subsection (1) of this Section. Failure to do so constitutes a breach of ethical standards.

(3) The representation prescribed in Subsection (2) of this Section shall be conspicuously set forth in every contract and solicitation therefor.

§142. Restrictions on Employment of Present and Former Employees.

(1) Except as may be permitted by regulations or rulings of the Government Ethics Government, it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or became, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed. Notice of this provision shall be provided in accordance with regulations promulgated by the Government Ethics Board.

(2) It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the Government, in connection with any: (a) judicial or other proceeding, application, request for a ruling, or other determination; (b) contract; (c) claim: or (d) charge or controversy, in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the Government is a party or has a direct and substantial interest.

(3) It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or as an agent for anyone other than the Government, in connection with any:

(a) judicial or other proceeding, application, request for a ruling, or other determination;

(b) contract;

(c) claim; or

(d) charge or controversy, in matters which were within the former employee's official responsibility, where the Government is a party or has a direct or substantial interest.

(4) It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the Government, in connection with any:

(a) judicial or other proceeding, application, request for a ruling, or other determination;

(b) contract;

(c) claim; or

(d) charge or controversy, in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the Government is a party or has a direct and substantial interest.

(5) It shall be a breach of ethical standards for any former employee, unless the former employee's last annual salary did not exceed $30,000, to engage in selling or attempting to sell supplies, services, or construction to the Government for one year following the date employment ceased. The term "sell" as used herein means signing a bid, proposal, or contract; negotiating a contract; contacting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling disputes concerning performance of a contract; or

any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person; provided, however, that this Section is not intended to preclude a former employee from accepting employment with private industry solely because the former employee's employer is a contractor with this Government, nor shall a former employee be precluded from serving as a consultant to the Government.

(6) Any person who violates subsections (1), (2), (3), (4) or (5) of this Section shall be guilty of an offense punishable under the Ethics and Governments Act.

§143. Use of Confidential Information.

(1) It shall be a breach of ethical standards for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.

(2) Any person who violates subsections (1) of this Section shall be guilty of an offense punishable under the Ethics and Governments Act.

§144. Civil and Administrative Remedies Against Employees Who Breach Ethical Standards.

(1) Civil and administrative remedies against employees which are in existence on the effective date of this Act shall not be impaired.

(2) In addition to existing remedies for breach of the ethical standards of this Part or regulations promulgated hereunder, the Government Ethics Board may impose any one or more of the following:

(a) oral or written warnings or reprimands;

(b) suspension with or without pay for specific periods of time; and

(c) termination of employment.

(3) The value of anything received by an employee in breach of the ethical standards of this Part or regulations promulgated hereunder shall be recoverable by the Government.

(4) All procedures under this Section shall be in accordance with due process requirements and existing law. In addition, notice and an opportunity for a hearing shall be provided prior to imposition of any suspension or termination of employment.

§145 Civil and Administrative Remedies Against Non-Employees Who Breached Ethical Standards.

(1) Civil and administrative remedies against non-employees which are in existence on the effective date of this Act shall not be impaired.

(2) In addition to existing remedies for breach of the ethical standards of this Part or regulations promulgated hereunder, the Government Ethics Board may impose civil and administrative remedies against non-employees, any one or more of the following:

(a) written warnings or reprimands;

(b) termination of transactions; and

(c) debarment or suspension from being a contractor or subcontractor under Government contracts.

(3) The value of anything transferred in breach of the ethical standard of this Article or regulations promulgated hereunder by a non-employee shall be recoverable by the Government.

(4) Debarment or suspension may be imposed by the Government Ethics Board in accordance with the procedures set forth in Section 131 of this Act, for breach of the ethical standards of this Part.

(5) All procedures under this Section shall be in accordance with due process requirements, including, but not limited to, a right to notice and an opportunity for a hearing prior to imposition of any termination, debarment, or suspension from being a contractor or subcontractor under a Government contract.

§146 Recovery of Value Transferred or Received in Breach of Ethical Standards.

(1) The value of anything transferred or received in breach of the ethical standards of this Part or regulations promulgated hereunder, by an employee or a non-employee may be recovered from both the employee and non-employee.

(2) Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the Government and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

§147. Criminal Sanctions.

To the extent that violations of the ethical standards set forth in this Part constitute violations of the Criminal Code, they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in this Part.

§148. Administrative Remedies

Upon referral, in addition to existing remedies for breach of the ethical standards set forth in this Chapter or regulations promulgated hereunder, the Government Ethics Board may impose any one or more of the following pursuant to Ethics in Government Act (1993):

(a) oral or written warnings or reprimands;

(b) suspension with or without pay for specific periods of time;

(c) termination of employment; and

(d) civil penalties in any amount, not to exceed $5,000 for each breach or violation. which shall be enforceable in a court of law.

PART VIII—MISCELLANEOUS

§149. Records and Public Disclosure.

(1) Written determinations required by this Act shall be retained in the appropriate official contract file of the Chief Procurement Officer or the Procuring Entity.

(2) The procuring entity shall maintain a record of all procurement actions in the manner set forth in the Regulations.

(3) The Chief Procurement Officer shall publicly disclose procurement and contract actions.

(4) The Chief Procurement Officer shall coordinate with the Ministry of Finance, the Economic Planning, Policy and Statistics Office, and the Auditor-General in the preparation of statistical data concerning the procurement, usage, and disposition of all supplies, services, and construction, and shall be provided such trained personnel by the Public Service Commission as may be necessary to carry out this function. All Using Agencies shall furnish such reports as the Chief Procurement Officer may require concerning usage, needs, and stocks on hand, and the Chief Procurement Officer shall, with the approval of the Secretary of Finance and the Attorney-General, have authority to prescribe forms to be used by the Using Agencies in requisitioning, ordering, and reporting of supplies, services, and construction.

(5) The Chief Procurement Officer shall report Anti-competitive Practices, when for any reason collusion or other anti-competitive practices are suspected among any bidders or offerors. A notice of relevant facts shall be transmitted to the Attorney-General.

(6) Retention of Procurement Records. All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Attorney-General. All retained documents shall be made available to the Attorney-General or a designee upon request and proper receipt therefore.

§151. Promulgation of Regulations.

(1) The Secretary shall issue Regulations to implement the provisions of this Act.

(2) The Regulations shall provide for:

(a) annual procurement planning linked to budget preparation and approval;

(b) defining activities that are, or are not, procurement for the purpose of this Act;

(c) methods and procedures for the procurement of goods, works, consultants and non-consulting services to be

applied by procuring entities during procurement proceedings;

(d) thresholds to determine which method of procurement shall be used by procuring entities;

(e) procedures for the exceptional waiver of competitive bidding;

(f) procedures for suspension and debarment, among other disqualifications; and

(g) other matters as the Secretary may decide.

(3) The Minister may, on the advice of the Secretary, amend methods of procurement and thresholds from time to time.

§152. RESERVED.

§153. Repeals, Savings and Transition.

(1) The Procurement Code (Act) of 1988 is hereby repealed and replaced by this Chapter.

(2) The Repeal of the Procurement Code (Act) of 1988 and coming into effect of this Chapter does not affect the rights and duties that matured, penalties and proceedings that were begun and contracts that were procured and awarded before the effective date of this Chapter.

§154. Effective date.

This Act shall take effect on October 1, 2023, after the date of certification in accordance with Article IV of the Constitution and the Rules and Procedures of the Nitijela.

CERTIFICATE

I hereby certify:

1. That Nitijela Bill No: **72ND2** was passed by the Nitijela of the Republic of the Marshall Islands on the 24th day of March 2023; and

2. That I am satisfied that Nitijela Bill No: **72ND2** was passed in accordance with the relevant provisions of the Constitution of the Republic of the Marshall Islands and the Rules of Procedures of the Nitijela.

I hereby place my signature before the Clerk this **10th** day of **April** 2023.

Kenneth A. Kedi
Speaker
Nitijela of the Marshall Islands

Attest:

Morean S. Watak
Clerk
Nitijela of the Marshall Islands