PD-ABN-676 92839

Stimulating Egyptian Economic Progress Through Procurement Reform

Final Report

Submitted to:

The US-Egypt Presidents' Council

Pursuant to:

Contract # 263-0225-C-00-6082-00

US Agency for International Development
106 Kasr El Aini Street • Garden City, Cairo • Egypt

Submitted by:

International Business and Technical Consultants, Inc.
13 Ibrahim Naguib Street • 4th Floor, Suite 14 • Garden City, Cairo • Egypt
Telephone: 202-354-4544 • Facsimile: 202-354-9833 • Email: ibtci@ritsec1.com.eg

Head Office
8614 Westwood Center Drive • Suite 400 • Vienna, VA 22182
Telephone: (703) 749-0100 • Facsimile: (703) 749-0110 • Email: IBTCI@aol.com

November 6, 1996

BEST AVAILABLE COPY

STIMULATING EGYPTIAN ECONOMIC PROGRESS THROUGH PROCUREMENT REFORM

BEST AVAILABLE COPY

2

TABLE OF CONTENTS

EXECUTIVE SUMMARY 1

I. INTRODUCTION 3

II. BACKGROUND AND DISCUSSION OF PROBLEMS 5

A. General 5
B. Specific Business Issues 6
C. Opportunity Costs for Egypt 7

III. ANALYSIS AND DISCUSSION OF LAW NINE 9

IV. EFFECTIVE PROCUREMENT LAW AND PRACTICE -- A COMPARATIVE STUDY 13

A. General 13
B. Multilateral Approaches 13

1. GATT's Government Procurement Agreement 13
2. The World Trade Organization's Proposed Interim Agreement 17
3. United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods and Construction 18
4. World Bank 21

C. Other Countries' Approaches 23

1. United States Defense Security Assistance Agency's Guidelines for Foreign Military Financing of Direct Commercial Contracts 23
2. Poland 24
3. Brazil 26

V. POLICY OBJECTIVES BASED ON SOUND PROCUREMENT PRINCIPLES FOR EGYPT 28

VI. RECOMMENDATIONS FOR IMPROVEMENT 31

3

APPENDIX A
Methodology

APPENDIX B
Egypt's Law Nine

APPENDIX C
1996 US Commercial Guide for Egypt

APPENDIX D
GATT Agreement on Government Procurement

APPENDIX E
Austrian Annex to GPA

APPENDIX F
US Government Papers on Interim Agreement

APPENDIX G
UNCITRAL Model Law on Procurement of Goods and Construction

APPENDIX H
World Bank Procurement Guidelines

APPENDIX I
US Defense Security Assistance Agency's Guidelines for Foreign Financing of Direct Commercial Contracts

APPENDIX J
Poland's Law on Public Procurement

APPENDIX K
Brazil's Government Procurement Law

EXECUTIVE SUMMARY

Egypt's hosting of the 1996 Middle East/North African Economic Summit in Cairo provides a tremendous opportunity for President Mubarak to raise Egypt's visibility and prestige within the international trade and investment communities, many of whose leaders will be in attendance or otherwise following the Summit's progress in the media. Despite political uncertainties in the region, Egypt's economic reform record establishes a solid basis for further improvement. Nonetheless, Egypt's efforts will be successful only if it can present itself as a country dedicated to comprehensive change designed to make it competitive among emerging market countries.

Preparation for the Summit follows significant and successful reforms already implemented by the Government of Egypt. A truly outstanding Summit, however, requires additional progress in areas of the economy which most significantly impact on the international business community. One area where the need for change is clear, and where the reforms President Mubarak has committed to undertake could quickly demonstrate the future direction of Egyptian policy, is in government procurement reform.

The Presidents' Council and other business associations and individual companies have cited a variety of problems in Egyptian government procurement which seriously impedes the procurement process and engender a negative image of Egypt in the international business community. Inherent deficiencies in the basic procurement law (Law Nine of 1993), and in the practices of Egyptian procurement officials in implementing the Law, may be perceived to bring short-term benefits to the government agencies or the individuals involved, but in the aggregate have a cumulative negative impact on Egypt.

These problems include, among others, the following:

- "Dutch Auctions" involving the legally prohibited practice of negotiating with bidders other than the lowest-price bidder after opening of bids;

- Onerous bid and performance bond requirements that impose additional costs on private sector bidders, and the tendency of government officials to use the threat of calling the bonds on the basis of questionable violations of bid or contract terms as a means of extracting concessions;

- Disproportionate rights extended to the contracting agency without corresponding obligations of the government to bidders and contractors;

- Lack of effective penalties imposed on the government contracting agency for violations of tender or contract terms or the law; and

- Absence of an effective means for injured bidders and contractors to seek redress against the government for violations of Law Nine.

Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

5

Ultimately, offensive practices permitted by Law Nine and the Egyptian Government's failure to enforce Law Nine increase procurement costs to Egypt by discouraging competition. Furthermore, such practices deny Egypt the high quality goods and services it needs to develop and compete internationally. It is likely that the perceptions these practices create extend to a broader view of Egypt as a risky, unsophisticated place to do business.

Review of sound procurement law and practice indicates fundamental principles which could form the basis of Egyptian government procurement reform and position Egypt as a leader in the effort to develop a widely-accepted international agreement on government procurement in Singapore in December. These principles can be summarized as Speediness, Transparency, Accountability and Reliability -- or "STAR."

With these basic principles as a foundation, President Mubarak has the opportunity to announce Egypt's STAR program to reform Egyptian government procurement and as a model for the Interim Agreement under discussion at the World Trade Organization's upcoming Singapore Ministerial Meeting.

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

I. INTRODUCTION

Egypt's Law Nine regulating Egyptian government purchasing decisions has extremely wide impact. Because of the government's extensive role in the Egyptian economy, Law Nine and its Executive Regulations affect not only most government agency procurement, but also the procurement of public sector companies. (See Appendix B.)

The current law, enacted in 1983 and subsequently amended, is highly complex. It contains a number of provisions, and allows practices, which ultimately discourage foreign firms from bidding on Egyptian contracts. This not only restricts foreign firms from potentially lucrative opportunities in Egypt, it harms Egypt by discouraging trade and competition. Restricted competition results in higher costs for goods and services purchased in government procurements. In order to ensure greater competition and the introduction of high quality goods and services in Egypt that contribute to Egyptian economic progress, changes in the Law and its enforcement are necessary.

The Presidents' Council was created to provide advice and counsel on business matters to the Egyptian and United States Governments in an effort to promote greater private sector development in Egypt and increased trade and investment between the two countries. The need to address government procurement issues has been recognized as a high priority item from the onset of the Council's discussions. The Council, made up of sixteen Egyptian and fifteen American business leaders, provides both the governments and the private sectors a forum for exchanging views on obstacles to increased trade and investment between the two countries. It has developed into an ongoing policy dialogue between both sides, putting policy issues into a business perspective that enables the sides to understand fully the key issues.

American corporations, in particular, have noted that the current Egyptian procurement system often puts United States firms at a competitive disadvantage, lacks the predictability necessary to conduct international business effectively, and reduces the attractiveness of Egypt as a market for American goods and services. The same problems raised by American firms are likely to deter other foreign bidders as well from participating in Egyptian government procurement opportunities. Accordingly, in order to compete successfully for investment and trade, Egypt must join other leading emerging markets in reforming its procedures. Egypt needs to demonstrate unequivocally to the outside world that foreign business is welcomed and will be treated fairly. Egyptian business people and officials recognize that by encouraging competition in procurement, Egypt will benefit from better prices and the introduction of higher quality goods and services.

The Council's objectives in instituting this review and analysis of Law Nine and formulating recommendations for change are to clarify the salient issues discouraging full and fair competition for Egyptian government contracts and to assist Egyptian policy-makers in formulating changes in Egypt's procurement law and practice in ways that will stimulate increased trade and investment of United States and other responsible foreign firms and provide improved opportunities for Egyptian economic progress.

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

7

Furthermore, government procurement reform presents Egypt with a unique opportunity to distinguish itself in the forefront on a key trade issue, on which Egypt could take a leadership role in the international arena. In particular, the World Trade Organization's Ministerial Meeting is scheduled for December in Singapore to discuss an Interim Agreement on openness, transparency and due process in government procurement. The internal reforms in its government procurement that Egypt has the opportunity to announce in conjunction with the Middle East/North Africa Economic Summit in Cairo in November could serve as a model for other emerging market countries' positions on the Interim Agreement.

Taking the initiative on domestic procurement reform would thus position Egypt as an influential leader in the international procurement reform initiative. Such a bold step, which would be in line with the recent aggressive reform program put in place by President Mubarak, would bring greater attention and focus on the Egyptian reform program at the moment of greatest possible impact -- the Cairo Economic Summit.

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

8

II. BACKGROUND AND DISCUSSION OF PROBLEMS

A. General

Egyptian government procurement presents lucrative opportunities for United States firms, yet only a few chose to participate in a small number of these bids. Given the technological lead United States firms hold in many fields, the Egyptian economy could benefit substantially from the introduction of American products and services. There are, however, a number of requirements and practices in Egyptian government procurement that discourage United States firms from bidding.
These same requirements and practices could also deter other responsible foreign firms from bidding, denying Egypt the goods and services they might offer.

Moreover, while the exploitation of Law Nine by each governmental entity may provide short-term incremental benefits to that agency, the cumulative effect of these agency actions is establishing a reputation for the entire country of Egypt as an unfavorable place to do business. Because that reputation has become fixed in the minds of international business leaders, Egypt must take significant steps to overcome the perceptions of international business people and investors.

While Law Nine has the external trappings of sound procurement process -- such as requirements for public bid opening and other internal controls -- generally speaking, it is not structured to guarantee a process that will be fair to bidders and contractors. The Law is largely drafted in terms that benefit the government party, with little consideration for equivalent rights of the contractor under similar circumstances.

Law Nine is extremely one-sided in the protection and flexibility it provides the Egyptian government contracting entity, while inversely disproportionate in imposing penalties and denying safeguards for the contractor. The obligations and responsibilities of contractors are stated in very specific details, but Law Nine imposes few specific requirements on the government agency. Law Nine offers no effective means for a bidder to challenge improper bid procedures or for a contractor to seek redress for breach of contract by the governmental entity.

Adding to these deficiencies, Law Nine does not provide the certainty and predictability that give United States firms confidence in the integrity of the bidding process. The Egyptian purchasing agency is subject to few time constraints and has wide flexibility concerning its decisions and actions. The Law does not require the government agency to publish its decision-making criteria, and it allows the use of vague and imprecise plans and specifications. While the Law generally prohibits negotiations after bid opening with any other than the lowest bidder, exceptions to, and blatant violations of the spirit and rule of Law Nine, result in a freewheeling bargaining process. This further undermines the integrity and predictability of the procurement process. Egypt then suffers from a negative image and loss of reputation.

Together, these features reduce the transparency of Law Nine to a level well below internationally accepted procurement standards. The net effect is to present the Egyptian

9

procurement process as an arbitrary and unstructured process, dependent on the vagaries of individual government officials, rather than on due process and rule of law.

The most significant specific deficiencies in the structure and enforcement of Law Nine are discussed below.

B. Specific Business Issues

While Egyptian law generally prohibits negotiations with bidders other than the lowest bidder once the bids have been opened, in practice government officials will solicit concessions from other bidders and use these to pressure the original lowest bidder to reduce its price or withdraw its bid. This practice, commonly known as a "Dutch Auction," introduces a lack of reliability in the selection process, discourages United States firms from submitting bids, and paralyzes those that do.

Law Nine discriminates against private sector Egyptian and foreign firms by requiring bid and performance bonds and exempting Egyptian public sector companies and cooperatives from the same burden. The deposit for bid bonds is between 1 and 2% of the bid and the deposit for performance bonds is between 5 and 10% of the contract price, dependent on the type of project involved. Moreover, Law Nine's regulations require the involvement of a local bank; thus, foreign firms generally must pay two sets of fees for their bonds -- one to their bank abroad and one to the approved Egyptian bank. Dealing with two banks also adds to the administrative burden. The bond costs and bank fees place foreign bidders at a competitive disadvantage.

Ancillary to the bonding requirement, Law Nine provides for forfeiture of the bid bond if the bidder withdraws its bid before bid opening. Similarly, if a winning bidder withdraws from a project, its bond is confiscated. In practice, the government agency can unilaterally delay bid opening or project commencement and force the bidder to maintain its bonds in force indefinitely. This adds substantially to the cost of doing business in Egypt for foreign firms; yet, the lowest bidder may never be able to reap the benefits of its efforts.

Moreover, once a contract is awarded and the bid bond has been increased to performance bond levels, the government contracting agency frequently delays its decisions, thereby keeping the bond in force or otherwise requiring the repeated renewal of the bonds. Not only does this add to the contractors' costs, but the threat of calling the bond is used as a means to exert pressure for additional concessions exceeding the contract terms. Sometimes these concessions, such as inspection trips, consist of personal perks in the guise of official business that individual contracting officers are able to extract.

Law Nine is extremely one-sided in imposing responsibilities and penalties on the supplier of goods and services without imposing corresponding duties and penalties on government purchasers. In addition to the unilateral delays in bid opening and contract execution, the Law allows government agencies to add new requirements that the supplier must meet while attendant increases in the price are reviewed and approved by a special committee. Similarly, the government may cancel an awarded contract without penalty. Government decisions essential

10

for the progress of the project are not subject to time limits, and the contractor can be forced to continue work in the meantime or bear the costs of the contract while indefinitely awaiting a decision.

The tendering regulations implementing Law Nine do not require publication of decision-making criteria, and requirements on "plans and specs" (i.e., project specifications) are so vague that tender specifications are often unclear. These deficiencies, combined with practices like the "Dutch Auction" and delays in awarding contracts while bidders must extend bid bonds, create the perception that a bidder has been preselected and government officials are seeking some way to divert the contract award to that more-favored entity.

Law Nine does not provide for alternative dispute resolution mechanisms, leaving such possibility to the post-award negotiation process. Without an effective independent means to seek redress against improper government actions, the injured contractor is at the mercy of Egyptian agency officials, whose interests also are at stake.

Law Nine requires that tender documents requested by foreign bidders only can be purchased by an Egyptian commercial agent. Thus, foreign bidders cannot obtain copies of tender documents directly from the issuing agency but must use the services of an Egyptian intermediary. The fees for such services typically add approximately 5% to the costs of bidding for foreign firms. Moreover, whether true or not, they create the perception, and an environment, of Egypt harboring favoritism and illicit payments that ultimately detract from Egypt's image as a sophisticated, developed economy and society.

The applicability of Law Nine is not uniform in that apparently many public companies evade its provisions. While most public companies are subject to Law Nine, the murkiness in whether a given company is subject to the law or not allows Egyptian public companies to use the law to their benefit and avoid its application when not in their interests. Such uncertainty exposes foreign bidders and contractors to additional risks.

C. Opportunity Costs for Egypt

While the types of procurement problems cited above, of which foreign bidders in Egypt commonly complain, are not unique to Egyptian law and practice, they nevertheless deter United States and possibly other responsible foreign firms from bidding on Egyptian government contracts. These actions of single agencies and individual government officials taken together have the cumulative effect of creating a very negative image of Egypt in the international business and investment community. This denies Egypt the benefit of quality goods and services at competitive prices and has a significant adverse impact on Egyptian economic development.

The extent to which these problems are widespread and publicly recognized is illustrated by their articulation in the "1996 United States Commercial Guide for Egypt." (See Appendix C.) The Guide serves as an introduction of the opportunities for trade and investment in Egypt for American firms, and after a cursory review of this document, it is surprising that any United States company would bother to seek to do business with Egyptian government entities.

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

In fact, the experience of the California Export Finance Office ("CEFO") -- representing an economy that ranks as one of the largest in the world -- has been bad enough in Egypt to precipitate a recent resolution that it will no longer guarantee sales of goods and services of California firms that require "final acceptance" outside the United States. In particular, the relevant provision states:

> **Unacceptable transactions:** Without exception, no guarantees will be provided when repayment of the CEFO guaranteed portion of a loan is dependent upon acceptance of the product or service in a location outside the United States.

The CEFO stated that this provision was inserted in its Credit Policies because of what it deemed was excessive and unjustified delays in final acceptance in an Egyptian government procurement. While CEFO will continue to provide guarantees of exports sales to Egypt, it remains leery now of Egyptian government procurement procedures and practices. Such concerns are likely to be transmitted to California firms approaching the agency for financing. Ultimately, some California firms, which might otherwise introduce new high quality products and services in Egypt, may not think it worthwhile to bother bidding on Egyptian procurements.

While an individual government agency may see a given contract as a "one-shot" deal to extract as much as possible from a foreign bidder, the sharp practices employed for immediate gain have the cumulative effect of undermining Egyptian Government credibility over the long term.

While the impact of the above-described procurement practices on the Egyptian economy is difficult to measure in precise monetary terms, extensive anecdotal evidence suggests that the problem is substantial and long-standing. Moreover, the widespread discussion of the problem among the United States international business community ensures that knowledge of the problem is disseminated broadly. Because of the obvious deterrent effect such information has on potential bidders' decisions to enter the Egyptian market, it is clear that Egypt is denied quality products and services at competitive prices. Ultimately, this impedes Egypt's economic progress.

12

III. ANALYSIS AND DISCUSSION OF LAW NINE

Although Law Nine was enacted in 1983, and subsequently amended, the Law and its regulations (See Appendix B.) have not been extensively scrutinized by United States legal scholars, and little analysis exists in the literature. Much of the criticism of Law Nine comes from real-world information based on the actual experiences of American bidders and from reports issued by the United States Government officials in Egypt.

Review of Law Nine, however, indicates a broad array of provisions that are common to procurement codes of other countries with sound procurement practices. While some of these provisions appear to offer protection to contractors or otherwise are designed to ensure fairness and the integrity of the procurement process, in practice Egyptian officials apparently have the flexibility to ignore the law and impose their own will. Considering Law Nine itself, the salient features are as follows:

-- Awards are to based on principles of "publicity, equality and freedom of competition" and can be offered locally or internationally. (Article 2) While this provision represents an articulation of Egypt's intended procurement policy, it is very general. Tenders and awards may appear to meet the letter of this policy, but frequently its spirit appears to be ignored. While not stated in policy terms, Article 18 also states the fundamental policy of basing awards on "the best tenderer's conditions and least prices." It, however, also gives a 15% price advantage to Egyptian bidders vis-a-vis foreign bidders. This latter point directly violates Article 2's principle of "equality" and is indicative of the type of contradictions in Law Nine.

-- Specialized methods of procurement, such as limited adjudication, local adjudication, private bargaining ("mumarssa"), and direct agreement are allowed (Article 1), and the procedures or conditions under which such methods may be employed are outlined (Articles 4, 5, 6, 7, 8). It appears that officials have wide discretion in choosing one method or other and may blatantly ignore requirements without penalty. The improper application of mumarsa or a Dutch Auction is a common complaint among bidders and United States officials. Egyptian procurement officials apparently change the method of procurement, imposing negotiations on price with other than the lowest price bidder, without prior notice in the tender documents that such practice would occur.

-- Although "Contracting shall be on the basis of exact and detailed technical specifications. Specimens may also be required to be supplied" and "technical drawings" are required for work contracts (Article 10), apparently such specific requirements are often omitted, and vague and general descriptions of goods and services is provided in many tenders. This gives the offering official wide discretion in interpreting the tenders and exercising favoritism. Vague descriptions, combined with the lack of a requirement that Egyptian agencies publish their decision criteria, make it difficult for all but insiders to succeed.

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

13

-- Law Nine contains a number of provisions for internal controls designed to ensure the integrity of the procurement process. These include separate committees for opening bids and making the award decision (Article 12), and the presence of various officials on such committees (Article 13). While such internal controls exist, it is difficult to gauge their effectiveness. The mere presence of a given official is no assurance that a process will be fair and in compliance with the law. The United States Commercial Guide notes that "While the decision-making process per se may be opaque, it is also porous in the sense that details of all bids are readily obtainable through back channels and become known quickly to all concerned." (See Appendix C.)

-- Details about suppliers and contractors must be maintained by each agency, and a list of those that have been debarred must also be maintained. (Article 15) A contractor may be debarred, for example, for fraud or corruption in dealing with the contracting authority or bankruptcy. (Article 27)

-- To ensure the integrity of the bid negotiation process, Article 16 requires that "After opening the envelopes, no negotiations may take place with any of the tenders to modify his tender." It does, however, allow negotiations with the tenderer of the lowest price offer to remove or modify a reservation or "to reduce his price to the market price level." Despite these specific requirements, negotiations are often undertaken with other than the lowest price offeror, and bidders are pitted against each other to extract a lower price. While such "Dutch Auction" process is forbidden, in practice, it is frequently conducted much to the dismay of the lowest price bidder, who expected adherence to the spirit and letter of Law Nine.

-- A series of provisions set out complex bid and performance bond requirements that give Egyptian officials excessive control over bidders and contractors. Article 19 mandates a bid bond of 1-2% of the total value of the tender dependent on the type of project, and Article 20 requires that the successful bidder increase his bond to 5-10% dependent on the type of project. The latter article notes that "The final deposit may be held to guarantee the implementation of the contract." This vague provision is apparently used by officials to keep the entire sum on deposit without regard to progress completed (although Article 22 permits reductions in some cases), to require unilateral extensions at additional costs to contractors and to extract additional concessions, sometimes of a personal nature, under threat of calling the bond. The Executive Regulations implementing Law Nine furthermore require the use of a local approved bank, which for foreign bidders and contractors leads to increased fees and additional administrative burdens. The regulations also allow the government wide flexibility in renewing performance bonds and dealing unilaterally with the guaranteeing banks without regard to the objections of the bidders. (See Executive Regulations Art. 69) It should be noted that Article 21 exempts public sector companies, public utilities and cooperative societies from this provision, another explicit violation of Law Nine's stated policy of "equality." (Article 2)

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

-- Article 22 also requires that "The final deposit shall not be collected if the successful tenderer supplies all items he is charged to deliver, and such items have been finally accepted by the administrative department contracting therefore within the period specified for the payment of the final deposit." (emphasis added) This provision places contractors entirely at the mercy of Egyptian officials who must act to "finally accept." If they do not act, the bonds have to be maintained in force by the contractor or be forfeited. There is no automatic release on completion nor an independent decision-maker to make that determination. Given Law Nine's other deficiencies in terms of lack of effective means of redress for injured contractors and the one-sided nature of the sanctions the government can impose, this provision places an excessive burden on the contractor and was a frequent point of criticism among United States firms. As noted in the preceding, it precipitated change in the California Export Finance Office's Credit Policies.

-- The series of provisions affording remedies to the government but little in the way of protections for the bidder or contractor are indicative of the lopsided, patently unfair nature of Law Nine. Article 24 permits the government to confiscate the bid bond and to exercise offset rights for any sums owed by the government to the bidder and to seek damages if the successful bidder does not increase his deposit within the specified time frame. The Law, however, places no burden on the government agency to act expeditiously or properly. Thus, agency officials could seek to extract concessions and yet force the winning bidder to increase its deposit.

-- Similarly, Article 26 provides for fines to be imposed on the contractor for the late start of work. Such fines can be imposed "upon the occurrence of the delay without requiring notice to the contractor" or other administrative action. Article 26 also extends damage rights to the government for losses sustained by the late start. As noted above, however, Law Nine does not impose a complementary duty on the government agency to act expeditiously in awarding the contract and meeting its responsibilities under it, nor does Law Nine impose penalties on the agency for its failure to act in a timely manner at any stage of the contracting process. A common complaint of contractors is that the government agency frequently delays commencement of contracts because it lacks sufficient funding, but refuses to release the contractor from its obligations and forces it to maintain performance bonds. Similarly, bidders are apparently forced to maintain bid bonds while the government agency delays its award decisions, notwithstanding Law Nine's Executive Regulations (Art. 71) which require return of bid bonds "within seven working days after the expiration of the period specified for the bid validity..."

-- Another lopsided provision of Law Nine favoring the government, but affording no protection to the contractor is Article 28. It states: "If the contractor violates any of the contract terms and conditions, the contracting party shall have the right to annul the contract, or to have it implemented on his account." Article 29 adds that the contracting party shall have the right to confiscate the final deposit and collect all fines "without the need to take any juridical procedures." Thus, government agency

Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

15

officials are permitted to act unilaterally without independent oversight, and no provision is made for the injured contractor to seek relief.

-- Articles 30-34 deal primarily with sale of movables through auction and by exception otherwise. These provisions do not appear to have adversely impacted foreign bidders and contractors.

-- Law Nine's General Provisions (Articles 35-40) incorporate a number of sound procurement principles. Article 36 prohibits intermediaries, except in the case of foreign contractors. In fact, foreign bidders and contractors are required to employ an Egyptian agent, and this can sometimes be a means of forcing foreign businesses to pay for services that are unnecessary and create an implication that corruption exists. Article 38 prohibits self dealing by employees of the contracting agencies.

The above discussion illustrates the inherent deficiencies in Law Nine and how it can be manipulated by government officials to achieve short-term goals which harm Egypt in the long-run by discouraging foreign bidders. Furthermore, these procurement processes and practices also create an overall negative image of Egypt in the international business community, which makes it generally less attractive for trade and investment. One important perception is that Law Nine can be used by procurement officials for personal gain. This reduces competition and deprives Egypt of quality goods and services it needs to raise living standards of its people, compete more effectively in world markets and achieve economic progress. Moreover, such practices also raise the costs to Egypt for the quality and services it is purchasing.

Reform of Law Nine would be an important step in signaling the international business community and domestic decision-makers that Egyptian leaders are intent on improving business and social conditions. If properly executed, government procurement reform in Egypt could be a model for other emerging economies. It would give Egypt the opportunity to take a leadership role in the current multilateral initiative to encourage government procurement reform through the framework of the World Trade Organization's Interim Agreement.

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

IV. EFFECTIVE PROCUREMENT LAW AND PRACTICE -- A COMPARATIVE STUDY

A. General

While Egyptian procurement law and practice must consider Egyptian conditions and other fundamentals that are unique to Egypt, Egypt would benefit from exploring other procurement approaches as a model for adaptation. In some cases, the approach regarding a given problem may be easily adopted by Egypt. In other cases, a successful approach may point the way of change, but need to be modified to operate effectively in Egypt.

In the interest of strengthening and regularizing government procurement, several multilateral organizations have developed procurement codes which they employ or offer as a model for others. Various countries have undertaken improvement in their procurement processes, sometimes through wholesale reform, as in Poland, and other times through piecemeal change to address specific problems or achieve certain policy objectives, such as Kuwait's recent amendment requiring the disclosure of agent commissions.

A variety of approaches are discussed below, which could be employed by Egypt to address or avoid the problems presented by the application of Law Nine in its current form.

B. Multilateral Approaches

1. GATT's Government Procurement Agreement

The Government Procurement Agreement ("GPA" or "Agreement"), as currently constituted, evolved out of an expansion of the 1979 GATT Agreement. It was reached in Geneva in December 1993, formally signed in Marrakech in April 1994 and came into force in 1996. (See Appendix D.) It is a "plurilateral" code or agreement between the signatories, which include the United States, the European Union, the EFTA countries, Canada, Japan, South Korea and Israel, with execution by Singapore pending.

While the basic terms of the Agreement are outlined in the approximately 30 pages attached hereto in Appendix D, another more than 250 pages deal with very specific reservations by each signatory for application of the Agreement and other administrative matters, such as the names of publications for bid announcements, national laws, regulations, judicial decisions, administrative rulings and the like regarding procurement. (See "The Austrian Annex" as explained in Appendix E.)

The current GPA was prompted by economic considerations in that its signatories recognized the significance of government procurement in trade relations between their nations and sought to develop a clear set of rules governing such transactions. The GPA was designed to facilitate trade and avoid conflicts by establishing rules for open and competitive procurement, and to ensure aggrieved contractors had effective rights of redress against the contracting government.

17

Its specific provisions are designed to achieve these policies as outlined in the GPA's Preamble, which states in relevant provisions the following:

> *Recognizing* the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the framework for the conduct of world trade;
>
> *Recognizing* that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or foreign suppliers;
>
> *Recognizing* that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;
>
> *Recognizing* the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;
>
> *Recognizing* the need to take into account the development, financial and trade needs of developing countries, in particular, the least-developed countries;
>
> *Desiring*, . . ., to broaden and improve the [earlier versions of the] Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts...

(emphasis added).

Thus, the current GPA sought to improve on earlier agreements by strengthening rules that discouraged "discrimination" and providing specific means of enforcing bid challenges. It also sought to reach to the procurement decisions of lower level governmental entities. This presented some problems for the United States, because of its Federal system of government and required the acquiescence of states and major cities to provisions that were contrary to "Buy National" or "Buy Local" policies. Each signatory specified the entities to which the GPA would be applicable and relevant thresholds in an Annex to the GPA. (See Appendix E.)

The current GPA addresses the following considerations:

As noted above with respect to the lengthy appendices to the GPA's core provisions, each signatory specifies explicitly the thresholds for application of the GPA, dependent on the level of the governmental entity and the type of contract involved. (Articles I and II)

Article III provides for "national treatment" and "non-discrimination" among bidders in the procurement process, providing no less favorable treatment to foreign suppliers than that extended domestically.

The GPA requires that "technical specifications" not be designed to create unnecessary obstacles to international trade. It specifies that the technical specifications prescribed in tender documents be stated in terms that are based on "performance rather than design or descriptive characteristics" of a product or service, and calls furthermore for these specifications to be based on international standards, if available, or specific national standards. If trade names or other similar designations are used to describe a product or service, the tender documents also will note "or equivalent" can be provided. (Article VI)

Article VII requires fairness and openness in tendering procedures in that they be applied in a "non-discriminatory manner," and it prohibits the selective provision of information that has the effect of "precluding competition."

The signatories to the GPA agree to provide potential bidders with information on their respective procurements, to which they have agreed the GPA will apply. This includes advertisements in the publications cited in the Appendix to the GPA. Form and content of the notice of tender also is outlined. The procuring agency must state whether the procurement is "open," "selective," "limited" or will involve "negotiations." (See Articles VII, IX, X and XV.) The invitation to bid must include very specific information on the nature and quantity of the procurement, timing, location, requirements and other details. (Articles IX, XI and XII) These provisions are designed to afford protections to bidders to ensure they have access to "all information necessary to permit them to submit responsive tenders." (Article XII) The Egyptian practice of unannounced Dutch Auctions would be prevented by this provision, if enforced.

Once bids have been opened and a contract awarded, similar notification requirements apply to inform the public of the winning bid and relevant specifics about it. (Article XVIII) This Article also obligates the contracting agency to provide, on request, an explanation to losing bidders of the reasons why they failed to qualify or were not selected in the tender, and why the winning bidder was superior.

The GPA requires detailed procedures for the processing and opening of tenders and the award of contracts to guarantee "the regularity of the openings." (Article XIII) This provision also protects bidders from mistakes of the contracting agency by providing that "A supplier shall not be penalized if a tender is received [late] because of delay due solely to mishandling on the part of the entity."

Awards of contracts shall be to the "tenderer who has been determined to be fully capable of undertaking the contract and whose tender, . . ., is either the lowest [price] tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous." (emphasis added) This would provide an improvement to Egypt's Law Nine, which does not require the publication of evaluation criteria.

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

Negotiations are permitted by the GPA under very narrow circumstances, as illustrated by Article XIV. The contracting agency must give prior notice of its intent to negotiate in the tender documents, or when no bid is obviously the most advantageous in terms of the specific published evaluation criteria. The government is curtailed in its use of negotiations primarily "to identify the strengths and weaknesses in tenders." (Article XIV) Moreover, the GPA requires that the government agency "treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants." (Article XIV)

Challenge procedures also are provided under the GPA. (Article XX) These include obligations by the signatories to "provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge breaches" of the GPA. Furthermore, "Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment." If the review body is not a court, additional protections to ensure the integrity of the process are provided. The challenge procedures shall provide for correction or compensation for losses or damages, which may be limited to the cost of bid or protest preparation, and it must be completed in a timely fashion.

In addition to other actions a signatory may take, the GPA provides for a "Dispute Settlement Body" to review disputes between parties to the GPA.

While the GPA in principle provides a guide for sound procurement procedures, as structured, it has limitations. Its operative provisions are exceedingly detailed and very complex. This makes it difficult to interpret, and deters additional nations from participating in it. Thus, only a very few countries are signatories, and none are emerging markets or developing countries. Furthermore, because of the thresholds and other scheduling provisions that each signatory specifies in the Appendix to the core provisions, the GPA's coverage is not comprehensive of all government entities.

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

2. The World Trade Organization's Proposed Interim Agreement

Currently, as a follow-up to the WTO Ministers' April 1995 meeting in Japan, an initiative is in progress to build on the principals of the GPA, but with streamlining to ensure the broadest possible participation. This so-called Interim Agreement would obligate member countries of the World Trade Organization to provide transparency, openness and due process in their government procurement, including appeal provisions, to an agreed set of goods and services. This approach allows countries which are not signatories of the GPA to facilitate their joining the GPA, or at least complying with its fundamental principles of sound procurement law and practice.

The proposed approach, the basic elements of which are described in United States Government's proposal in Appendix F, are superior to the GPA for a number of reasons. It is a first step in encouraging improvements in government procurement without forcing parties to change current rules allowing national preferences or otherwise direct contracts to national suppliers.

The new Interim Agreement would be designed to allow changes to be phased in piecemeal, by gradually extending the scope of coverage to a larger range of government entities and to lowered value contracts. It would be limited strictly to transparency, openness and due process considerations and would be flexible enough to take into account the variety of procurement practices among WTO member nations. There is no requirement contemplated that would require participating governments to adhere to the more wide-ranging, rigid and complex GPA.

While the Interim Agreement would create new procedural obligations of WTO members, these would not be as burdensome as those imposed by the current GPA. Basically, these procedures would be designed to increase the flow of information on procurement opportunities, to ensure equal access to information on tender terms and to provide effective mechanisms for dispute resolution. Technical assistance would be provided to developing countries to better understand the value of sound procurement principles and to develop procedures in their countries which would accommodate national approaches with these principles.

As noted in the United States Government proposals provided in Appendix F, the Interim Agreement would build on earlier agreements and discussions and be formally initiated at the WTO Singapore Ministerial Meetings in December 1996. This initiative provides Egypt with a unique opportunity to take a leadership position on a focused attempt to influence change in government procurement internationally based on approaches that are workable in Egypt.

Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

3. United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods and Construction

As early as 1986, UNCITRAL recognized the need for improvements in national approaches to government procurement of goods and construction in order to promote greater economy and efficiency through competition and encourage confidence in government procurement involving both domestic and international tenders. UNCITRAL sought to develop a model for transparent government procurement that would be fair and equitable to bidders, contractors and the government procuring agencies. Its efforts culminated in 1993 with the approval of the Model Law on Procurement of Goods and Construction. (See Appendix G.)

The policies this model law seeks to achieve are outlined in its Preamble as follows:

> WHEREAS . . .[it is considered] desirable to regulate the procurement of goods and of construction so as to promote the objectives of:
>
> *(a)* maximizing economy and efficiency in procurement;
>
> *(b)* fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
>
> *(c)* promoting competition among suppliers and contractors for the supply of the goods and construction to be procured;
>
> *(d)* providing the fair and equitable treatment of all suppliers and contractors;
>
> *(e)* promoting the integrity of, and fairness and public confidence in, the procurement process; and
>
> *(f)* achieving transparency in the procedures relating to procurement . . .

(emphasis added).

While more limited in scope than the GPA in that UNCITRAL's model law does not include services except those that are incidental to procurement of goods and construction, it nevertheless provides the fundamental framework for a sound procurement system. The model law is intended as a guide, which can be accepted in whole or in part, and in this regard can provide Egypt with insights into standard approaches for addressing various problems posed by Law Nine.

In particular, UNCITRAL provides for essentially five methods of procurement involving competition. The first method is a direct tender. Three alternative methods of procurement are provided for to meet various needs and conditions when it is too difficult to formulate precise

22

plans and specs for goods or construction that would allow a direct tender. These three include, Two Stage Tendering, Requests for Proposals and Competitive Negotiation. (See Articles 16, 17 and 18) A fifth method of Requesting Quotations is useful basically only for procurements of commercially available goods. (Article 19) These provisions provide flexibility to contracting authorities while providing a clear set of rules to govern the given process.

There are also a series of provisions that, unlike Egypt's Law Nine, require the notice of evaluation criteria. Article 6(4) requires it in the pre-qualification of bidders, and Article 26(e) on the contents of solicitation documents requires that the "factors to be used by the procuring entity in determining the successful tender . . . and relative weight of such factors" be provided. Like the GPA, UNCITRAL provides rules for description of plans and specs based on "objective technical and quality characteristics," and similarly allows use of brand names and other descriptive devices only when terms such as "or equivalent" are included. (Article 14) The UNCITRAL model provides extensive detail on the contents of invitations to tender (Article 23) and of solicitation documents (Article 25) that are designed to provide clear and comprehensive information to bidders in advance.

Tenders: In the use of Tenders as a procurement method under UNCITRAL's model, negotiations with bidders during the tendering proceeding is expressly prohibited (Article 34), and the contract must be awarded to the lowest price bidder or on other terms clearly specified in the bid solicitation documents. (Article 32) However, preference is allowed to domestic bidders if provided in the local procurement laws. (Article 32(4)(d)) The right to bid by foreign entities is generally guaranteed by Article 6(5), which prohibits discrimination in qualifying a bidder on the basis of nationality. Article 8 similarly discourages discrimination of the basis of nationality, but allows limited participation on such basis if the reasons are justified in a published statement. Under UNCITRAL's model code, the contract would become enforceable upon notice to the successful bidder of the award (Article 35), but before award, the contracting agency may reject all bids. (Article 33)

Two-Stage Tendering: Under Two-Stage Tendering, the contracting agency first requests technical proposals without price quotes, on the basis of which the agency develops its specifications. In the second stage, the bidders submit price proposals based on the specifications developed in the first stage. First stage bidders may drop out of tender without penalty. (See Articles 17 and 36.)

Requests for Proposals: Under UNCITRAL's Requests for Proposals method of procurement, the contracting agency must provide certain basic information in its RFP and must disclose its decision criteria and the weights applied to the various factors. While negotiation is permitted with bidders, the contracting agency must maintain the confidentiality of information provided by each. On completion of negotiations, best and final offers are requested. Then the evaluation is conducted in a two-step process on reviewing the technical proposal followed by a separate review of price quotes. (See Articles 17 and 38.)

Competitive Negotiations: Under Competitive Negotiations, information on the tender must reach enough potential bidders to ensure that there is competition. Like the RFP process,

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

23

information from each bidder must be kept confidential, and when negotiations are completed, best and final offers are requested. (See Articles 17 and 39.)

Request for Quotations: UNCITRAL suggests that Request for Quotations be used only for goods that are commercially available, that at least three bidders participate and that the contract be awarded to the lowest price responsible bidder. (See Articles 19 and 40.)

Single Source procurements are allowed as a method of procurement only under restricted circumstances as where there is a single supplier or urgent need. (See Articles 20 and 41.)

While bid bonds are permitted, UNCITRAL's model code provides specific requirements and procedures designed to protect both the government agency and the bidder (Article 30) and requires among other conditions for the prompt return of bid bonds on the expiration of the bond, the entry of a contract and provision of a performance security, if required, the termination of the tendering proceedings or the withdrawal of the tender prior to the deadline for submission of tenders, unless the solicitation documents specify otherwise. (Article 30(2))

Furthermore, Article 29(2)(a) allows voluntary extension of the bond by the bidder if the contracting agency delays the bid opening and award. Adoption of protective provisions such as these in Law Nine would help alleviate one of the major complaints of bidders in Egypt without negative impact on government agencies.

Openness is encouraged by UNCITRAL provisions requiring that minimal information identifying successful bidders be available for public inspection following contract award. (Article 35(6)). Similarly, bidders are granted standing to seek review of the bidding process and the right to file protest with the head of the procuring agency. (Articles 42 and 43) While this does not ensure initial independent review, it does provide minimum remedies and requires under certain circumstances the suspension of the contract until a valid protest is resolved (Article 46). Appeal is provided through administrative review (Article 44) and judicial review (Article 47). UNCITRAL also provides for the possibility of rather extensive remedies to an injured bid protester including corrective action, recovery of costs and lost profits. (See Article 44.)

Like the GPA, UNCITRAL's Model Procurement Code provides for extensive record keeping and comprehensive procedures to ensure the integrity of the bid and award process. (Article 11) Furthermore, any attempt by a bidder to bribe procurement officials or otherwise to offer inducements to secure a favorable decision is grounds for rejection of the bid, and publication of the grounds for such action. (Article 13)

UNCITRAL's Model Procurement Code offers a variety of guidelines to Egypt's reform efforts. It provides greater balance in rights, remedies and responsibilities of the government party and the bidder/contractor. Its use would prohibit the Dutch Auction system, while providing a structure for alternative methods of procurement that could meet Egyptian agency needs. Its provisions on bid bonds is superior to the current rules in Egypt which leave bidders

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

at the mercy of officials. The specificity UNCITRAL adds to the solicitation process would benefit both bidders and Egyptian authorities in the long-run.

4. World Bank

As a significant source of financing among developing nations, the World Bank has long been concerned that host country government procurement maximize the benefits of its assistance. In recently issued revised Procurement Guidelines (See Appendix H.), the World Bank emphasized four basic considerations that guide its requirements (Section 1.2), as follows:

(a) the need for economy and efficiency;

(b) the interest in giving all eligible bidders the opportunity to compete in providing goods and works financed by the Bank;

(c) the interest in developing domestic contracting and manufacturing capabilities; and

(d) the importance of transparency in the procurement process.

The Bank's Guidelines provide explicit focus on "Fraud and Corruption" (Section 1.15) by requiring borrowers, bidders and contractors under Bank-financed contracts to "observe the highest standard of ethics during the procurement and execution of such contracts." The Bank reserves the right to reject a proposal for award if it determines the bidder engaged in corrupt or fraudulent practices in its competition for the contract and to cancel that portion of a Bank loan where the Borrower or the beneficiary of the loan engaged in corrupt or fraudulent practices. Like Egypt's Law Nine, firms which violate these prohibitions can be debarred.

The Bank has renewed its emphasis on ethical standards with its President's speech at the Bank's Annual Meeting in Washington, DC in October, 1996. With respect to the Bank's "New Compact," he stated:

> "Corruption is a problem that all countries have to confront. Solutions, however, can only be home-grown. National leaders need to take a stand. Civil society plays a key role as well. Working with our partners, the Bank Group will help any of our member countries to implement national programs that discourage corrupt practices. And we will support international efforts to fight corruption and to establish voluntary standards of behavior for corporations and investors in the industrialized world.
>
> "The Bank Group cannot intervene in the political affairs of our member countries. But we can give advice, encouragement and support to governments that wish to fight corruption -- and it is these governments that will, over time, attract the larger volume of investment. Let me emphasize that the Bank Group will not tolerate corruption in the programs that we support; and we are taking steps to ensure that our own activities continue to meet the highest standards of probity."

Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

25

The Bank's Guidelines, like the other models discussed above, contain detailed requirements to ensure the bidding and award process is open and competitive. There are specific requirements for details in bidding documents (Sections 2.2, 2.11, 2.12 and 2.16-2.18) and for notification and advertising to ensure broad participation. (Sections 2.7 and 2.8)

Of particular relevance to Egyptian policy-makers seeking to include evaluation criteria in Law Nine is the requirement for bidding documents that "The basis for bid evaluation and selection of the lowest evaluated bid shall be clearly outlined in the instructions to bidders and/or in the specifications. (Section 2.11) Moreover, Guideline 2.17 requires that the factors, in addition to price, which will be taken into account in evaluating bids, and how such factors will be quantified and evaluated, be specified. Bank Guidelines also permit Two-Stage Bidding, as provided by UNCITRAL under similar circumstances. (Section 2.6)

The Bank Guidelines also provide for bid security, but with the specification that the bonds be valid for a period sufficient to allow the borrower to complete the process of all approvals in time for award, (Section 2.13) and continues that this period shall extend to four weeks beyond the validity period of the bid. (Section 2.14) Once an award is made, the losing bidders' bonds must be released.

The Guidelines also require performance bonds to protect the borrower from a contractor's breach, (Sections 2.38 and 2.39) and a portion of the security must extend beyond the completion date to cover defects up to final acceptance. This approach would help satisfy critics of Law Nine with regard to Egyptian requirements that the entire performance be maintained even though little risk remains as some contracts near completion. Another approach provided for in the Bank's Guidelines is retention of a portion of periodic payments as security. (Sections 2.38 and 2.39)

While liquidated damages also are required to protect the borrower from contractor's delays, the Guidelines recommend bonuses for early completion that benefits the borrower. (Section 2.40) Alternative dispute resolution procedures are recommended, such as international arbitration and other means to expedite settlements in a fair manner. (Section 2.42)

Procedures for bid opening, evaluation and contract award are also specified in some detail. (Sections 2.43-2.53) They provide the standard procedures to maintain the integrity of the process, such as public openings, maintaining confidentiality of the bids and related requirements to ensure that bidders are treated fairly and transparently. Of particular relevance is the requirement for a report explaining the reasons for selecting the winning bid. (Section 2.53)

Bidders are expressly protected from additional concession in that "A bidder shall not be required, as a condition of award, to undertake responsibilities for work not stipulated in the bidding documents or otherwise to modify the bid as originally submitted." (Section 2.58)

While borrowers may justifiably reject all bids when there is a lack of effective competition (Section 2.60), they cannot do so "solely for the purpose of obtaining lower prices." (Section

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

2.61) In fact, as an independent control to prevent practices like Dutch Auctions, "the Bank's prior concurrence shall be obtained before rejecting all bids, soliciting new bids, or entering into negotiation with the lowest evaluated bidder." (Section 2.62)

The World Bank's Procurement Guidelines provide insights into how Egypt can address a number of the problems bidders and contractors have raised, yet still ensure it has adequate protection of its needs. While these Guidelines apply to Bank-financed projects, they nevertheless provide further evidence of what is acceptable practice in international procurement.

C. Other Countries' Approaches

1. United States Defense Security Assistance Agency's Guidelines for Foreign Military Financing of Direct Commercial Contracts

US Defense Security Assistance Agency's ("DSAA") Guidelines are particularly relevant in providing direction for reform of Law Nine, because they are frequently employed in Egyptian military procurement and appear to provide some of the broader protections bidders and contractors need without jeopardizing the protection Egyptian government contracting agencies need. These Guidelines were established in 1984 by the United States Department of Defense for the processing and review of commercial contracts for direct purchase of non-standard United States defense articles from United States firms. (See Appendix I.)

The focus of the Guidelines is on "United States origin" products and services, and as such exclude expenses of foreign subsidiaries of the United States firms. (Paragraph 5.D) Offsets, either through required investments or procurements of components in-country, as a condition of securing the purchase are not encouraged. (Paragraph 7) Commissions or contingent fees are not funded or treated as allowable costs under the contract (Paragraph 8), and funding will not be considered for procurement agents and other intermediaries unless the need can be fully justified. (Paragraph 9.C)

Thus, the use of Egyptian agents as a matter of law is dispensed with under a DSAA contract financed by the DSAA. This elimination of intermediaries raises the question whether Law Nine's requirement that foreign bidders employ Egyptian agents in non-United States defense financed contracts serves a useful purpose.

With respect to performance bonds or letters of credit from a United States supplier, the use of a United States bank is required. (Paragraph 12) And "any purchase agreement that provides for a refund, penalty, liquidated damages, bonding provisions, or other form of financial reimbursement to the purchasing country must be structured to ensure that such payment is made by the contractor or designated agent . . . directly and without delay, from the payor to the United States Government." (Paragraph 15)

As a means of limiting the possibility that contracting agency officials will seek personal benefits in the guise of official business, the Guidelines refuse to "approve payments for travel,

27

per diem, accommodations, lodging, car rental, personal expenses, entertainment or similar expenses of purchasing country personnel in connection with a direct commercial purchase." (Paragraph 14)

With regard to tender procedures and criteria, the Guidelines require competitive bidding and the purchasing agency to identify the various contractors solicited and the prices submitted. If the lowest bid was not selected, the purchaser must provide a justification of its actions. (Paragraph 20)

The DSAA encourages arbitration clauses, and the Guidelines provide that if the contract includes arbitration, that it be in either the United States or a mutually-agrees third country, but not in the purchasing country. (Paragraph 27) The enforceability of such arbitration has been troublesome in Egypt.

While the DSAA's Guidelines deal with a unique type of procurement, they nevertheless have proven generally workable in Egypt, and offer some approaches that may be useful in considering modifications of Law Nine.

2. Poland

With the collapse of Soviet Communism and the centrally planned economy in 1989, Poland embarked on wholesale political and economic reforms. Under a "shock therapy" program begun in 1990, Poland sought to quickly rebuild its economic system according to market principles. By 1993, the economy began to turn around and in subsequent years, Poland's economy has been one of the fastest growing in Europe. While Poland has embarked on sweeping reform that contributes to its highly favorable image as a good place to do business and invest, one element of this effort has been government procurement reform. Poland's new Law on Government Procurement is attached in Appendix J.

The Polish Law generally provides many of the provisions that form the foundation for sound procurement law and practice, and offers some interesting features that may be useful in the Egyptian context. In the latter regard is the provision for an "Office of Public Procurement," whose Chairman reports directly to the Prime Minister. (Articles 7 and 8) The Chairman has broad functions including approving procurement procedures other than tendering, establishing and publicizing a list of "arbiters," maintaining records on public procurements and reporting to the Council of Ministers on the functioning of the public procurement system, organizing training programs for procurement officials, to mention a few. (Article 9) Egypt could potentially benefit from the establishment of a similar office that could empower in an official independent at the contracting agency with authority to oversee the procurement process. This official, reporting to the Prime Minister, could carry out on his behalf, the implementation of policies designed to encourage Egyptian economic progress.

While six procurement methods (Article 13) are allowed -- unlimited tendering, limited tendering, two-stage tendering, negotiations-with-retaining-competition, requests-for-quotations,

28

and single-source procurement -- the preferred method is clearly stated as "unlimited tendering." (Article 14)

Articles 16 and 17 outline basic policies designed to encourage fairness and competition through equal treatment of bidders, while Article 18 emphasizes that domestic and foreign bidders shall be entitled to participate on an equal basis. However, the code reserves the right to limit certain small price procurements to domestic suppliers or foreign firms with a branch in Poland and to restrict some others domestic entities. If a domestic preference is to be imposed, it must be stated at the start of the procurement action. (Articles 18.2-4)

Conflicts of interest are viewed broadly and prohibit the participation of officials in certain clearly defined circumstances. (Article 20)

Like the model codes discussed above, Poland's Law also provides for publication of criteria and evaluation methods for pre-qualification of bidders (Article 23.4.2) and to satisfy the conditions for the procurement, including the weights (Articles 35.1.2 and 1.6). All-in-all, the essential information that must be provided to bidders is very detailed and comprehensively described, including protest and appeal rights and procedures. (See Article 35.)

To ensure transparency, the Law requires extensive record-keeping and publication of reports, comprehensively describing details of each procurement, the bidders involved, the evaluation criteria, a discussion of the evaluation the price and terms of the offers and justifications for a variety of decisions. (Article 25) However, provision is made to protect trade secrets and commercial information of bidders. (Articles 22 and 27)

Bidders are bound by the tender during the time period specified in the tender documents, however, for no longer "than 90 days." Furthermore, while a procuring agency can request bidders to extend this period, bidders who refuse cannot be forced to forfeit their bid bonds. Bidders who agree to the extension must also extend their bid bonds, but only to cover the period of the extension. (Article 40) This provision represents a vast improvement over Law Nine practice and apparently would be welcomed by bidders in Egypt. Articles 41 and 42 outline very specific terms for imposing bid bonds, their return and the limited conditions of their forfeiture -- the offeror refuses to sign the agreement under the conditions of its tender or to provide the required performance bond. While performance bonds may be required under Polish government procurements, the maximum amount of the security can be no higher than double the fines set in the contract or 80% of the procurement's value. (Article 75)

Like the model codes, Poland's Public Procurement Law would apparently prohibit Dutch Auctions in direct tenders, as "No changes in the content of the tender, especially change in the price and no negotiations between the procuring entity and the offeror concerning the submitted tender shall be permitted." (Article 44.2)

Protest and appeal rights and procedures to exercise them are clearly provided. (Articles 78-92) These detailed provisions offer a range of actions, including arbitration to resolve the dispute.

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

Review of Poland's procurement law should offer valuable insights to Egyptian policy-makers. It is a modern, innovative law in a country that is developing rapidly. It demonstrates that principles of sound procurement law and practice, such as accountability, fairness and transparency to encourage open competition can be achieved in a country in the development process.

3. Brazil

Brazil is another country, like Poland, that has experienced rapid growth and given its size, offers an especially large market. Law Number 8666 of 1993, as amended by Law Number 8883 of 1994 addressing largely bidding procedures, comprises the bulk of Brazilian government procurement laws. (See Appendix K.)

Brazil's Law states its policy objectives clearly in the beginning as, "bidding is designed to guarantee observance of the constitutional principle of isonomy [i.e., equality before the law] and to select the bid that is most advantageous for the Administration, and shall be processed and judged strictly in accordance with the basic principles of legality, impersonality, morality, equality, publicity, administrative probity, abidance by the announcement to bid, objective judgment, and other related items." (Article 3)

While bidding shall be open to foreigners to maximize competition, a national preference is provided for. (Article 3, paragraphs 1 and 2) Open, public proceedings are required. (Article 3, paragraph 3)

Overall, the Brazilian Law is exceedingly complex in that its coverage is extensive and its terms are specified in excruciating detail. Five methods of procurement are provided for -- Competitive Bidding, Request for Quotation, Invitation to Bid, Contest Bidding, and Auction. (Article 22) Use of these methods of procurement is restricted based on varying contract value limits based on the services or goods procured and even the procuring agency. (Article 23)

The Brazilian Law contains interesting approaches to achieve its objectives. For example, Article 25, paragraph 2 provides that the service provider and the "responsible public agent shall be jointly liable for any damages caused" by overbilling. And extensive eligibility requirements to bid are imposed, such as evidence of good standing from the tax authorities, documentation of technical qualifications through registration with appropriate professional entity, documentation of economic and financial qualifications and the like. (Articles 27, 28, 29, 30 and 31) The required documentation may be submitted in the original version, a certified copy issued by the competent registry or Administration official or as published in the press, and specific compliance requirements are applicable to foreign firms. (Article 32)

Brazilian tender documents must contain a great deal of specific information. Of particular benefit to bidders are requirements to outline penalties in the case of default and the criteria for bid adjudication, "set out in clear-cut terms and objective parameters," payment conditions and instructions and rules for appeals. (Article 40)

While Article 45 provides for bids to be analyzed on an "objective basis," and awarded based on the lowest priced responsive bidder, Article 46 introduces "best technology" approach for certain types of contracts, which are so designated in advance.

Performance bonds may be required by the terms of the tender documents, but may not exceed 5% of the contract amount. (Article 56)

Brazilian government procurement law is especially broad on the issue of administrative and judicial sanctions and penalties, which apply both to contractors and civil servants and are spelled out in excruciating detail. (Articles 81-108)

Brazil's law also provides bidders the rights to administrative appeal the procuring agency's decisions and actions. (Article 109)

The Brazilian government procurement law is exceedingly complex and detailed. While it offers several interesting provisions not found in the model codes, its overall approach is not the type of model that would be very helpful in streamlining Egypt's Law Nine.

Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

V. POLICY OBJECTIVES BASED ON SOUND PROCUREMENT PRINCIPLES FOR EGYPT

The Presidents' Council has previously examined the issues of Egyptian government procurement as a means of facilitating United States business in Egypt and to encourage an overall positive climate for trade and investment. The Council has issued a series of statements calling for reform of Egyptian government procurement.

In their initial review of pertinent issues, the Council's United States members called for Egyptian procurement and evaluation procedures for government contracting to be in basic compliance with the GATT's Government Procurement Agreement, for rigorous enforcement of adherence to the new procedures and criticized the Dutch Auction practice frequently employed by Egyptian government agencies as typical of the arbitrary, ad hoc procedures currently governing Egyptian procurement practices.

In its January 1996 Joint Statement, the Council called for increased transparency, consistency, accountability and rationality in the implementation of regulations governing trade and investment, and in this respect, recommended reform of the Egyptian government procurement system. The Council collectively recognized that the Dutch Auction system violated these principles and called for its abolition. The financial burden and inherent unfairness imposed by Egyptian practice regarding bid and performance bonds was similarly recognized, leading the Council to call for more flexibility in their imposition and procedures to ensure the timely release of bonds.

The July 1996 Joint Statement of the Council again focused its criticisms on the use of "mumarsa" or the Dutch Auction system and the "lack of an efficient system for release of performance and bid bonds," concluding that the latter, in particular, "can raise the cost of doing business in Egypt to unacceptable, and non-competitive, levels."

The Council's pronouncements underscored the essentially the need to build effective Egyptian procurement policy based on sound procurement principles.

As discussed in the preceding Section IV, there are a number of specific detailed sets of rules on procurement law and practice developed by multilateral organizations and other nations that are internationally accepted and could serve as a guide for Egyptian policy-makers. These include the GATT's Government Procurement Agreement and its proposed streamlined World Trade Organization's Interim Agreement, the World Bank's procurement rules, UNCITRAL's Model Law on Procurement and national approaches such as the United States Defense Security Assistance Agency's Guidelines for Foreign Military Financing of Direct Commercial Contracts and those of emerging economies, like Poland, which has have established a new procurement law consistent with policies designed to stimulate growth and development.

Together, these various approaches have many common features that provide a policy framework characterized by sound procurement principles. Their provisions, as discussed

32

above, address many of the concerns that the Council and others have raised about current Egyptian procurement law and practice. These are as follows:

- Adequate notice
- Neutral standards designed to avoid giving advantage to any one bidder
- Objective and pre-specified bid criteria
- Public bid opening
- Award of contracts to the lowest responsive bidder or demonstrably best overall value on the basis of objective criteria
- Access to an independent appeal body for bid protests and post-award dispute resolution

These features are designed to ensure speediness, transparency, accountability and reliability (including fairness and predictability) in the procurement process.

While there are a number of model approaches to procurement law and practice as discussed in Section IV, above, that incorporate these principles, it is not a foregone conclusion that these guides should be adopted wholesale by Egypt. Rather, an opportunity exists for Egypt to take a leadership role in proposing its own innovative changes that could then serve as a model for other emerging market countries.

Considering the basic objectives sound procurement seeks to achieve as outlined above, President Mubarak could take advantage of the visibility offered by the MENA Summit to announce renewed efforts to make Egypt a "rising star" among emerging market countries by creating an overall environment conducive to trade and investment. As a step in this process, he could announce major reforms in Egyptian government procurement, called the "STAR Program."

The proposed STAR Program would consist of procurement reforms to achieve the following four basic objectives:

- Speediness
- Transparency
- Accountability
- Reliability

Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

Egypt needs to encourage "speediness" in order to overcome the seemingly endless delays, postponements and uncertainties bidders and contractor frequently encounter under the current system. Time is money in business, and delays increases costs to bidders and contractors, which are ultimately passed on to Egypt in the long-run.

Increased "transparency" is essential to eliminate corruption and to foster greater participation in the bidding process by responsible businesses. Transparency increases the predictability of the procurement process encouraging foreign businesses to enter the Egyptian market and to fuel economic progress and development. A transparent procurement system will benefit Egypt as well as contractors. It ensures that government procurement officials cannot abuse their public positions for private gain and that Egypt can maximize its procurement monies for their intended purposes. By establishing and enforcing clear and workable standards of conduct in government procurement, Egypt can begin to strengthen its procurement system and present itself as a leader among emerging market countries in this regard.

Greater "accountability" at all levels of the procurement process is needed to ensure that bidders and contractors are adequately protected. It would introduce provisions that are more even-handed, and will give contractors confidence that they will not be subject to mistreatment when they have held up their end of the terms of the bid process or contract. It would also introduce a greater appreciation of procedures designed to protect all parties from arbitrary action of government officials.

"Reliability" in the procurement process is essential to ensure the fairness and predictability foreign businessmen need to enter a market. Measures to enhance reliability would eliminate or at least curtail preferential treatment and the perception that favoritism or preselection is rampant in Egyptian government procurement.

Introduction of the proposed STAR Program policy guidelines would benefit not only foreign bidders and contractors, but also honest Egyptian businesses seeking government contracts. They would be assured of a fair and predictable process on which they could more precisely estimate the costs and benefits of participation. Moreover, Egypt would benefit from lower costs of goods and services that accompany predictability and transparency and the economic progress that follows from reducing arbitrary government actions in the marketplace.

In conjunction with the indigenous changes Egypt's proposed STAR Program could introduce, Egypt could take a leadership role internationally in procurement reform initiatives. While much of the developed world subscribes to the Government Procurement Agreement, few emergent economies are signatories, because of the GPA's complexity and rigidity. Egypt could offer to lead the effort to introduce the principles of sound procurement, as illustrated by Egypt's proposed STAR Program, through the proposed negotiations on the Interim Agreement that would be workable and acceptable to countries with emerging economies like Egypt's.

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

VI. RECOMMENDATIONS FOR IMPROVEMENT

In this section, we discuss our recommendations for the improvement of Law Nine and its accompanying regulations. In order to facilitate comparison with the existing text of the Law, we attach it hereto as Appendix B. In all cases discussed below, the citations to various Articles conform to the Articles of Law Nine as currently written.

Article 1
Article 2
Article 3
Article 4
Article 5
Article 6
Article 7

Articles 1-7 of Law Nine, inclusive, should be repealed and replaced by the following provisions:

Article 1

Policy. It shall be the policy of the Government of Egypt, as elaborated and defined herein, that all of its procurement activities shall be through the practices of public advertising, full and open competition, and sealed bidding, except where expressly authorized to the contrary. It shall further be the policy of the Government of Egypt that the administration of public contracts awarded hereunder shall be fair and equitable, and conducive to the just treatment of the legitimate goals of both the Government and its contractors.

All of the provisions of this Law, and all implementing regulations which may be promulgated hereunder, shall be interpreted in order to secure on a timely basis the best value product or service to the Government, while maintaining the public's trust in the fairness and integrity of the procurement system. This Law is intended to --

(a) satisfy the Government in terms of cost, quality and timeliness of delivery;

(b) promote competition through the use of contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform as speedily as possible;

(c) conduct business with transparency, integrity, fairness, and openness; and

35

(d) minimize administrative arbitrariness and operating costs, and maximize accountability and regularity.

All Ministers, Governors, and Board Chairmen are personally charged with the successful implementation of this Law.

Discussion. As currently written, Law Nine contains no general statement of the policy of the Government of Egypt concerning government procurement and contract administration. Accordingly, the proposed language is intended simply to make evident what is already the Government's official -- albeit unstated -- policy. Unfortunately, what is not stated explicitly is often ignored. Thus, in order to send a clear signal -- both to the cognizant government officials and to potential bidders and contractors -- such broad and sweeping language is required to underline the importance that Egypt places on this issue, and the accompanying major reforms to the official procurement system.

The new language will unmistakably emphasize the Government's commitment to enhancing the speediness, transparency, accountability and reliability of the GOE procurement system and contract administration. In addition, the proposed amendments provide a common basis, which now appears to be lacking, for both the Government and interested bidders to interpret Law Nine as a whole, and especially the substantial amendments we believe are necessary.

Especially for international firms looking at potential markets in the Egyptian government sector, the new language will provide a much-needed wake-up call that the Government is fully committed to an official procurement system that is fair and equitable. A clear statement of policy reform in procurement law and practice also lays the foundation for presenting Egypt to the international business community as a country taking the lead in ensuring a fair and predictable climate, and thus encouraging international trade and investment.

Article 2

Open Competition. Unless specified herein, full, fair and open competition for the procurement of goods and services for the Government shall be required. Ministers, Governors and Board Chairmen will take all necessary measures to ensure that this provision is fully understood and implemented within their respective Ministries, departments, local government units and public and general organizations, and, as may be required by the President, shall report to him from time to time on their compliance with this Law.

Discussion. To replace the existing confused introductory provisions to Law Nine, the proposed language of Article 2 now states unambiguously that the preferred mode of GOE procurement is full, fair and open competition. This method thus becomes the norm, or default procedure, from which all deviations must be justified by GOE officials who desire a different approach in a particular procurement, on a case-by-case basis.

To emphasize the personal importance which we believe President Mubarak must attach to this initiative if it is to succeed, this proposed Article also underlines the role which individual Ministers, Governors and Board Chairmen must play in fully implementing the statutory and regulatory changes. The proposed Article 2 highlights the Ministers' and others' direct responsibility to the President in order to ensure that these changes to Law Nine are not simply relegated to low-level officials within the respective bureaucracies. They become personally accountable to the President for the actions of their subordinates, in the expectation that they will demand high standards and accountability throughout their respective Ministries, departments, local government units and public and general organizations.

Article 3

Procurement Other than Through Open Competition. The following are the only exceptions which shall be permitted to full, fair and open competition:

(a) Limited competition, which requires that bidders be restricted to specific contractors, whether inside Egypt or abroad, provided that they must have shown efficiency in technical and financial matters, and should have outstanding business reputations;

(b) Local competition, which shall be limited to no more than LE40,000, restricted to local contractors, as determined by the cognizant Ministry, department, local government unit or public and general organization;

(c) Private bargaining ("mumarassa") or direct negotiation in cases where:

(i) goods or services are available only from one person;

(ii) animals, poultry and fowls of all kinds are required for non-nutritional purposes;

(iii) the national security interest requires that procurement be handled in a non-public manner; or

(iv) urgency so requires, and where the maximum amount involved is no greater than LE4,000.

In each of the three cases specified above, the Minister of the responsible Ministry, or other cognizant official (Governor or Board Chairman) shall state publicly at the outset of the procurement process his reasons for and justification of selecting one of the exceptions to full, fair and open competition. Under no circumstances may a procurement process which begins as full, fair and open competition under the provisions of this Law be changed prior to the final award of a contract.

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

Violations of this provision will result in treble damages (consisting of all costs of bid preparation, as well as lost profits) of the bidder which would have won the contract in full, fair and open competition, payable by the Ministry in violation, as well as cancellation and invalidation of the contract to the bidder(s) who benefitted by the violation, and appropriate civil penalties as determined by the Procurement Executive.

In all cases of private bargaining, a Committee shall be appointed by the cognizant Minister, Governor or Board Chairman, including technical, financial and legal representatives, as appropriate. A delegate from the Ministry of Finance shall participate in all such Councils where the contract value exceeds LE20,000, and another from the State Council where the contract value exceeds LE100,000. All contract awards by such Committees shall be justified, and their justifications made public.

Discussion. The existing exceptions to full, fair and open competition are substantially narrowed by the proposed Article 3. Moreover, by combining the exceptions into one Article, the proposed amendment emphasizes and underlines that the alternative methods do not merit equal dignity or status with open competition, but are only fall-back options to be used in limited, narrowly-defined circumstances, and only when they can be publicly justified.

Most significantly, the practice of private negotiations ("mumarassa") is dramatically limited, thus curbing one of the worst abuses of the present procurement system. By limiting the discretion of contracting officials, the proposed Article 3 can introduce greater transparency and accountability into GOE decision making, thus enhancing fairness and openness, and increasing the trust and confidence of potential bidders. In turn, such greater trust and confidence will induce more firms to bid for GOE procurement, thus increasing competition and the efficiency of procurement, and ultimately lowering costs to the Government and taxpayers of Egypt.

The reimbursement and penalty provisions will require cognizant Ministry (or other purchasing organization) officials to recognize the costs of doing business in unfair and discriminatory ways, and holds them strictly accountable for their improper actions.

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

Article 4

Prohibition Against Favoritism, Preselection, and Bias in Bidding and Contract Awards and Administration. In all forms of procurement and contract administration, the Government of Egypt shall be committed to contracting procedures free of favoritism, preselection or bias in contract awards, or the appearance of favoritism, preselection or bias. Contracting officials shall take particular care in the preparation of technical specifications (whether design, performance or a combination thereof), delivery terms, financing, and all other appropriate elements of invitations for bids or requests for proposals or quotations, to avoid the appearance or reality of compromising the integrity of the procurement process.

Discussion. The general international perception, based on substantial anecdotal evidence which is widely circulated in the business community, is that favoritism, preselection, and bias are the principal problems in the Egyptian government procurement and contract administration process. Although we could not fully resolve all of these allegations during the course of the present study, this perception of favoritism is deeply damaging to Egypt's attractiveness to international business.

In practice, these problems manifest themselves in a number of ways -- abuse of bid and performance bonds, so-called "Dutch auction" procedures, the lack of a workable bid-protest system, fear of unjust terminations and reprisals in the awards of future contracts, and the like, the real problem is favoritism.

Allegations that the invitation/solicitation, bidding and contract award processes are too often manipulated in order to achieve a preconceived result, awarding a contract to a particular bidder despite masquerading the decision-making process as a competition, have been quite harmful to Egypt internationally. Concern about favoritism undermines business confidence in the integrity and transparency of the GOE's entire procurement system, with substantial adverse effects well beyond the results in individual procurements, because of the reduced willingness of corporations to participate in the first place, thus reducing the overall number of competitive players.

Defects in the system inhibit bidders from participating at all, especially foreign bidders new to the Egyptian market, or who might be considering entering it, but who are dissuaded by reports that the contracting process is a charade intended to cloak the decision-making process rather than open it up. This is exactly the opposite of the kind of predictable bidding environment now being discussed in the context of the World Trade Organization. The net effect is that Egypt as a whole develops -- fairly or unfairly -- a poor reputation as a place to do business, thus burdening it with a competitive disadvantage among the large emerging markets.

By addressing -- and expressly and unambiguously forbidding -- this deleterious practice or tendency, the proposed Article 4 strikes directly at the heart of the problem. Other proposed

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

amendments to Law Nine address specific manifestations of the problem, and are themselves strengthened by an explicit prohibition of the root cause, as delineated herein.

Article 5

Procurement Protest System. There is hereby established a "Procurement Protest System," available to bidders and contractors as specified herein. Any material deviation from the provisions of this Law or its implementing regulations concerning the competition for, or award of contracts under this Law shall be subject to protest through this system.

There shall be established within the Office of the Prime Minister a "Procurement Executive" who shall report directly to the Prime Minister, and who shall promptly hear and decide protests under this Law. Protesters need not be participants in a particular procurement case to protest under this Article, so long as they have credible evidence of a violation to bring to the attention of the Procurement Executive. The Procurement Executive shall have all necessary authority to carry out the policy and the provisions of this Law, including but not limited to:

(a) suspending a procurement process, barring a contract award, suspending performance under a contract already awarded, or barring any effort to annul a contract, deregister a contractor, or assess damages, fines, or any other penalties or default provisions under Articles 27-29 below, in order to adjudicate protests made hereunder;

(b) voiding a procurement process, and directing that it be recommenced;

(c) assessing damages and penalties against the offending Ministry, department, local government unit, or public and general organization, and/or officials or employees, and directing that such sums be paid immediately to the damages party(ies);

(d) suspending from all involvement in the procurement process any official or employee of the Government of Egypt found to have violated any provision of this Law or its implementing regulations, and to impose such other disciplinary measures, up to and including removal from office, as may be fair and just; and

(e) such other authority as the President may determine to vest in such Executive to ensure the full and fair implementation of this Law and its executive regulations.

The Ministry of Finance, in consultation with the Ministry of Justice, shall promulgate regulations to implement this provision after first publishing such proposed regulations, following full and timely public notification, and after allowing for appropriate public

40

comment and discussion before issuing a final decree establishing the "Procurement Protest System."

Discussion. One of the principle criticisms of Law Nine as presently drafted is the complete absence of a bid protest system. Without such a system, bidders and contractors who have faced unjust and unfair discrimination have no procedural recourse other than the unfettered discretion of GOE procurement decision makers. Since, in many instances, it was that very discretion that caused the unfair and unjust treatment in the first place, this situation is worse than no remedy at all.

To correct this deficiency, the proposed Article 5 creates the "Procurement Protest System," to provide a regularized and accountable mechanism for bidders and contractors who have been abused or mistreated to receive a fair and impartial review of their claims. The System, therefore, should provide an opportunity for interested suppliers to challenge procurement decisions, and seek an objective and independent review and decision on their challenges. In addition, this new mechanism is deliberately designed to be flexible and responsive, and to avoid the administrative rigidity and burdensomeness that accompany adjudicatory systems in the government procurement codes of many developed countries.

The proposed Article 5 also makes it clear that the protest system to be established encompasses within its jurisdiction wrongful attempts to annual contracts and deregister contractors or assess damages, fines or any other penalties under Articles 27-29 of Law Nine. For a fuller discussion of the implications of this provision, see the discussion below on Articles 27-29.

Lastly, proposed Article 5 provides for the imposition of damages and penalties against the offending Ministry, department, local government unit, or public and general organization and its officials and employees, as a means of holding them accountable for their improper actions.

Article 6

Retaliation and Whistle-Blowing. Bidders and contractors shall be completely free to exercise their rights under Article 5 and all other provisions of this Law ("whistle blowing") without fear of retaliation in present or future government procurement actions, including but not limited to, invitations for bids or requests for proposals/quotations or contract awards or administration. This protection shall also apply to Government officials and employees who bring alleged violations of this Law to the attention of their superiors or the Procurement Executive.

A finding by the Procurement Executive that an employee or official of the Government of Egypt has engaged in or abetted retaliation against a bidder/contractor shall result in that individual being removed from his or her position, and being barred from all Government procurement activity for a period to be determined by the Procurement Executive. Such individuals may also be personally subjected to fines, damages and penalties, as provided by the implementing regulations.

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

Discussion. No procurement protest system can be effective if resort to the system simply penalizes the protester or whistle-blower in subsequent procurement actions. One of the principal complaints about the existing Law Nine, however, in addition to the absence of a regularized, transparent bid-protest system, was the fear of retaliation for raising objections to unfair treatment in contract award or administration.

Thus, in order to address that concern directly, and to signal to the Government's procurement personnel that this new provision needs to be taken seriously, disciplinary penalties directly against offending officials and employees are also required when the provision is found to be violated. Such penalties must be clearly articulated and published, together with a specified means of adjudication and appeal, to ensure that the Procurement Executive is accountable to the same standards of fairness and due process a the position itself is intended to introduce and foster in the Egyptian procurement system.

Article 7

Discussion. Existing Article 7 to be repealed, and the section to be intentionally left blank until all changes to Law Nine are completed and appropriate renumbering can take place.

Article 8
Article 9

Discussion. No changes recommended (although these and all other appropriate Articles should be renumbered to conform to other changes in Law Nine).

Article 10

Article 10 should be amended to read as follows:

Specifications. (a) Contracting shall be on the basis of exact and detailed technical specifications, which are defined as the description of the technical requirements for a material, product or service that includes the criteria for determining whether these requirements are met. In all cases, specifications, whether design, performance, or any combination thereof, and criteria for judging the acceptability of bids shall be stated in as transparent and detailed a fashion as possible, and consistently with internationally recognized norms and expectations for the materials, products or services in question.

(b) Such specifications laying down the characteristics of the materials, products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by the Ministries, departments, local government units or public and general organizations, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to competition, or favoritism, in procurement.

42

(c) Technical specifications shall, where appropriate: (i) be in terms of performance rather than design or descriptive characteristics; and (ii) be based on international standards, where such exist, or on Egyptian national technical standards which have been published or otherwise made fully publicly available.

(d) There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, product or supplier, unless there is otherwise no sufficiently precise or intelligible way of describing the procurement requirements, and provided that words such as "or equivalent" are included in the procurement documentation.

(e) Where appropriate, model specimens may be used to supplement specifications, and bidders may be required to submit models with their proposals.

Discussion. As currently written, Article 10 is generally satisfactory. The proposed amendments are intended primarily to strengthen it further, and to enhance the transparency of specifications, both for purposes of the bidding process and in case later disputes arise during contract administration. So doing can reduce administrative arbitrariness and discretion, and make the procurement and contract administration process more open and accountable.

Article 11
Article 12
Article 13
Article 14
Article 15

Discussion. No changes recommended (although renumbering may be appropriate, as noted above).

43

Article 16

Discussion. No changes recommended. Many observers read this Article, as currently written, to prohibit the practice of "Dutch auctions." Although the section has not been totally effective, as evidenced by the continuing reappearance of the practice of Dutch auctions in certain Ministries and other purchasing organizations, we do not recommend amending or replacing this section. We believe that the substantial modifications proposed in earlier sections should be sufficient. Moreover, the limited discretion afforded to the Government in this section does not appear unwarranted.

Article 17

Discussion. No change recommended. Article 17's existing provisions for the cancellation of requests for proposals/invitations for bids, as written, do not seem exceptional, and they have not, in the course of the present research, produced substantial criticism or comment.

Nonetheless, we are concerned about the prospects for abuse of discretion in this provision, especially in light of the other changes proposed herein, which substantially eliminate many other outlets for arbitrary and capricious behavior on the part of government contracting officials. We therefore urge the Government of Egypt and those who seek to do business with it, to monitor carefully the implementation of Article 17 in the future, with a view to amending Law Nine or such other steps which may be necessary to ensure that the provision is implemented in complete good faith.

Article 18

This Article should be repealed.

Discussion. As with Article 17, our research has not uncovered systematic and widespread abuse of this provision to discriminate against non-Egyptian contractors to date. Nonetheless, here we believe that the Government of Egypt should take the lead among emerging markets to distinguish itself. While it is unlikely that many contract awards will be affected because of the inherent competitive advantage that many local suppliers will retain, this proposed change would send a strong signal internationally. Moreover, it would help eliminate a problem before it develops, rather than let it fester and require another effort to reform Law Nine in the very near future.

We are confident that Egypt will become an increasingly attractive market, and that, accordingly, it will attract more and more foreign bidders eager to supply the Government's procurement needs. It follows, therefore, that it will only be a relatively short period before the competitive advantage afforded to Egyptian contractors by this fifteen-percent preference for Egyptian contractors begins to make the Egyptian market less attractive. Moreover, we believe that the protectionist effects of Article 18 on Egyptian firms will unnecessarily shield them from the realities and discipline of international competition, and may well result in retaliatory

measures being taken against them by other governments. In light of all of these circumstances, it seems appropriate to act now and repeal this provision.

Article 19
Article 20
Article 21
Article 22
Article 23
Article 24

Articles 19-24 of Law Nine, inclusive, should be repealed. [Articles 68-72 of Decree 157, inclusive, should also be repealed.]

Discussion. These Law Nine articles, dealing with bid and performance bonds, have been subject to abuse and manipulation, as described above. Although apparently designed to ensure that bidders and contractors are financially stable, and to provide a reserve against nonperformance, they now appear more liable to be excuses for arbitrariness and discrimination by government authorities.

The competitive bidding process itself now provides ample opportunity for GOE authorities to satisfy themselves that bidders and potential contractors are sufficiently liquid and/or competent to guarantee performance. Moreover, the costs imposed on contractors by requiring bid and/or performance bonds, and the risks, delays, uncertainties and extra costs created by extending or confiscating the bonds arbitrarily, all ultimately raise the cost of procurement to the Government of Egypt. The bond system is thus counterproductive, costly, and a deterrent to full and fair competition.

In the United States, for example, bid and performance bonds have largely disappeared in Federal contracting. Only in construction contracts does the practice survive, and then only because of the Miller Act, an antiquated, Depression-era statute. The most progressive and transparent step, the one that most effectively eliminates the possibility for arbitrariness and discrimination, and one that is increasingly consistent with international procurement norms, is simply to abolish bid and performance bonds entirely.

Article 25
Article 26

Conforming changes should be made to these Articles to make them consistent with the repeal of Articles 19-24.

Article 27
Article 28
Article 29

45

Discussion. Articles 27-29, as presently drafted, describe the circumstance under which the Government of Egypt can annul a contract, remove the contractor from the approved register of contractors, assess fines or damages, and set forth the procedures to be followed by the Government in such cases.

While these provisions, as written, are themselves relatively unexceptional, and while not the subject of extensive reports of abuses uncovered during the present research, they nonetheless symbolize the unbalanced, one-sided nature of Law Nine in its present form. Accordingly, given the major changes suggested in other provisions of the Law, it would be imprudent to ignore the potential for abuse inherent in these Articles, given the broad and sweeping authority they confer upon Government officials.

As noted previously, in the proposed changes to Articles 5 and 6, above, transparency and regularity in contract administration are important elements in establishing the confidence of the contractor community in the procurement process of the Government of Egypt. While the Government itself has a legitimate interest in terminating contracts in cases of breach, fraud or bribery, the contractor also has a legitimate interest in being treated in a fair and non-discriminatory fashion. Contractors should not have to fear unjust cancellation of contracts once awarded any more than they should fear bias or discrimination in the contract award process.

By opening up a route of protest to the newly-created Procurement Executive, Article 5 should, provide a necessary protection against mistreatment in the contract administration process. Thus, at least for present purposes, we do not believe that amendments to Articles 27-29 are necessary.

Minor modifications are, however, required to Articles 27-29 in order to conform them to the repeal of Articles 19-24, relating to bid and performance bonds, proposed above.

Article 30
Article 31
Article 32
Article 33
Article 34
Article 35

Discussion. No changes recommended to any of the Articles of Part II of Law Nine (although renumbering may be appropriate, as noted above).

Article 36

Article 36 should be repealed and replaced by the following provision:

46

Agents. No bidder or contractor, whether Egyptian or foreign, shall be subject to any requirements to have or retain agents for purposes of bidding, receiving or implementing contracts with the Government of Egypt.

Article 59 of Decree 157 should be repealed to conform to the above change.

Discussion. As written, Article 36 is confused and ambiguous, and therefore subject to abuse and arbitrariness. It should be clarified to ensure that there are no artificial barriers to competition, especially for potential foreign bidders. The existence of requirements for local agents, even minimal ones, raises concerns among bidders about potential favoritism and conflicts of interest, and unnecessarily raises the costs of contracting both to the Government of Egypt and its taxpayers. If local agents are useful and helpful, bidders will make such decisions on their own, subject to the discipline of the market and the realities of the competitive market. There is no need for the Government to intervene in this process, other than to ensure that it remains transparent and accountable.

Article 37

Discussion. No changes recommended (although renumbering may be appropriate, as noted above).

Article 38

Article 38 should be repealed and replaced by the following provision:

Conflicts of Interest. (a) General. Government business shall be conducted in a manner above reproach and, except as authorized herein, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule shall be to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. The official conduct of government personnel must be such that they would have no reluctance to make a full public disclosure of their actions.

(b) Gratuities. No Government employee may ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly (including through family members), any money, bribe, gratuity, gift, favor, entertainment, loan, benefit under the guise of official duties, or anything of monetary value from anyone who (i) has or is seeking to obtain Government business with the employee's agency; (ii) conducts activities that are regulated by the employee's agency; or (iii) has interests that may be substantially affected by the performance or non-performance of the employee's official duties.

(c) Employment. No Government employee may participate personally and substantially in any matter that would affect the financial interests of any

person or firm with whom the employee is negotiating for employment. No Government employee, after leaving Government service, may represent a contractor before the Government in relation to any contract on which the former employee worked while employed by the Government.

(d) Proprietary information. No Government employee shall disclose, during or after his or her Government employment, any proprietary or source selection information regarding any procurement directly or indirectly to any person or firm other than a person or firm authorized by the Minister responsible for such employee to receive such information.

(e) Contractor responsibility. No bidder or contractor shall offer or solicit any thing of value, as enumerated hereinabove, to any Government employee.

Discussion. Widespread allegations of the abuse of administrative discretion, favoritism in contract award and administration, and fear of retaliation all carry with them the suspicion that contracting decisions are being made under the influence of conflicts of interest. This pervasive feeling creates an attitude of cynicism on the part of potential bidders, and deters them from even entering the procurement process. By thus reducing competition, rampant conflicts of interest, or the appearance of conflicts of interest, increase the cost of Government procurement and inhibit the entire range of economic reforms.

Greater transparency in government procurement is a growing worldwide trend, and one in which the Government of Egypt should take a leading role, as an example to other emerging markets and developing countries, as befits its economic size and status.

As noted earlier, James D. Wolfensohn, President of the World Bank, emphasized the importance of national efforts when he said in his October 1, 1996, speech to the Annual Meeting of the World Bank Group that:

> "Corruption is a problem that all countries have to confront. Solutions, however, can only be home-grown. National leaders need to take a stand. Civil society plays a key role as well."

At about the same time (September 29, 1996), the Interim Committee of the Board of Governors of the International Monetary Fund issued a statement entitled "Declaration on Partnership for Sustainable Global Growth." There, the IMF emphasized the goal of:

> "[p]romoting good governance in all its aspects, including by ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption, as essential elements of a framework within which economies can prosper."

These pronouncements are clear indications of an international consensus on the importance of transparency and accountability that can have a real impact on government procurement.

The proposed amendment to Article 38 is a modest step in that direction, but one that we believe is vital to enhance confidence in the transparency and accountability of the Government's procurement process. Moreover, just as the Government and its employees must be subject to the conflict of interest provisions, so, too, contractors and bidders should also be subject to the prohibitions and restrictions described above, in order to ensure that the competitive process is as free as possible from the taint of conflicts of interest.

Article 39
Article 40

Discussion. No changes recommended (although renumbering may be appropriate, as noted above).

49

APPENDICES

A. **Methodology**
B. **Egypt's Law Nine**
C. **1996 US Commercial Guide for Egypt**
D. **GATT Agreement on Government Procurement**
E. **Austrian Annex to GPA**
F. **US Government Papers on the Interim Agreement**
G. **UNCITRAL Model Law on Procurement of Goods and Construction**
H. **World Bank Procurement Guidelines**
I. **US Defense Security Assistance Agency's Guidelines for Foreign Military Financing of Direct Commercial Contracts.**
J. **Poland's Law on Public Procurement**
K. **Brazil's Government Procurement Law**

Use or disclosure of data contained on this page is subject to the restrictions on the first page of this document. IBTCI

Appendix A
METHODOLOGY

APPENDIX A

Methodology

Immediately on commencement of the contract, IBTCI organized its team of specialists both in the United States and Egypt to conduct an analysis of Law Nine in the context of sound procurement principles. In the first stage of research, an exhaustive search of the Western legal literature was conducted. While no articles were found addressing Law Nine specifically, a variety of discussions of procurement issues provided a foundation for evaluation and comparison of Law Nine. Moreover, extensive research was undertaken in United States government procurement law, both regulatory and decisional for helpful analogies and experiences.

In addition to the literature search, actual, current business information was sought from firms which have had experience dealing with Egyptian government procurement. In particular, members of the Presidents' Council were contacted and surveyed. Several discussions were held with a number of members. In the course of the investigation of Law Nine and other Egyptian procurement experiences, other firms and individuals came to the attention of IBTCI researchers. In addition, United States Government and state officials familiar with Egyptian procurement were also surveyed. These included officials of the Departments of State, Treasury, Defense and Commerce, the United States Trade Representative, the Overseas Private Investment Corporation and the California Export Finance Office. The comments of these collective individuals and groups led to the characterization of the primary problems associated with Law Nine.

These problems were then considered in light of model procurement codes including UNCITRAL's, the GATT's Government Procurement Agreement, the World Trade Organization's proposed Interim Agreement, World Bank Procurement Guidelines, and the Defense Security Assistance Agency Guidelines that seek to achieve sound procurement principles. From these sources and the experience of Poland, Brazil and other countries, IBTCI produced the analysis and recommendations presented to the Presidents' Council.

 Use or disclosure of the data contained on this page is subject to the restrictions on the first page of this document.

Appendix B
EGYPT'S LAW NINE

LAW NO. 9/1983
ORGANIZATION OF ADJUDICATION AND BIDDINGS WITH ITS
EXECUTIVE REGULATIONS D. NO. 157/1983 AS AMENDED BY
D. NO. 13/1984, D. NO 65/1984, D. NO.201/84
234/84,19/1985,189/1986
127/1987 , 50, 241/1988

INDEX

	PAGE
- LAW NO. 9/1983 PROMULGATING THE LAW ON ORGANIZATION OF ADJUDICATIONS AND BIDDINGS.....	1
- PART ONE -PURCHASE OF MOVABLES AND OFFERING SERVICES AND CONTRACTING PROCEDURES.....	3
- PART TWO - SLAE OF MOVABLES AND RENTING THE BUFFETS ETC.....	15
- PART THREE - GENERAL PROVISIONS.....	16
- D.NO. 157/1983 ISSUING THE EXECUTIVE REGULATION....	19
- PART ONE - GENERAL PROVISIONS.....	20
- PART TWO - CONTRACTING PROCEDURES - CHAPTER ONE - PUBLIC ADJUDICATION	26
- CHAPTER TWO - THE LIMITED ADJUDICATION.....	40
- CHAPTER THREE - THE LOCAL ADJUDICATION.....	41
- CHAPTER FOUR - PRACTICE METHOD, TRANSACTION.....	43
- CHAPTER FIVE - DIRECT AGREEMENT DEAL.....	45
- PART THREE - GENERAL TERMS - CHAPTER ONE - GENERAL CONDITIONS.....	46
- CHAPTER TWO - ON THE BOND DEPOSIT.....	58
- PART FOUR - CONTRACT EXECUTION MEASURES - CHAPTER ONE GENERAL CONDITIONS.....	62
- CHAPTER TWO - ON TERMS OF WORKS CONTRACTS EXECUTION.	65
- CHAPTER THREE - SUPPLY CONTRACTS EXECUTION TERMS....	75
- CHAPTER FOUR - TAKING DELIVERY OF ARTICLES.....	80
- PART FIVE - MOBILES SALE RENTING BUFFETS. ETC.....	
- CHAPTER ONE - GENERAL PROVISIONS.....	87
- CHAPTER TWO - CONTRACTING STEPS AND MEASURES.....	91

****

LAW NO. 9 FOR 1983
PROMULGATING THE LAW ON ORGANIZATION OF ADJUDICATIONS AND BIDDINGS.

IN THE NAME OF THE PEOPLE

THE PRESIDENT OF THE REPUBLIC

The People's Assembly decreed the following law and it is promulgated by us:

ARTICLE 1

The provisions of the annexed law shall apply to all ministries, departments, local government units, and public and general organisations, where no special text is provided in the laws and decrees concerning their establishment.

ARTICLE 2

The Executive Statutes shall determine the meaning intended by the expression "appropriate authority" , in applying the provisions of the present law. Pending the issuance of such statutes, the Minister, the Governor, or the Board chairman, each within the limits of his powers, shall define the meaning intended by the expression " appropriate authority".

ARTICLE 3

Law No. 236 for 1954 concerning the organisation of adjudications and biddings , and its modifying laws, shall be abolished. Shall also be abolished all provisions contradicting the provisions of the present law.

ARTICLE 4

The Minister of Finance, within three months from the date the present law comes in force, shall promulgate the relevant executive statutes. Until such statute is issued, regulations and decrees in force at present shall continue to apply where they do not contradict the provisions of the present law

ARTICLE 5

The present law shall be published in the official journal, and come in force thirty days following its publication.

To receive the seal of the State and be enforced as one of the State laws.

Promulgated at the Presidency of the Republic on 20 February 1983

HOSNY MOBARAK

BEST AVAILABLE COPY

LAW ORGANISING ADJUDICATIONS AND BIDDINGS

PART - I

PURCHASE OF MOVABLES AND OFFERING SERVICES AND CONTRACTING PROCEDURES.

ARTICLE 1

Contracting for the purchase of movables, offering services, and concluding works and transport contracts shall be through general adjudications to be announced for.

Contracting via one of the following methods may however take place, in exception of the foregoing and through a justified decision from the appropriate authority :

(a) Limited adjudication

(b) Local adjudication

(c) Private bargaining

(d) Direct agreement

Within the limits set and according to the conditions and situations indicated in the present law and decrees issued to implement it.

ARTICLE 2 :

General adjudications shall be subject to principles on publicity, equality and freedom of competition. They are either internal, as announced in the Arab Republic of Egypt, or external to be announced in Egypt and abroad.

ARTICLE 3 :

Contracting via limited adjudications shall be for the cases which, according to their nature, require that participation be restricted to specific suppliers or contractors, whether inside Egypt, or abroad, provided they should have shown efficiency in technical and financial aspects, and should fulfil good repu-

BEST AVAILABLE COPY

tation requirements.

ARTICLE 4

Contracting via local adjudications shall be within no more than LE40,000 (Forty thousand pounds) worth. Participation in these adjudications shall be restricted to local suppliers and contractors with whom the admistrative department concerned decides to deal.

ARTICLE 5

Contracting via private bargaining (MUMARASSA) shall be in the following cases :

1- Articles the manufacture or import of which is monopolised
2- Items which are available only with one particular person
3- Items which cannot be defined with precise specifications
4- Consultative or technical works, which by their nature, require to be carried out by means of technicians, specialists, or specific experts.
5- Animals, poultry and fowls of all kinds required for other than nourishment purposes.
6- Supplies, and works and transport contracting, and offering services, which are qualified as urgent, or the nature of which or the purpose for which they are desired to be obtained, requires that their selection and purchase be from their place of production, or which are required for public interest to be effected in a secret way, or for which no tenders have been submitted via adjudications, or for which tenders have been submitted with prices higher than market prices but the demanding department is asking for them in an urgent manner so they may not be put up again for purchase via adjudications.

ARTICLE 6

Procedures of private bargaining shall be handed by a Committee to be formed by a decision of the appropriate authority, and to comprise

technical, financial, and legal elements, according to the significance and nature of the contract. A delegate from the Ministry of Finance shall participate in its membership if the contract value exceeds LE20,000, and another from the State Council if the value is in excess of LE100,000.

In case of a private bargaining being conducted abroad, the formation of the Relevant Committee shall be made by a decision of the appropriate authority, with the membership of a delegate from the Ministry of Finance if the value exceeds LE100,000, and a member from the State Council, if the value exceeds LE200,000.-

The convention of the Private Bargaining Committee shall not be valid except with the presence of a delegate from the Ministry of Finance, or a delegate from the Ministry of Finance together with a member from the State Council, according to each case, afore-Said.

The Appropriate authority may authorise the said Committee to conclude the contract directly if it finds that to be justified.

In all cases the decision of the Private Bargain Committee shall be justified.

Provisions governing adjudications shall apply to the private bargain where no other provision exists in respect thereof in the present law.

ARTICLE 7 :

In urgent cases which cannot bear tender procedures, and by virtue of licence from the appropriate authority, contracting may take place via direct agreement within the limits of LE2,000 at the most (two thousand pounds), for ordinary purchases, services, and transport contracts and LE4,000 (four thousand pounds) for contracting works. Contracts may also be concluded in the same way for the purchase of monopolised items from companies abroad having no agents in Egypt within the limits of LE8,00 (eight thousand pounds) maximum.

ARTICLE 8

The Ministry of Defense , in case of extreme necessity, may enter into contract via local adjudications, or direct agreement, or private bargaining , according to the provisions of law no. 204 for 1957 concerning tax and customs duty exemption for armament contracts, and the financial rules .

The Minister of Supply, in similar circumstances, may purchase or transport the supply materials necessary for the country, via local tenders , or direct agreement, after getting the approval of the Prime Minister for each case, and according to the conditions set thereby, without derogation to the rules applicable with respect to the General Authority for Supply Commodities.

ARTICLE 9

Concluding the contracts shall be within the limits of actual requirements for the specified activities. Contracts for periodical supplies and services may be concluded for a period exceeding that of the financial year, provided this does not result in more obligations in any of the following financial years, over what is specified during the year of the contract.

Contracting with regard to investment projects comprised in the plan shall be within the limits of the approved total costs. Payment therefrom shall be within the limits of the approved financial appropriations.

ARTICLE 10 :

Contracting shall be on the basis of exact and detailed technical specifications. Specimens may also be required to be supplied and submitted together with the tenders. Contracting may also be effected on the basis of model specimens . Concerning work contracts, the

conclusion of such contracts shall be effected on the ground of technical drawings to be prepared for the purpose.

ARTICLE 11 :

Contracting for the purchase of items imported from abroad shall be according to the provisions of the present law, and its executive statutes, and with due regard to the decrees organising import activities.

ARTICLE 12 :

Decision concerning all kinds of adjudications, shall be taken through two committees, one for opening the envelopes, and another to take decision in the adjudication.

However, concerning adjudications of less than LE5000 (five thousand pounds), the opening of envelopes and taking the decision shall be via one committee alone.

ARTICLE 13 :

A decision shall be issued by the competent authority on the formation of the envelopes opening Committees and the Decision Committees. In their formation consideration shall be given to the importance and the value of the contract. Such committees shall comprise technical, financial and legal elements.

The Ministry of Finance shall be represented by its delegate, on the Decision Committee if the estimated value of the adjudication exceeds LE 50,000 (fifty thousand pounds). A member from the Legal Opinion Department Concerned in the state council shall also participate in these committees if the value exceeds three hundred thousand pounds .

The meeting of the Decision Committee shall not be valid except in the presence of a delegate from the Ministry of Finance, or a delegate from the Ministry of Finance and a member from the Competent Legal Opinion Department of the state council according to the cases, there-of.

ARTICLE 14 :

The Decision Committee may assign to sub-committees to be formed among its members, the study of the financial and technical aspects in the tenders submitted, and the extent of their conformity to the conditions announced. Such committees may also be assigned to ascertain the fulfilment of financial adequacy, technical capability, and good reputation requirements, with the tenderers. The Decision Committee may include in the membership of these sub committees whoever it decides to resort to their opinion among people of expertise

The sub committees shall submit a report comprising the result of their search and recommendations , to the Decision Committee. The Decision Committee may not accept these recommendations by a justified decision issued by it.

ARTICLE 15 :

Each administrative department shall keep registers in which names of suppliers and contractors shall be inscribed, whether they are natural or moral persons. Shall also be recorded all adequate data about them. Each of these departments shall also hold a register in which shall be inscribed the names of those who are prevented from dealing with it, whether by virtue of a legal provision, or by administrative decisions published by the Ministry of Finance in all cases prescribed in article 27 of the present law. Dealing shall be banned with those inserted in this register .

ARTICLE 16

After opening the envelopes, no negotiations may take place with any of the tenderers to modify his tender. However, the Decision Committee may negotiate with the tenderer of the lowest price offer to which a reservation, or reservations are attached, to relinquish his reservations, or some of them, with a view to rendering his offer as far as possible Conforming to the tender conditions the committee may also negotiate with the tenderer of the lowest offer which is not coupled with reservations, to reduce his price to the market prices level.

Negotiations in the two aforementioned cases shall be carried out by virtue of a decision from the competent authority.

ARTICLE 17

An adjudication shall be cancelled, after publishing it or calling for tenders thereto and before a decision is taken in its respect, by a decision from the competent authority, if it is dispensed with, totally, or if this is so required by the public interest. An adjudication may also be aboslished in the following cases :

a- If only one tender is submitted, or if after the eliminated tenders only one tender remains valid.

b- If all or most of the tenders are coupled with reservations

c- If the value of the lowest offer exceeds the market value.

Cancelling the adjudication in these cases shall take place by a decision of the competent authority, upon a recommendation from the Decision Committee. In all cases cancelling an adjudication shall take place by virtue of a justified decision .

ARTICLE 18:

The Order for awarding the adjudication, shall be accorded to the best tenderer's conditions and least prices . A tender submitted,concerning supplies of local production, or works or services rendered by Egyptian quarters shall be considered as of the least price if the increase in it does not exceed 15% of the value of the least foreign tender price. The provisions of this clause shall not be ignored except in extreme cases called for,by the general interest and with the approval of the Minister of Finance

If one or more tenders are eliminated from those submitted in the adjudication, the elimination decision shall be justified.

ARTICLE 19

A provisional deposit not less than 1 per cent of the total value of the tender in the works contracts and not less than 2 per cent for other tenders shall be submitted with each tender.

ARTICLE 20

A successful tenderer shall, within a period not exceeding ten days from the date which follows that of notifying him with a registered letter with acknowledgment of receipt, of the acceptance of his tender, remit an amount completing the provisional deposit to 5 per cent for works contracts he is to implement and 10 per cent of the value of other contracts. Concerning contracts which are concluded with a tenderer from abroad, the said deposit shall be remitted within a period not exceeding 20 days. The period specified for remitting the final deposit may be extended to not more than 10 days with the approval of the competent authority. The Final deposit may be held to guarantee the implementation of the contract.

ARTICLE 21

ARTICLE 21

General Organisations and public sector companies and public utility societies and cooperative societies notarial according to the law shall be exempted from the provisional and final deposits, with regard to offers coming within their activities and provided they implement the operation by themselves. In case of necessity, the competent authority may, with the approval of the Decision Committee, exempt the monopolising companies from submitting the provisional and final deposits if they so stipulate in their tenders and they do not require payment in advance. The exemption decision shall be justified,

ARTICLE 22

With the exception of works contracts, the final deposit may be reduced by a justified decision from the competent authority, within the limits estimated thereby, and provided the reduction shall not be more than 50 % of the deposit amount, on the proviso that the announcement for the adjudication should comprise the value of the deposit in such case.

The final deposit shall not be collected if the successful tenderer supplies all items he is charged to deliver, and such items have been finally accepted by the administrative department contracting therefore within the period specified for the payment of the final deposit.

ARTICLE 23

The Executive statutes of the present law shall indicate the mode of payment of the provisional and final deposits, and the procedures to be followed in this respect .

ARTICLE 24

If the successful tenderer does not pay the final deposit

65

required to be submitted within the period specified there - of, the contracting department, by virtue of a registered letter with acknowledgment of receipt, and without need for taking any other procedures or having recourse to the court, may cancel the contract and confiscate the provisional deposit, or it may implement the whole or part of the work on the account of the tenderer, either by itself, or by another tenderer that follows in order, or through another adjudication, or private bargaining, or direct contract.

It shall have the right to deduct from any amounts owing or that accrue to him for any reason whatsoever with the contracting department, or with any other administrative department, all the losses it sustains, without derogation to its right to sue him at court for whatever rights it will not have had fulfilled by him administratively.

ARTICLE 25 :

With the approval of the competent authority, advance payments may be concluded on account of the operation, against an approved letter of guarantee, according to the conditions and percentages and limits, and terms set by the executive statutes.

ARTICLE 26:

If the contracting part delays the implementation of the contract beyond the date specified for him, the competent authority may, in case it is so called for, by the general interest, grant the contracting party an additional period for completion of the implementation provided a fine shall be inflicted on him for the period of delay, according to the percentages and the bases and the limits specified by the executive statutes and prescribed in the contract, provided

the total of such fines shall not exceed 15 per cent in respect of work contracts and 4 per cent for supply contracts .

The fine shall be inflicted upon the occurrence of the delay without requiring to warn him or draw his attention, or taking any administrative or judiciary procedures.

Inflicting the fine shall not derogate the right of the administrative department to claim from the contracting party a complete compensation for the lossess it sustains as a result of his delay in the fulfilment of his commitments .

ARTICLE 27

The contract shall be annulled and the final deposit shall be confiscated in the following cases:

1- If the contracting party resort to fraud or manipulation in his dealing with the contracting department .

2- If it is established that the contracting party embarked either personally or through a third party, directly or indirectly, on bribing an official of the department governed by the provisions of the present law.

3- If the contracting party becomes bankrupt or insolvent.

The name of the contracting party shall be discarded completely, in the two cases (1) and (2), from the register of contractors or suppliers. The Ministry of Finance shall then be notified thereof to publish the decision taken to rule him out, in the circulars of the Administration. The annulment of the Contract and confiscation of the deposit shall not derogate the right of the administrative department to claim the necessary compensations for the damages from the contracting party .

At the request of the party concerned, the supplier, or the contractor, whose name is discarded, may be re-inscribed in the register of suppliers or contractors, if the reason which caused his name to be discarded, no longer exists. His re-inscription in the register shall take place with the issue of a final verdict announcing the innocence of the contracting party from the cause attributed to him, or with the issue of a decision from the Public Prosecution to the effect that the case to be brought against him is not justified, or that it should be shelved administratively. In this case the decision for his re-inscription shall be forwarded to the Ministry of Finance to publish it for all departments.

ARTICLE 28 :

If the contractor violates any of the contract terms and conditions, the contracting party shall have the right to annul the contract, or to have it implemented on his account.

Annulment or implementation of the contract on the account of the contracting party shall be with a decision from the competent authority to be announced to the contracting party by letter - registered with acknowledgement of receipt - at his address as indicated in the contract.

ARTICLE 29 :

The contracting party, in case the contract is annulled, or implemented on account of the contractor, shall have the right to confiscate the final deposit and collect all fines owing to it out of the entitlements accruing to the contractor with it, or with any other administrative department, without need to take any juridical procedures.

BEST AVAILABLE COPY

PART - II

SALE OF MOVABLES AND RENTING THE BUFFETS ETC

ARTICLE 30:

Selling or renting the buffets and others shall be through a public or local auction, or sealed envelopes. In case of necessity selling or renting the buffets etc. may take place without auction, if the value does not exceed LE 1,000.- (one thousand pounds), according to the rules and procedures indicated in the executive statutes.

Selling or renting by private bargaining may take place as an exception and with a justified decision from the competent Authority, in the following cases :

1- Items feared to sustain damage through long storage
2- Items for which no offers are submitted in auctions, or those the price of which does not rise up to the basic price.
3- Cases of emergency which could not bear auction procedures

ARTICLE 31 :

Sale or renting procedures shall be undertaken by committees to be formed in the manner prescribed for envelopes opening and decision committees concerned with general or local adjudications. Selling and renting through private bargain procedures shall be subject to same rules and procedures as those organising the purchase through private bargain, provided this shall not contradict with the nature of sale or renting.

The Competent Authority may delegate the selling or renting committee, assigned the general public and local auction procedures, to effect the contracts directly.

ARTICLE 32 : The pricing of items required to be sold shall be

done by a Committee to be formed by a decision of the Competent Authority comprising necessary specific experts and specialisations. The basic price shall be determined according to criterions and regulations prescribed in the executive statutes. The basic price shall be confidential.

ARTICLE 33 :

Adjudging in the auction shall be in favor of the highest price bidder who fulfils the conditions and requirements provided his price shall not be less than the basic price.

ARTICLE 34: An auction shall be cancelled, after announcing and callin for it, and before a decision is taken in the auction, if the sale or renting is finally dispensed with, or if it is so necessitated by the public interest. Biddings may also be cancelled in the following two cases :

1- If in the auction only one offer is submitted fulfilling the requirements of bidding.

2- If the bidding result does not reach the basic price .

In all cases the decision to cancel the bidding shall be justified and issued by the competent authority. The executive statutes shall regulate the procedures to be followed in case of cancelling the bidding.

PART - III

GENERAL PROVISIONS

ARTICLE 35

No contract the amount of which exceeds LE 5,000 (five thousand pounds) may be concluded without consulting the Competent Department at the State Council, unless the contract is concluded on the basis of conditions on which the opinion of the said department is gotten

or conditions on the basis of which a similar contract was previously concluded, if these conditions in both cases have not sustained any change

ARTICLE 36

Intermediaries are banned in contracting with regard to items that are not sold ordinarily except to departments subject to the provisions of the present law. This shall not apply to those contracting with such firms , if their head office is abroad, with approved agent in Egypt.

ARTICLE 37: Departments subject to the provisions of the present law, may contract among themselves via direct agreement. In case of necessity, any of these quarters may deputise for one another , in practising the contract procedures concerning a specific task, according to the rules applicable at the department asking for such contract .

Ceding the contracts shall be banned to other than these departments with regard to dealings concluded among themselves.

ARTICLE 38 : Workers of the administrative organism of the State and Local Government Units, and Public Organisations shall be prohibited to submit tenders or offers to these departments . No items may be purchased from them, nor can they be charged with the implementation of works. This shall not be applicable to the purchase of books compiled by them or to assigning the implementation of technical works to them, such as drawing and photography, and the like, or the purchase of these works of art from them, if they are connected with the department work. However, purchasing or assigning the job shall take place within the limits and according to the rules and procedures set by the executive statutes.

Workers of these departments shall not be allowed to enter in the biddings or private bargainings of all kinds, unless the items purchased are for their personal use, and are put up for sale through other departments than those where they work, and which are not subject to the supervision of their own departments.

ARTICLE 39

Partitioning the purchases or works or services may not be resorted to for the purpose of avoiding the procedures or regulations or guarantees or requirements prescribed in the provisions of the present law.

ARTICLE 40

In the contract terms a provision shall be set considering the regulations of the executive statutes of the present law an integral part of these terms to which the contract is subjected.

MINISTRY OF FINANCE
DECREE NO. 157/1983 ISSUING THE EXECUTIVE REGULATION
FOR LAW NO. 9/1983 ORGANISING AUCTIONS & ADJUDICATIONS

OFFICIAL TOURNEL NO. 162 DATED 17.7.1983 .

The Minister of Finance;

Having considered law No 9 for 1983 promulgating law for organising adjudications and auctions, and law No 61/1963 promulgating the law for general organisations;

And law no 47/1978 promulgating the law for the state civil servants scale;

And law No 43/1979 promulgating the law for local governments,

And law No 127/81 promulgating the law for governmental accountancy;

And decree No 2126/71 by the president of the Republic establishing the General Organisation for Government services;

And decree No 557/77 Re-organising the Ministry of Finance,

And decree No 707/1979 by the Prime minister issuing the executive regulation for local governments system law.

And decree No 181/82 by the Minister of Finance issuing the executive regulation for the Governmental accountancy law;

And upon views adopted by the state Council,

Decreed

(Article First)

The provisions of the enclosed regulation shall apply to all Ministries, departments and local government units and shall also apply to general organisations where their own regulations shall not expressly include a stipulation organising the adjudications and auctions prepared by such organisations or authorities.

(Article Second)

Decree No 542/57 promulgating the regulation for adjudications and auctions and decree No 15/1958 unifying purchasing operations along with decrees and decisions amending them, shall be

cancelled, and so shall any provision standing contrary to those of either this decree or the attached regulation.

(THIRD ARTICLE)

This decree shall be published in Alwakaei Al misriya Journal and enforced as of the date of its publication.

20th Shaaban 1403 - 2nd June, 1983.

DR. MAHMOUD SALAH EDDIN HAMED.

The Phrase "The Department Head" contained in the articles of the executive regulations for Law No. 9 of 1983 regulating tenders and bids, issued as per decree No.157 of 1983 referred to, shall substituted by the phrase "The General Manager".

The phrase "The Departments", provided for, in Article 10 of the said decree, shall be substituted by the phrase "The General Administrations".(1)

THE EXECUTIVE REGULATION FOR THE LAW ORGANISING ADJUDICATIONS AND AUCTIONS.

Part One

GENERAL PROVISIONS

Article (1):Contracting shall be within the actual needs required for the progress of work or production on basis of factual and objective studies conducted by the body concerned, while considering storage levels, consumption rates and dispensing decisions. No contracting shall be concluded for items where similar of same are available in stock or in case of substitutes to achieve the purpose.

To decide the factual needs, the head of the administrative body, shall have to approve same or whoever he shall delegate to the purpose of approving such needs.

"Department Heads occupying the high and distinguished degree shall have the functions authorized to the Manager of the Central Department in the attached regulations". (2)

Article (2): On contracting, things shall be divided into homogeneous groups and in order to realise the principle of equal opportunities no indication shall be made of type, description or the number stated in the suppliers lists. No certain mark or specification applied to special or characterised models shall be made.

---

(1) Added by D. No. 201 / 1984 - Egyptian Wakaeh No. 227.

(2) Added by D. No. 65 - Egyptian Wakaeh No. 109 dated May 9, 1984.

Article (3) Contracting shall be concluded on basis of technical, accurate and detailed specifications prepared by a technical Committee of experience in the items required. The Egyptian recorded measurement and government supply specifications - and such other specifications as adopted or approved by concerned technical bodies shall be observed.

The technical Committee, shall, on setting the specifications, observe that these shall be suitable for the nature of local production as far as possible.

In cases where conclusion of contracts shall require supply to be on basis of samples, stipulations as to weight, measurement or size shall be included while in cases the articles shall be required to be supplied in containers, the type, the capacity and specifications of such containers shall have to be stated. Technical drawings required shall be prepared in cases of contractoring.

Article (4) Before advertising an invitation for tendering articles, services, works or transport abroad the approval of the Minister concerned shall have to be secured beforehand and justifications of such a step shall be contained in a memo to be enclosed to the documents of such an operation.

(@) "ARTICLE 4 bis: Concerning the cases requiring the transport of goods by sea, the contractual conditions must include a provision that transport should be effected through the Egyptian Company For Marine Transport. Exception to this provision shall be with the approval of the Minister of Maritime Transport or whoever is deputised by him".

Article (5) Under no circumstances shall contracting be authorised on the execuse of using up the financial appropriations neither shall purchase of articles or carrying contractoring operations be allowed in the final month of the financial year unless in very exceptional cases necessitated by work requirements, provided a memo including such justifications shall, for approval, be submitted to the competent authorities.

Article (6) Each administrative unit concluding a contract for purchasing operations, offering services, carrying contractoring

(@)ARTICLE 4 BIS ADDED AS PER DECREE NO. 127/1987

or transportation Contracts shall keep the following registers and models by the purchasing departments thereof:-

1) A general register for recording the suppliers, contractors, experience houses and specialists whether inside the Republic or abroad.

2) A special register for recording the local suppliers, contractors, houses of expertise and specialists, that the concerned administrative unit shall decide to deal with.

The above mentioned registers shall have the following data recorded therein:-

- The name of the activity owner and the goodwill if any.
- The trade name.
- The name of the responsible manager or employee in-charge .
- The legal address the selected location .
- Types of activity.
- Personal or family identity card number.
- Taxation Card number.
- Number of recording in the industrial, commercial, or commercial agents register or contractors register in the Ministry of Housing or in any other register where recording is required by law.
- The name of bank or banks with which he deals and their addresses.
- Data related to technical & financial efficiency.
- Any other data required for the activity of the administrative body.

(3) Register for recording those, whose dealing-with, shall be banned.

In addition to the above data, the following informations shall be recorded in such a register:

- The body issuing the banning decision, its date and number of issue.
- Reasons for banning dealing with him.

(4) Form of an application for a local bid .

This shall be used at contracting through local tenders.

(5)-Register for reports of minutes of opening envelopes.

(6) Model of the book for tabulation of bids or offers.

(7) Register for the proceedings and decisions of the settlement Committee.

(8) Form of notifying the bid awardness .

(9) Register for recording samples arriving with bids.

(10)Register for recording the adjudications.

(11)Register for recording local adjudications.

(12)Register for recording direct purchases bargains .

(13)Register for recording direct agreements.

(14)Register for recording foreign contracts.

(15) A form of a letter of guarantee for a temporary deposit .

(16) Form for a letter of guarantee of performance bonds .

The Minister of Finance shall specify the forms referred to and detail the procedure of keeping and recording in the registers and books afore-mentioned.

The above stated books and registers shall not be used for any other purpose except those detailed above and no erasion, oblitering or crossing shall be tolerated as regards the data stated in these books and registers. However in case a correction shall be required in such data, this shall be made in red ink and signed against it by the concerned official and then signed for approval by his direct senior while the date shall be written in each case. In case the cancellation of any form or page in a register shall be indispensable, the word "CANCELLED" shall be inserted between two sloping parallel lines on the form or page required to be cancelled while justifications for such a step shall be detailed.

<u>Article</u> (7) The General Government Services Authority shall receive the decisions issued by bodies concerned - after making

reference to the competent department of legal opinion of the State Council, to cancel or re-record the suppliers or contractors and the authority Shall publish these decisions in accordance with the provisions of the law for adjudications and auctions.

Article (8) People working in the government bodies, general organisations, public sector bodies and local government bodies shall refrain from submitting bids or offers to any of these bodies neither shall articles be purchased from such working people nor shall they be charged to carry out works but this provision shall not apply to books of their writings nor to have them charged to carry arts works like drawing, painting, sculpturing ... etc. nor shall such provisions apply to the purchase of such art works in case these shall have a bearing on the department activities. Purchasing from these people or charging them with artistic works of the same book or the same artistic works shall only be for once during any financial year and shall be authorised by any of the following authorities:-

The head of the department in so far as the value shall not be more than LE 100.

The competent head of the central Administration in so far as the value shall not exceed five hundred pounds.

The competent minister or whoever practises his powers, in so far as the value one thousand pounds .

The General, Government services Authority in so far as the value shall not exceed two thousand pounds.

As regards the educational text books, the Minister of Education shall have the power to approve their purchase according to the general rules stipulated in the present regulation.

In case the employee shall have sold the copy right and publication right to a publisher or an individual supported by a contract of registered date at least six months before the purchase, such a purchase in this case shall be in conformity with the provisions of the law for adjudications and auctions and those stipulated in the present regulation.

The author shall, as regards the purchase of patent, copy and publication rights, has to be in close connection with the activity of the administrative body and that the latter shall feel a dire need to acquire the works, provided the copies required shall not be less than one thousand, unless the book shall have been written specially upon the demand of the administrative body and in such a case of necessity the number may be less than the figure above mentioned. Moreover a committee of experts in the subject matter of the book shall be erected to inspect the book, estimate its scientific value and propose the amount to be paid in return for this purchase , provided that on evaluating the value, the number of copies required and the period to make use of such a right shall be observed. A decree by the competent Minister shall be issued in case the value shall not exceed one thousand pounds and a decree by the Minister of Finance in case the value shall not exceed two thousand pounds.(1)

Buying the right of authorship, translation, printing or publishing in relation to Al Azhar and the Ministry of Education shall be in accordance with the rules for which shall be issued a decree by the Prime Minister.

<u>Article</u> (9) No addition, drop out or amendment of any condition or article in the general or special conditions that shall have to be approved by the State Council Department concerned with checking the contracts shall be allowed till after referring the matter to such a body and having its approval to any of these steps beforehand.

(1) This para is added as per D.NO.50/1988

Article (10) A minister or whoever shall practise his powers shall appoint by a decree issued by him the central administrations and departments whose heads shall have the power to exercise the authorities allowed by the present regulation to the chiefs of the central administrations and departments. As for local government units the powers stipulated in the local government units law and executive regulation shall be authorised to the central administrations and departments heads, detailed in the present regulation.

Article (11) An official shall only practise either the presidency of the committees stipulated under the present regulation or the powers of approval but he shall not practise the powers of both.

Article (12) The provisions of this regulation shall apply to contracts of services and transport contractoring as regards the purchase of mobiles in a manner as shall not stand contrary to the nature of the service operation or transport contractoring.

Article (13) Any violation of a provision thereof shall cause the violator to be exposed to disciplinary punishment in accordance with the rules and provisions of the State Civil servants scale, and without prejudice to the right of filing the civil and criminal law suit against him if required.

Article (14) Without prejudice to the law organising adjudications and auctions no exception shall be tolerated for individual cases from the provisions of the present regulation unless if so necessitated and upon a decree by the Minister of Finance.

PART II

Contracting Procedures Chapter One

The Public Adjudication

Article (15) A public tender shall be advertised in due course in Al Wakaei Al Misriya Journal, in addition to publication twice

BEST AVAILABLE COPY

in one or two Arabic daily Papers of wide distribution unless the price of the adjudication shall be more than L.E 50,000 then publication in the dailies shall be three times. The advertisement shall specify the body to which the bid shall be submitted, the closing date for submission, the article or work required, the percentage of both the preliminary performance and the performance bonds deposits, the price of the copy of the tender's specifications and terms and any other information deemed by the administrative body to be necessary for the interest of the work. Foreign adjudications shall be advertised in Egypt and abroad.

Article (16) A period of at least 30 days shall be specified for the submission of bids in public adjudications to be calculated as of the date of the first advertisement of the public adjudication in Al Wakaei Al Misriya Journal. However, such a period may be shortened by an authorisation by the concerned head of the central administration provided such a period shall not fall less than 15 days if so necessitated, but such shortening of the period shall not apply to public adjudications related to annual supplies unless the adjudication shall have been re-announced. The shortest time possible shall be dtermined for the validity of a bid and in a manner that it shall not exceed one month unless in cases of utmost necessity dictated by the nature and circumstances of the adjudication object and by the approval of the head of the central administration concerned. The validity period of the bid shall be calculated as of the opening envelopes date, while settlement and notification of the awardness of a bid shall be completed before the end of the validity period. In case this shall not be possible the administration body shall, in due course, ask the bidders to accept the extension of their bids validity for the additional period required.

Article (17) Anybody shall before announcing an adjudication prepare a booklet of the specifications and terms, lists of articles or works and their appendices. These shall be printed, and after being sealed and approved by the purchases director be distributed among applicants according to the rules and price specified by the administrative body provided such price shall be based on the actual costs of the booklet of bid terms and specifications and all other documents attached thereto and plus a percentage not exceeding 20 percent to be added to these costs as administrative expenses.

The storing procedures in force shall be applied in respect of such booklets as regards addition, issue or cancellation.

In case of foreign adjudications the booklet afore mentioned shall be translated provided that mention shall be made that the Arabic version shall be decisive in case of difference in/ or misinterpretation of the contents.

(1) In the event of the tender being cancelled prior to the date set for opening of envelopes, the price of the book of conditions, statements, specifications and their annexes shall be refunded to the purchaser at his request, on condition that such documents be returned to the concerned authority in full.

Article (18) The formation of the envelope opening Committee shall be based on a decision adopted by the head of the central administration and the chairmanship of the Committee shall be charged to an official whose post and grade shall be commensurate to the significance of the adjudication and with the membership of the head of the department concerned in addition to a technical official as regards contractoring, the membership of the purchases director or his deputy as regards purchases. A delegate from the accounts department shall attend the meeting to collect the preliminary performance bond deposits. The decision may stipulate that another official or others shall join the Committee membership.

Article (19) Before the meeting of the Envelopes opening Committee date an official shall be delegated for receiving all the bids that shall have arrived to the incoming mail or to the concerned department and he shall have these kept in the bid box located in each administrative body and the slit , opening of

82

which shall have been designed in such a manner as shall not allow taking anything out of it. Such a box shall have two locks, a key of one to be kept with the head of the body or whoever he shall delegate for the purpose while the other shall be in the custody of the purchases director or the competent section head.

The in coming mail section shall take prompt delivery of bids arriving to the Envelope Opening Committee up to noon time twelve O'clock of the opening envelope day specified for all administrative bodies.

Article (20) The chairman of the envelope opening Committee shall at noon time twelve O'clock of the specified closing date open the bid box and he shall then :-

1) State the condition in which the bids shall have been received after checking the safety , of the seals.

2) State the number of envelopes and have this figure inserted in the opening of envelopes report of minutes.

3) Unfold the bids successively and he shall on opening every envelope have a serial number inserted on both the bid and its envelope in the form of a fraction the upper number will be that of the bid while the lower (demeanor) shall be the number of bids received.

4) Giving an internal series of numbers to the papers of each bid and have the number of such documents inserted in the report of minutes.

5) Read out the bidder name, bid prices and total price for all present bidders or their representatives.

6) Insert the totals in figures and in writing along with the temporary preliminary performance bond deposits submitted.

7) Sign with the Committee members each bid, its envelope, each document there contained provided that such data shall be inserted in the register prepared for this purpose.

8) Insert, in red , a circle round each erasion or correction while drawing a horizontal line in the blanks left against any item where no mention shall have been made of a price in the bid and make a mark of same. Any erasion or correction circled in red by the chairman shall be recorded in the minutes of the committee while detailing the contents inside such red circles.

9) Write in letters , in red ink, the figures that shall have not been stated in writing .

10) Sign along with all the Committee members against all such indications as above mentioned.

11) Sign along with all the Committee members after inserting all the above mentioned steps, the Committee report of minutes.

12) Hand all deposits received to the accounts representative and have the latter sign the receipt , on the minutes of the Committee and the chief accountant shall on the same day or at most the day after sign to the effect that he shall have checked the received deposits and that these shall have been recorded in the competent account.

13) Enclose the bids, related documents and the envelopes in which they shall have been received with the Committee report of minutes and shall have all these delivered to the purchases dirctor his deputy or the concerned department chief in order to be kept in a closed safe .

14) Check the samples submitted by the bidders against the list where these shall have been stated on their arrival after making sure of the safety , of the seals and covers. Then he along with all the Committee members shall

sign this list and on the samples that shall have been submitted within the bid envelopes after having these stated in a special list. All samples shall then be delivered to the purchases director, his deputy or the head of the concerned section as the case may be in the same way applied as regards the documents of bids.

15) The Committee shall finalise all its works at the same session.

Article (21) Any bid or amendment there-to, arriving after the date specified for the envelopes opening shall completely be disconsidered even if the bidder shall have forwarded it at his end at a date preceding that specified for opening the envelopes. Such a bid or amendment shall on its arrival immediately be submitted to the Committee chairman who shall open it and mark on it the hour and date of its arrival. Then this shall be inserted in the list of delayed bids. However the competent Minister may after having a favourable view of the settlement Committee decide to disconsider the delay in cases where the forwarded bids by mail shall have arrived before the Envelope Opening Committee not having finalised its work and further, provided that the delay shall be attributed to reasons beyond the reach of the bidder and that the bid in delay shall be in favour of the treasury.

In case of a bid arriving after the finalisation of the Committee wrok, this shall under no circumstances be accepted.

At any rate any reduction in prices stated in the bids arriving before the date specified for the opening of envelopes shall be accepted.

Article (22) The purchases department or the section concerned shall assort the samples of every article and have these inserted in the samples register and such a register shall detail the adjudication date and type and the purchases

85

director or section director shall send directly or within the following two days to the envelopes opening date what samples required to be sent to the Government technical lab. or the concerned technical organ in order that the required analysis shall be completed as quickly as possible and the reports there-of, being received, shall have to be recorded in the previously mentioned register each against the sample concerned to be submitted to the settlement Committee.

Article (23) The samples submitted with the bids and which shall, according to their nature cannot be checked against the specifications or the model samples by simple inspection, shall be forwarded to the Competent Government technical lab. or the competent technical body for inspection and testing in case the value of one article shall be more than two thousand pounds(L.E 2,000) and the article shall be considered as one of same even if their unit weights sizes, colours shall differ and the purchases director or the head of the concerned section shall insert confidential figures (always observing the instructions of the inspecting body) and a detailed list elaborating their items, the purpose for which the article shall be purchased, the quantity required and their prices, shall accompany the samples. These shall also be arranged in the list in escalation order on basis of the prices submitted while details of inserted confidential numbers, stamps and signatures shall be given in order to have these discriminated among one another and to guarantee that these shall not be replaced by others)-. Kenston shall also be made of the date for settlement of the adjudication in order to allow the inspecting body to carry the job and provide the body concerned with the inspection result at a time adequate enough before the above mentioned

date, to consider the bids in the light of the lab report about the samples and submit the required recommendation to the settlement Committee of the same adjudication at the specified date. The inspecting technical body shall carry inspection of the samples and test them in relay and shall give them other secret numbers of reference for distinguishing among them while a detailed report of results stating the percentage of quality for each sample analysed shall accompany them. Such steps shall be required to reach the cheapest bid submitted where analysis shall prove the sample offered to be in conformity with the specifications. The purchases director or the head of the competent section shall ensure that the report of the technical lab or body arriving in succession according to the order of the adjudication files be kept in safety after having the data recorded in the register kept for the purpose and before submitting all these to the inspection Committee and then make a note against each report indicating the file number in which details shall be kept.

Article (24) One or more of the responsible officials shall be charged with checking the bids before their tabulation. This accountancy checking shall be accurate and signed to the effect of such a checking and in case a difference shall be discovered between the price unit and the total price of units the former shall be the one that counts and in case of descripancy between the price in figure and the price in writing the latter shall be the one to depend upon.

Article (25) In case a bidder shall complain of a physical error in his bid such a complaint shall be considered by the

Settlement Committee and then the Minister concerned after having the view of the competent department in the State Council if required.

Article (26) The purchase director or the concerned body head shall charge one or more of the officers under their supervision to carry tabulation of the bids using the form prepared for this purpose of three copies and he shall re-deposit same at the end of every day with the closed safe till such tabulation shall have been finalised while recording all remarks and qualifications by bidders contrary to the terms of the administrative body. This operation shall be completed at the shortest possible time in order that settlement of the bids shall be completed before the expiry of bids periods. The list shall be marked with the number and amount of the appropriation concerned article in the budget .

Two auditors shall check the bids against the tabulation lists and they shall sign to the effect of having carried the checking operation before submitting same to the Settlement Committee.

Article (27) The erection of the settlement committees shall be based upon a decision adopted by the concerned authority of approval. A settlement comittee shall be presided over by the head of the central administration or the concerned head of the department or whoever he shall delegate for this purpose and with the membership of one or more of the technical representatives, from within or out of such a body, of experience as regards the articles or works required to be supplied or executed, the purchases director a representative of the financial department and finally a representative of the legal department both from the administrative body provided

that the posts and experience of these people shall be commensurate to the importance of the contracted object.

The Ministry of Finance shall be represented on the settlement Committees by the finance directors at the Governorates or the finance controllers at the Ministries or whoever each of them shall empower, and as for other bodies the Ministry of Finance shall be represented by officials it shall delegate to this purpose and the State Council shall be represented by a member from the concerned legal opinion department to be delegated by its head, within the limits stipulated by the law of organising adjudications and auctions.

Article (28) The Settlement Committee shall make sure that the bids tabulations shall be identical to the bids themselves and shall inspect the samples, and rates and compare these against each other. The Committee shall further adequately detail on the bids tabulation that aspects of shortage and violation of the terms or the specifications in the bids that the committee shall have not accepted. The committee shall record its discussions in a report of minutes to be inserted in a special register and a copy of such minutes marked by the chairman of the Committee to the effect of its being a true copy of the original, shall be enclosed to the adjudication documents.

Article (29) On the settlement of the bids, the Committee shall be guided by the latest previous prices dealt with either locally or abroad and such prices shall be elaborated in the tabulation lists detailing the dates of dealings previously concluded and the committee shall also be guided with the market current prices for which the purchases department shall carry the responsibility of providing them.

In case the Committee shall deem it proper to cancel the adjudication and announce it anew due to high prices such a step shall be based on a decision, justified in detail and the documents of the annulled adjudication shall be attached to those of the new one.

Prices shall be calculated on basis of delivering the articles at the stores of the administrative body free of all charges and duties while observing the foreign exchange rates, the expenses of currency conversion..etc...in order that a comparison held among the offered prices shall be accurate in considering the bids.

Article (30) Negociation and settlement of results shall be governed by the provisions of the law organising adjudications and auctions by a decision adopted by the authority concerned, with approval after the consent of the settlement committee. However in case of difference in opinion between the settlement Committee or its majority on the one hand and that of the central Administration Head or that of the concerned department head on the other, as regards the exclusion of certain bids or the consderation of a bid to be the best suited one for awardness on its bidder or to carry or abstain from carrying negociations or any other procedure, then the matter shall be referred to the directly higher authority for final settlement.

But in case there shall be a difference in opinion among the Committee members themselves, aspects of such a difference shall be included in the minutes and the settlement of same shall be left to the authority concerned with the approval of the adjudication results. In case of difference in opinion held by the technical member then the Committee chairman shall invite another

technical representative to join the former to be guided with his views and in case both opinions shall be identical, this shall be decisive. In case the two representatives shall have different opinions, the matter shall be referred to the chairman of the Committee to outweigh one of the two opinions.

Article (31) The Settlement Committee shall submit its recommendations signed by all the members and the chairman for approval by the following authorities:-

a) The department Head, in case the adjudication price shall not exceed L.E 50,000 (Fifty thousand pounds).

b) The Central Administration Head, in case the adjudication price shall not exceed L.E 200,000 (two hundred thousand pounds).

c) The Minister concerned or whoever shall be empowered to exert his powers if the price shall exceed the above figures .

Article (32) As regards an adjudication of a price less than L.E 5,000 (Five thousand pounds) a committee shall be erected upon a decision adopted by the competent department head, to be under the chairmanship of a responsible official and with the membership of two employees whose posts and experience shall be commensurate to the object of the adjudication. This committee shall open the adjudication envelopes, inspect the bids, have these tabulated and then give their settlement recommendations for the adjudication after completion of steps regarding cheching or analysis. The Committee shall record its op-

inion on the tabulation list and the recommendations adopted by this committee shall for approval be submitted to the authority which shall have adopted the decision for its erection.

Article (33) The adjudication shall be cancelled in cases stipulated under the law organising adjudications and auctions provided a decision with justifications shall be made by the approval authority concerned. Upon the approval of such an authority a single bid to an adjudication may be accepted provided the following:-

1) In case the requirements of work shall not permit re-announcement or that no use shall be obtained from re-tendering.

2) In case the single bid shall be in conformity with the terms and the price shall be proper.

Article (34) The purchases director shall notify the bidders whose tenders shall have been accepted with the results of the adjudication within at most a week as from the date of approval of the adjudication result . He shall ask the bidders in the same notification the deposit of the performance bond within the specified period and invite him to sign the contract(s) and a true copy of any such notifications shall be attached to the contract while another copy shall be sent to the stores director or the concerned division as the case may be. Bidders excluded or whose bids shall not have been accepted shall be provided with the reasons for exclusion or non - acceptance.

Article (35) A contract concluded for the supply of articles, execution of works, transportation or services announced in public adjudications shall have to be in writing in case the total amount for the awarded supply or works executed shall not be less than L.E 2000 (Two thousand pounds) but in case it shall be otherwise, a statement in writing by the bidder including all the guarantees and bonds required for the execution of the contract shall be adequate provided the final performance bond deposit shall be collected.

A contract shall be of three copies,at least, of which one shall be handed over to the accounts department attaching all bids and a copy of the tabulation lists for checking purposes, another copy of the contract shall be given to the enterpreneur while the third copy shall be kept with the authority concerned with the execution.

Each copy shall bear particulars about the final performance bond as regards its amount, type and date of delivery .

The enterpreneur shall along with the concerned department head,or the purchases director sign the model samples and the accepted samples and have these sealed with red wax prvided that stamping such seals shall be in such a manner as will make a change in these samples impossible.

Article (36) The administrative body shall inform the taxation Department of all transactions or works concluded ,provided the information reported shall include the following data :-

(1) The triple name of the contractor.

(2) The firm address and the competent district police station and its location .

(3) The contract total price.

(4) The nature of contracting, the duration of execution and the date specified for completion.

(5) The commercial register number of the contractor and his identity card (family/personal) number and its date of issue.

(6) Number of his Taxation card.

The Administrative Authority should also advise the Sales Tax Administration of all the details referred to in addition to the registration number with the Administration if the contracting party is registered pursuant to the provisions of the law concerning the general tax on sales No. 11 for 1991.

*Added to Article (36) as per D. No. 209/93 (Al Wakale Al Massreya Issue No. 148 dated 6th July, 93

Chapter Two
The Limited Adjudication

Article (37) Concluding a contract through a limited adjudication shall be effected upon a decision by the concerned approval authority. The invitation to submit bids to the limited adjudication shall be sent by registered mail with receipt acknowledgement including all the information that shall have to be stated in the announcement in case of a puplic adjudication according to the provisions of the present regulation. An advertisement to such a limited adjudication upon a permission by the Central Administration Head or the concerned department chief may be made, if required and in this case the same procedures of publication as regards the public adjudications shall be applied.

ARTICLE (38):

The limited adjudication shall be participated by the largest number possible of those working in the type of activity related to the object of the adjudication, and who shall have been recorded in the register of the suppliers and contractors.

ARTICLE (39):

Except for the above stated rules the limited adjudication shall be subject to all the rules, conditions, provisions and terms stipulated by the present regulation regarding the public adjudication.

CHAPTER THREE

The Local Adjudication

ARTICLE (40):

Concluding contract in case of a local adjudication, shall be effected upon a decision by the concerned Central Administration Head, and all Public adjudication rules, provisions, procedures and terms stipulated under this regulation shall apply too, except those related to publication and where a special text, shall be made.

ARTICLE (41):

Invitation, as regards local adjudications, shall be addressed to the largest number possible of local suppliers and contractors whom the body shall choose, to deal with from among those recorded in the register, kept for this purpose.

The 'PRIVATE TREATY' Committee, in case of necessity, and expedition, may with the approval of the Competent Authority, proceed to the offices of suppliers or contractors, in order to hold a private treaty sitting with them and obtain offers from them, complete and fulfilled, according to the provisions of the present statutes in which case the Committee shall guarantee, it will make public to all participants in the private treaty, the offers made, and shall record the same and the procedures taken by the Committee in this respect, in the minutes of the Private Treaty session.(*)

Invitations may also be addressed to non-registered people, upon a decision adopted by the concerned

---

(*) This paragraph is added by D. No. 19/1985 - the Official Journal No. 30.

authority with approval.

Article (42) The bid shall be submitted in the printed envelope enclosed to the application for a local bid up to the date specified for accepting bids.

Article (43) Applications for local bids shall be sent to the contractors or the suppliers the administrative body shall decide to invite for participation in the adjudication by registered mail with receipt of acknowledgement, an adequate time before the date specified for the envelope opening not less than five days. However in case of urgency the invitation shall be sent by a messenger at least forty eight hours before the opening envelope date and shall be handed over against a receipt bearing the date.

Article (44) Local bids shall be opened at the dates specified to this effect and shall be tabulated immediately, Just after opening on, the form prepared to this purpose of an original which shall remain in the book and copies to be attached to the bids.

Article (45) Approval of recommendations adopted by the settlement committee shall be accorded by the following authorities:-

1- The competent department head up to L.E 20,000 (Twenty thousand pounds).
2- The competent central administration head, up to L.E 40,000 (Forty thousand pounds).

96

Chapter Four

Practice Method, Transaction.

Article (46) Practice method of contracting as in casea stipulated by the law, organising adjudications and auctions shall be allowed by a decision adopted by the authority concerned with approval, such an authority shall issue a resolution forming the practice committee to be presided over and with membership from among responsible officials whose posts and technical, financial and legal experience shall commensurate to the importance and type of the transaction.

The formation of a practice committee, shall, in case the transaction shall be carried abroad, be upon a decree adopted by the competent Minister as required by the provisions of the law referred to.

Article (47) Invitations to submit offers to practice method transactions shall be effected by registered mail with receipt of acknowledgement and such an invitation shall include all the data required to be mentioned in the advertisements for public adjudications as detailed in the present regulation and the first meeting date, shall be specified for the practice Committee to convene where the suppliers, contractors or their representatives shall be present.

The invitations shall be mailed to the largest number possible of those, working in type of activity, representing the object of the practice transaction,

and who shall have been recorded in the register of suppliers and contractors.

An advertisement of the practice transaction may be allowed upon a permit by the authority concerned with approval and the practice committee shall carry its practice functions in a plenary open session attended by the suppliers and contractors where the Committee shall make discussion with these people or their representatives attending the meeting the offers they shall have submitted. Then the Committee shall submit the results in the form of recommendations to the authority concerned with approval unless the committee shall be empowered to directly conclude the contract deal.

The practice method committee shall record all its adopted arrangements and discussions, in a report of minutes to include further its recommendations and then be signed by all the members.

Article (48) The approval of the practice Method Commettee recommendations shall be left to the following authorities.

1- The competent department head up to L.E 20,000.
2- The competent central administration head up to L.E 50,000.
3- The competent minister or whoever shall be delegated his poweres for contracts in excess of the above amount.

Article (49) Concluding contracts under practice transaction method shall be subject to the general terms of the

public adjudications unless otherwise governed by a specific stipulation in the present regulation.

Chapter Five
Direct Agreement Deal

Article (50) In case of necessity where purchase services, contractoring execution of transportation or works contracts direct agreement shall within the provisions of the law, regulating adjudications and auctions, be concluded. Such steps shall be based upon a permission by the central administration Head concerned or the Competent department chief, and the documents shall detail the justifications for urgency following the direct agreement method and the responsible official shall write on the payment documents a statement that the articles or the works shall, as regards type and specifications, be in conformity with the purpose for which they shall be needed and that the prices shall be proper.

The approval of results attained through this procedure shall be left to:-

1- The concerned department head up to L.E 1,000 (One thousand pounds) as regards ordinary purchases, services and transportation contractorings, and up to L.E 2,000 (Two thousand pounds) as regards contractoring of works and finally up to L.E 4,000 (Four thousand pounds) in respect of purchasing articles monopolised by companies abroad and having no agents in Egypt.

2- The central administration Head as regards

amounts in excess of the above limits.

Article (51) Concluding contracts through direct agreement method shall not be frequented more than once a year regarding the same transaction of purchase, service or contractoring of transportation or works unless in case of necessity and upon the approval of the competent minister.

PART THREE
GENERAL TERMS
CHAPTER ONE
GENERAL CONDITIONS

Article (52) Without prejudice to the provisions of the law regulating adjudications and auctions, the bidders must observe the provisions detailed in the following articles.

Article (53) Bids shall be submitted on the bid forms sealed by the stamp of the administrative body and marked with the number and date of the receipt given against payment of the price and on the schedul of rates , forms, attached to it, and shall be signed by the bidders and sent inside an envelope stamped with red wax which in its turn shall be placed inside another envelope. On the inner envelope the phrase " Bid for ( )" session dated (.....) shall be written while on the outer envelope the name address, the administration body or unit concerned, shall be written, in addition to the following " Contains bid for session of .... " . A bid in this way shall be sent by registered mail fully paid, and it may be placed

in the box appropriated for placing bids. In case a bid shall be desired to be handed over to the archive section of the administrative body, this step shall be effected against a receipt where the date and hour of delivery shall be stated.

In case a bid shall be submitted by an individual or firm,abroad,it may be offered on the bid " form for bidders " provided such a bidder shall have purchased the booklet of specifications and terms.

Article (54) On preparing the list of prices Rates-Schedule. bidder shall observe the following.

(1) Ink,shall be used,in writing the bid prices,in terms of the Egyptian currency,in both figures and writing,and the unit price of each article shall be in conformity with the Rates - Schedule contents as regards number, weight, size... etc without any change or amendment in the unit.

In case of a bid offered by an individual or firm abroad,prices may be inscribed in terms of foreign exchange while the equivalent of same shall be written in terms of the Egyptian currency.

The price list(s) shall be dated and signed by the bidder.

(2) No erasion or obliterating , shall be allowed in the lists of prices and any correction... etc shall be re-written in ink,in figures,and in writing and shall be signed against.

(3) A bidder shall not cross-out any item in the bid or in the technical specifications neither shall he make any amendment whatsoever.

In case he shall desire to put special qualifications or carry any amendments he shall send these, contained in a letter to be attached to his bid provided he shall refer to such a letter in the bid itself or he shall send the amendment in a letter, later, but to arrive before the date specified for the opening of the envelopes and no other means of correspondence shall be considered.

Any claim by a bidder, of an error, in his bid, shall entirely be disconsidered, should such a claim arrive after opening the envelopes.

(4) In case a bidder for an adjudications of the supply of articles, shall fail in specifying the price, of any of the things required to be supplied, in the list of prices submitted by him, such a failure shall be considered as abstension from entering the adjudication as regards such an article.

In case of contractoring works, however the administrative body, shall, while keeping its right to execlude the bid, insert the highest price submitted to such an item for purposes of comparison among all bids, and in case such a bid shall be awarded, he shall be considered as having accepted the lowest price of such an item as, stated in the other submitted bids, without having the right on

his part to dispute such a step.

(5) Indications shall be made in the price list, whether the article shall have been manufactured in Egypt or abroad and in case such information shall prove to be incorrect wholly or in part, the article in question shall be refused and further the name of the bidder shall be crossed out of the Government suppliers names.

(6) The rates specified by a bidder in the rates Schedule shall cover all expenses and obligations of any sort, whatsoever incurred as regards any of the items and shall also cover the completion of all the works, deliver same to the administration body and safekeeping of them during the period of guarantee in accordance with the contract terms. The closing account shall be made through the application of these prices, heedless of the market fluctuations or fluctuations in foreign exchange, customs tariffs excise duties and all other duties.

Article (55) Bidders to contractor works shall detail in a separate letter enclosed to the bid, the value, types and dates of works they shall have carried out for the Government, general organisations and public sectore companies. In the event of their having previously not carried out works with such parties they shall submit to the administration body, evidence that they shall recently have completed works, similar in type, to those placed and announced by the

tender and such an evidence shall detail the sites of these works, the total prices and dates of completion. They shall also provide the facilitating steps for representatives of the administration body to inspect these works and shall provide the data and documents proving their recording at private offices on registers according to laws or decisions organising that .

Article (56) A bid to supply articles shall be in conformity with the administration body model samples, specifications or approved drawings, the bidder shall see and submit a statement of his having seen them and he shall make his supplies according to them even if his bid shall be enclosing other samples.

However as regards food stuff and chemicals, supply shall be effected in conformity with the specifications specified for them, and in case such suppliers shall have no specifications, the articles supplied shall be according to samples required to be submitted with the bids. In case such samples shall be liable to deterioration and shall not remain, whole, up to the date of delivery such supplies shall be accepted, provided the results of their analysis shall be identical to those carried on the samples of supply.

Regarding engineering, metallic and electrical products, the supply of same shall be in accordance with the specifications without having to be bound to samples. However samples may be provided but only

as for guidance .

As for products of spinning and weaving, the acceptance of these shall depend on their conformity with the terms, specifications and technical allowances approved by the Ministry of Industry.

In case the competent administrative body shall, in its advertisement, require the submission of samples with the bids, then, these shall be of a size, measurement or weight which shall allow inspection or analysis and shall be in conformity with the specifications.

Bidders shall be entitled to recover such samples within two weeks as of the date of their being advised of their refusal by registered mail otherwise such samples shall be the Government Property free of any charge.

Article (57) A bid shall remain valid and irrevocable as of the date of its outgoing by the bidder, regardless of the date of its being received by the administration body up to the bid expiry date specified by the bid form attached to the terms.

Article (58) In case a bidder shall withdraw his bid before the date specified for opening envelope, the preliminary performance bond deposit, shall be the property of the body without having a need to warning, filing a claim, taking any other measure or giving evidence of any damage incurred.

On the expiration of a bid validity the bidder may recover the preliminary performance bond deposit and in such a case the bid shall be considered as cancelled and void and in case a bidder shall reffain from so doing,he shall be considered as having accepted to be committed to his bid till such time when he shall send to the administration body a notification to withdraw his deposit and thus renouncing his bid.

Article (59) A bidder shall be a resident of the Arab Republic of Egypt or shall have an agent therein, otherwise he shall specify in his bid the agent empowered by him in the Arab Republic of Egypt in case his bid shall be awarded and he shall detail in his bid the address where he shall be contacted and any claim or declaration sent to such an address shall be considered as proper and legal.

In case a bid shall be submitted by the agent of a bidder,this agent shall submit with the offer a power of attorney attested by the competent authorities in addition to all data and documents he shall have to submit as required by the laws and rules organising such a step.

Article (60) Every bid submitted by a company,shall enclose an official copy of its constitution contract and statutes. On the submission of a bid by a commercial firm composed of more than one person an official copy of the association contract shall be attached.

In both cases above, the copy submitted shall enclose data of the person (s) authorised to conclude contracts on behalf of the company or firm, the extent and limits of such an entitlement, the names of officials directly responsible for the execution of contracts, signing receipts and giving certificates for payment on behalf of the company or firm along with specimens of their signatures provided these shall be the same as those appearing on the copy of the contract or power of attorney.

In case the bid shall be submitted by a person of moral or physical entity a copy of his taxation card shall be attached.

Article (61) The bids shall reach the administration body or unit concerned at most at noon time twelve O'clock on the day specified by the advertisement, and bids submitted after such a date, shall whatever reasons for delay may be, entirely disconsidered.

Article (62) The administration body shall have the right to check the prices submitted whether as regards their individual items or their totals and shall carry the physical corrections if necessary .

The price stated in writing shall be the one to be considered , and a bid based on a reduction , percentage in the lowest price in all bids submitted, shall be disconsidered.

Article (63) Bids accompanied by credit facilities

by the bidders,shall be taken into account on settling priorities of bids.

Article (64) Delivery of supplies shall be effected at the dates and places stated in the lists of prices and the following shall be observed on preparing the bid prices:-

a) In case delivery of articles shall be FOB.,the price stated in the bid,shall include package of cases, tins, barrels, bags...etc..along with the transport expenses untill loading on board ths ship.

b) If delivery shall be (CIF. or C & F.) or at the port of destination, the price shall in addition to item (a) above include sea or air freight, unloading expenses from board of ships and insurance dues, in case of CIF. and the arrival port .

In both cases, if the entrepreneur shall put in his bid a condition to the effect that the Concerned stration body shall pay the price through a letter of credit to be established in his favour or in favour of his clients abroad or inside the country, then the costs of establising such a credit shall be borne by the bidder and he shall detail in the bid the amounts required to be transferred abroad, the sort of currency and the place from where importation shall take place.

However the competent minister may upon the approval of the settlement committee,accord for the administration body to endure the costs of

establishing the letter of credit if so required by the entrepreneur provided that such a condition shall be taken into consideration on comparison and preference among various offers as regards the prices and qualifications submitted.

C) In case delivery shall be at the stores of the administration body stores, the price shall in addition to contents of item(b) above, include the customs and other duties and taxes in force at the time of submitting the bid and inland freight in a manner that the articles shall be delivered to the stores of the administration body free of all duties and expenses.

d) In case a change shall be introduced to customs tariffs or other taxes collected on the articles supplied in the period between the bid submission and the delivery closing date and that supply shall have been completed during such a period, then the difference, shall, accordingly be settled, provided the entrepreneur shall give evidence to his payment of duties and taxes on the articles supplied on basis of the rates amended upward, but in case such amendment shall be otherwise concerned with reductions of such rates, the difference shall be deducted from the contract price, unless the entrepreneur shall prove that payment of such duties and taxes shall have been made on basis of the original rates before the amendment.

In case of delaying delivery till after the specified dates as per the contract while the amendment in rates of taxes and duties shall be introduced after these dates then the entrepreneur shall incur any increase in such rates as regards the items delayed in delivery unless he shall prove that the delay shall have been due to force majeur while in case of reduction in such rates then this shall be deducted from the contract value .

Article (65) A bidder or his representative may attend the session of opening the envelopes at the time specified thereof in order to hear prices of bids submitted,when read out.

Article (66) In case prices shall be equal as regards two or more bids, division of quantities announced may, if such a step shall be in favour of the work,be effected. among those bidders .Also,in case the bidder of the lowest prices shall require longer periods for delivery,not favourable to the interest of work,at the administration body, the contract may be concluded with the following second best bidder to provide the least quantity required for supplying the stores within the period falling between the two delivery dates,another contract with the first bidder of the lowest price,to provide the rest of the quantities and the settlement committee in this case shall insert in its report the balance in stock of this article in the stores and the consumption average rate.

Bids submitted by vocational - training , centres

and similar organisations, erected by a decree by the competent minister, shall be preferred when their prices shall be equal to bids of least prices and when these shall be in conformity with the terms and specifications.

Article (67):

In cases of urgency, amounts in advance of the price of articles, contracting of works, transportation or services, concluded, in case such payment in advance shall be among the conditions of contracting, provided the following limits shall be observed:-

- Up to 50 percent of the contract price, provided that the approval of concerned central administration head shall be secured.
- Up to 100 percent of the contract price provided that the approval of the competent minister shall be secured.

Payment in advance shall be made against a letter of an approved bank guarantee at the same value and in the same currency, free of any limits and valid up to the date of the contract execution completion.

Cases of concluding contracts between two bodies subject to the provisions of the law organising adjudications and auctions, shall be exempted from the conditions governing the letter of guarantee referred to above, exceptionally.

" Accepting the letters of guarantee submitted by the Public Sector Authority Concerned, may be excepted with the approval of its Board of Administration, from the advance payments obtained by the companies affiliated to the Authority, provided they are not **tied down by any conditions, and that they are valid until the expiry date of contract execution." (*)

On holding comparison and preference among the bids, an interest rate equivalent to that announced by the Central Bank at the time of settling the adjudications shall be added to the bid price accompanied by the advanced payment on the amounts of same required to be paid in advance, and such an interest shall be calculated on payment date of such amounts till the time they shall actually become due.

In all cases an advance payment(s) shall be within the appropriations allocated by the budget of the financial year where contracting shall be concluded.

(*) Added by D. No. 19 / 1985 - Official Journal No.30

(**) Bound

111

CHAPTER TWO

ON THE BOND DEPOSIT

Article (68):

Without prejudice to the provisions of the law organising adjudications and auctions, the performce bond deposits shall be paid in cash and the bidder may request decution of such a deposit from monies due to him at the administration body, provided these shall be due for payment to him at the time of submitting the bid or at the time of submitting an application as regards the final performance bond deposit. Payment of such a deposit shall be allowed through guarantee.

However, a guarantee to the value of the deposit may not be advanced in case it shall be less than twenty pounds.

Article (69):

In case the bond deposit shall be in cash, it shall be imbursed at one of the government treasuries against an official receipt of which the date and serial number shall be inscribed on the bid.

A bond deposit may be submitted enclosed with the bid in the form of a postal order to its value. No interest shall be charged on such amounts.

Cheques drawn on local banks shall be accepted if they bear payment acceptance by the bank on which they shall have been drawn. Cheques drawn on banks abroad shall also be accepted provided these shall be marked with payment acceptance by one of the approved banks .

However, in case of necessity, ordinary cheques but neither bank cheques nor those marked by the banks on which they shall have been drawn may be accepted should there be adequate guarantees.

In case the performance bond deposit shall be in the shape of a letter of guarantee, such a letter shall have to be issued by one of the approved local banks and shall not be connected with any limit or condition whatsoever,and the bank shall pledge to pay to,or to order of the administration body an amount equal to that of,the preliminary performance bond deposit upon request,in total,and the bank shall be prepared to renew the validity period of the letter of guarantee for other periods , accoding to what deemed proper by the concerned administration body in whose favour the bond shall have been issued as soon as it is demanded , and without giving any consideration to objections raised to this effect by the bidder .

Any of the administrative bodies, shall on receiving a guarantee for a final performance bond deposit from a bank authorised to issue such letters of guarantees or a branch there of, such a body shall have to make sure that the bank or the branch

shall have given, as regards this guarantee, a statement that it shall not have exceeded the maximum specified for it for the total guarantees the bank shall be authorised to issue.

If on checking the notes, at the Ministry of Economy and Foreign Trade, it shall discern that a bank shall have exceeded the maximum limit specified for it, regarding guarantees, the Ministry shall promptly advise the body concerned in order that the latter shall claim from the bank to pay within three days as of notification the amount of the letter of guarantee in cash.

In case the guarantee shall be for a limited period the validity of such a period shall not fall less than 30 days after the end of the period specified for the bids validity. As regards the final performance bond deposit, the validity of the letter of guarantee shall be for a period beginning with the date of its issue till three months after the contract period expiration, unless otherwise agreed upon.

Article (70) The final performance bond shall not be collected in case the accepted bidder shall deliver all the articles which he shall have been awarded to deliver and these shall have been finally accepted by the contracting administration body during the period specified for depositing the final performance bond.

114

In case the accepted supply shall have been for a part of the articles referred to and the price of same shall be adequate to cover the amount of the final performance bond, then the equivalent of such bond shall be deducted from the value of the articles already delivered and such a deducted amount shall be kept with the contracting party as a final performance bond till such time when the contract shall have been executed.

Article (71) Without prejudice to the provisions of the present regulation the preliminary performance bond deposit shall be refund to bidders whose bids shall be unaccepted, without waiting for an application to be submitted by these people and whether the deposit shall have been in cash, a cheque or a letter of guarantee and within seven working days after the expiration of the period specified for the bid validity or before this date, in case the final performance bond deposit shall have been collected from the winning bidder.

The final performance bond shall be kept in full, up to the time the contract shall finally have been executed in conformity with the terms. Then the final performance bond or whatever left of it shall be refund to its owner without having to wait for an application by him to this effect and within a period not exceeding seven working days after the contract final execution in conformity with the terms.

Article (72) A decree with justifications shall be issued by the concerned Minister or whoever shall be delegated to exert his powers in cases of exempting monopolistic firms from depositing the preliminary and final performance bonds, extending the delay specified for depositing a performance bond for not more that ten days or reducing such performance bond by not more than 50 percent. And according to rules and conditions stipulated under the law of adjudications and auctions.

PART FOUR
Contract Execution Measures
Chapter One
General Conditions

Article (73) The period specified for supply shall begin with the day, next to that the entrepreneur shall be notified of accepting his bid, unless otherwise agreed upon, and notification of entrepreneurs abroad shall be effected by cables to be confirmed with letters later.

A notification shall in addition to contents provided under article (34) of the present regulation shall detail the articles, quantities, rates and dates of commencement and completion of supply.

The period specified for the execution of works contracts shall begin with the date where the site shall be handed over to the contractor and, such a hand over shall be on basis of a report of minutes signed by the two parties and made of two copies of

which one shall be given to the contractor while the other shall be kept with the administration body. In case the contractor or his representative shall fail to attend the site to receive, at the date previously specified to him by the administration body, in the notification which he should have received, to the effect of his being the winner, a report of minutes shall be made and such a date shall be considered as specifying the commencement of work execution period.

Article (74):

In case the contracting party shall violate any of the contract conditions, then the body of contracting party shall have the right to breach the contract, or have the works executed directly at the expense of the former party.

Breaching of contract execution at the expense of the entrepreneur shall be adopted upon a decision by the authority concerned with giving the approval, and shall be declared to the contracting party by registered mail with acknoweldgement receipt on his address stated in the contract, and without having to adopt any other judiciary or administrative measures.

Article (75):

Under no circumstances shall an entrepreneur or contractor assign the contract or amounts due to him partly or wholly to third party. However he may assign such amounts to one of the banks and in such a case the accord of the bank to such a step shall be adequate and the contractor or the entrepreneur shall remain responsible for the contract execution, provided that the acceptance of this assignment of any amount due to him shall not relieve him of his liability to any rights of the administration body that may be due by him.

Article (76):

In case of the decease of the contractor or entrepreneur, the administrative body may breach the contract and refund the performance bond deposit, in case such a body shall have no claims against the deceased or may accord for the heirs to proceed with execution of the contract, provided they shall appoint an agent for them through power of attorney with their signatures attested and upon the approval of the competent central administration head.

In case a contract shall be concluded with more than one contractor, or entrepreneur, and one of these shall have died, then the administrative body shall have the right,either to terminate the contract and refund the performance bond, or to ask the rest of contractors or entrepreneurs to proceed with the execution of the contract

Termination in all such cases as above,shall be effected through registered mail with acknowledgement receipt without having to resort to any other measures or to law court.

Article 76 (Bis)"repeated": (*)

Administrative bodies subject to the provisions of the present executive regulation,shall have the right to amend quantities or size or scope in its contracts by an increase or decrease within the limits of 15 percent as regards supply contracts, 30 percent in respect of food supply contracts, and 25 percent regarding works contracts, and under the same terms and prices without rendering, contracts with such bodies, the right to claim any compensation to this effect.

The concerned authority may, with the consent of the contractor,extend the limit of percentages stipulated in the previous paragraph in case of emergencies, and such a step shall not affect the priority of the contractor as regards the order of his bid , and also provides the availability of the financial appropriate credit required.

(*) Article 76 Bis is added by D. No. 234/1984 - The Official Journal No. 264.

Chapter Two
On Terms of Works Contracts
Execution

Article (77) A contractor shall observe government and local laws and regulations related to the execution of the contract object, including the obtainment of the licences, and he shall be responsible for keeping order at site of work and carrying out the orders of the administration body to clude any person who shall neglect or refuse the application of these orders or shall attempt deceit or violation of the provisions of these terms.

The contractor shall also pledge to take all precautions aimed at preventing injuries among or death of any of the workers or third party or damage property of the government or individuals. His responsibility in this respect shall be considered direct and without the interference of the administration body.

In case of his violation of any of the above obligations the administration body shall be entitled to carry, these, out at his own expense.

Article (78) The contractor shall inspect for himself the nature of the works and shall carry whatever tests etc. to make sure that the approved specifications and designs are most suited for the works and he shall advise the administration body in due

course of his remarks as he shall be held responsible for such designs and drawings as if they shall have been submitted by him.

Article (79) All materials and heaped stored stock articles, parts, plant, machinery that shall have been brought by the contractor to the site of works or land occupied by him with the purpose of the execution of the works also all other temporary facilities, erections, and works, shall remain and shall not be moved or disposed of, unless so authorised by the administration body till such time when temporary hand over shall take place, provided these shall remain under the custody and the responsibility of the contractor alone. The administration body shall in this regard hold no responsibility due to loss, damage, theft or any other reason.

The contractor shall prepare a suitable place for the storage of deterioratable materials because of atmospherics in order to provide protection for them in a manner that shall be satisfactory to the administration body engineer.

Article (80) The quantities and weights stated in the list of rates shall be considered as approximate liable to be increased or decreased according to the nature of the operation and the purpose of such quantities and wieghts shall be to specify the amount of work in general and the prices paid to the contractor shall be on basis of the quantities actually

used , whether such quantities shall be in excess or short of those stated in the estimate or drawings and whether the suplus or deficit shall have arisen from an error in computation in the primary estimate or from change orders that shall have been introduced to the works according to the provisions of the contract provided that this shall not affect the priority of the contractor as regards the order of his bid.

The contractor shall hold the responsibility of carrying his own investigations about the accuracy of quantities and weights - and any of the rates stated in the list of rates . shall make the contractor carry on obligation for it and not liable for re - consideration for any reason whatsoever and the contractor shall not have the right to claim any amount in excess or compensation whatever his loss shall be and whatever additional expenses he shall incur.

The administration body engineer shall carry measurement and weight,operation of the works during the progress of work, jointly with the contractor, his engineer or his representative and the two shall sign to the effect of the measurement and weights being proper and in case the contractor or his representative shall after his being notified fail to attend such an operation he shall be considered as accepting the measurement and weights carried by the administration body engineer.

However, in case the technical element required, shall not be available in any of the administration bodies, party to such a contract, an engineer from the concerned Housing Directorate shall be delegated for this purpose. The administration body engineer or the Housing Directorate engineer (as in the latter case) shall be responsible for the soundness and accuracy of the data he shall provide in this respect.

The aspects of difference in this regard shall be referred to the administration body whose decision in this respect shall be decisive and final.

Article (81) The contractor shall complete the works covered by the contract in a manner that these shall be ready for temporary hand-over at the specified dates.

In case he shall delay, the authority concerned with giving the approval, may accord for him an additional period for completion if so required by public interest, provided a fine shall be imposed for the period of delay in the completion of works, after the specified dates, up to the temporary hand over.

Periods of suspension proved to the administration body, to be due to force majeur, shall be excluded from the delay period. The fine shall be imposed according to the following rules and conditions:-

1 percent for the first week of delay or any part thereof.
1.5 percent for the second week or any part thereof.
2 Percent for the third week or any part thereof.
2.5 Percent for the fourth week or any part thereof.
4 Percent for any further month or part thereof,

provided total fines shall not exceed fifteen(15) percent.

The fine shall be calculated on basis of the total amount of the whole works in case the administration body shall decide that the delayed part shall prevent making use either directly or indirectly of the work executed at the specified dates but in case the administration body shall decide that the delayed part of works shall not prevent making use of the parts completed of the work, then the fine percentage shall be applied only to the value of the delayed parts and at the rates and rules specified above.

The fine shall be imposed immediately, on delay taking place without any notice or warning, even if no damage shall result from such delay.

The administration body must be careful to deduct fines of delay before authorising payment of monies due to the contractor.

Article (82) In case the contractor shall infringe any of the conditions of the contract, neglect or fail to carry any of his obligations as stated by the contract and shall refrain from re-instating such an infringement within the period of fifteen days following his being notified by registered mail with acknowledgement receipt, asking him to perform such rectification, then the central administration Head

or the competent Head of the department shall have on his own responsibility the right to adopt any of the two following measures:-

a) Breaching the contract and confiscate the final performance bond, due, at the time of termination, and to obtain whatever fines or compensation due to the administration body in return for damages suffered.

b) To withdraw the work from the contractor and to have it executed through a public adjudication, limited adjudication, local adjudication or practice method under the provisions of the law of adjudications and auctions along within the provisions of the present regulation while confiscating the final performance bond due by the contractor at the time of withdrawal of the works and the administration body shall collect what fines and compensations due and recover all expenses, losses incurred in excess of the contract price due to the withdrawal of the works.

The administration body shall have the right to retain a part or the whole of the provisional erections, buildings, plant, machinery, articles, raw materials... etc. without being responsible before the contractor or third party for these things or for any damage or shortage affecting them for any reason whatsoever or to pay any wage or money in return. This body shall also have the right to retain same, even after the completion of the work as a guarantee for its rights and shall be entitled to sell them without bearing any responsibility as regards such a sale.

ARTICLE (83): (*)

With the approval of the contracting administrative authority, payments on account may be made to the contractor according to the progress of the work, and in the following manner:-

(a) With a maximum of 95% of the value prescribed for the works which have actually been completed in compliance with the conditions and specification as per the rates contained in the schedule.

The remaining 5% may be paid against a letter of guarantee approved by one of the local banks and expiring thrity days from the date when the works have temporarily been handed over.

(b) With a maximum of 75% of the value prescribed for the materials which have been delivered by the contractor for use for the permanent work and which are actually required by the work, on condition that such materials

---

(*) Article (83) is substituted by D. No. 201 / 1984 - the Official Gazette No. 227

(**) Negotiation

124

be in compliance with the specifications, approved and stacked at the work site in a good condition after effecting the actual stock-taking thereof, as per the rates of the contract. They shall be treated as stocks of materials to be delivered at work site suitable for erection,pending their erection.

The contracting administrative authority shall have the right to regulate payment being made to the contractor in respect of the works which shall be completed in a different manner if the nautre of the works entrusted to him so requires. The Authority shall have the right to suspend payments if it considers that the progress of work or the contractor's behaviour is unsatisfactory.

(c) After the works shall have temporarily been handed over,the administrative authority shall prepare the final statements in respect of all the works which have actually been completed and payment of the amounts due to the contractor shall directly thereafter be made after deduction of the amounts previously paid on account and any other amounts due by the contractor.

(d) On the final handing over of the works after the period of the guarantee and the presentation by the contractor of the official report, in evidence,thereof, the final account shall be settled and the balance shall be paid to the contractor inclusive of the amount of the performance bond or the remainder thereof.

Article (84) In case of withdrawing the whole or a part of the work from the contractor, a list of the completed works, plant and machinery either used or non used yet, brought by the contractor to the site but as regards , the still new apparatuses they shall, within one month after the date of withdrawing the work, be prepared and this inventory shall be carried by the representative of the administration body and in the presence of the contractor after notifying him to this effect by registered mail to be present or to send his representative to attend on his behalf. This inventory shall be supported by a report of minutes to be signed by both the representative of the administration body and the contractor or his representative. In case the contractor shall fail to attend or to send his representative then the inventory shall be carried out in his absence.

In this latter case the contractor shall be provided with the results of the inventory and should no remarks be received from him within one week as of the date of delivery of these results, then the matter shall be considered as a statement by him to the truth of the data contained in the inventory minutes. However the administration body shall not carry the obligation of taking any of these things except to the extent that shall be required to complete the works provided these shall be fit for utilization and the contractor shall be required to remove what shall be in excess of such an extent away from the site of work.

126

Article (85) The contractor shall on the completion of the work, evacuate the site from all materials, earth and anything left over and he shall level out the place, otherwise the administration body shall, after notifying him with registered mail, have the right to remove such earth at his own expense and notify him in writing to this effect. He shall then be advised of the inspection date and a report of minutes shall be made for the temporary hand over after the inspection completion. The minutes shall be signed by the contractor or his representatives duly authorised by an attested power of attorney and the representatives of the administration body whose names shall have been reported to the contractor. The report of minutes shall be of three copies of which one shall be handed over to the contractor. In case he or his representative shall fail to be present at the specified date, the inspection shall be carried out and the minute shall be signed by the representatives of the administration body only. In case the inspection shall reveal that the works shall properly have been completed, the date in which the contractor shall have advised the administration body of his readiness for the temporary take-over by the body, shall be considered as that of the completion of work and the commencement of the guarantee period. But in case the inspection shall reveal that the work shall not have properly been completed, such a development shall be stated in the

minutes and the temporary take over shall be deferred till such time when the work shall be completed according to the conditions (This shall be without prejudice to the responsibility of the contractor under the provisions of the civil law) and the period of guarantee shall commence with the date of the last inspection.

Once the temporary take-over, shall take place the contractor shall - if no claims by the administration or any other government body shall exist against him - be refunded the amount in excess in the final performance bond over and above the percentage specified of the value of works actually completed and the contracting body shall retain this percentage till such time when the period of guarantee shall expire and the final delivery shall take place.

Article (86) The contractor shall guarantee the works, forming the subject of the contract and the good workmanship of their execution and completion for a period of one year after the temporary delivery and this shall be without prejudice to the guarantee period stipulated under the civil law. The contractor shall be held responsible for all the works to remain safe during the guarantee period and in case any damage or defect shall appear within such a period he shall at his own expense rectify same and if he shall fail to do so, the administration body shall be entitled to carry the rectification required, at the contractor's expense and on his own responsibility.

Article (87) A suitable period of time before the expiry date of the guarantee, the contractor shall ask the administration body in writing to fix a date for the final inspection.

In case the works carried out shall prove to be in accordance with the specifications and in a good condition they shall finally be taken over and a report of minutes of three copies shall be made in writing and signed by the representatives of the administration body and the contractor or his representative duly authorised. A copy shall then be handed over to the rontractor: In case the inspeection shall reveal that the contractor shall not have carried out certain obligations, then the final delivery shall be postponed till such obligations shall be fulfiled and such a step shall be taken without prejudice to his liabilities under the provisions of the civil law.

On the completion of the final delivery, the amounts due to the contractor and the final performance bond amount or what shall remain of same, shall be paid to the contractor.

Chapter Three
Supply Contracts Execution Terms

Article (88) The contractor shall supply the articles contracted, upon at the specified date or dates, free of all expenses and dues, and these shall be in accordance with the supply order and the specifications or the

approved samples. The keeper of the reception stores shall take receipt of the articles supplied by the entrepreneur on basis of number, weight or measurement, in the presence of the entrepreneur's representative who shall be handed over a temporary receipt stamped with the seal of the administration body, detailing the date and hour of delivery, and including a statement about the conditions of the articles as regards their safety. This step shall be taken till such time when the entrepreneur shall be notified of the date where the inspection committee shall meet to attend the measures of inspection and final delivery. Such a notification shall be sent to the entrepreneur within the three wroking days following the date of the temporary receipt, and the keeper of the reception stores shall on taking reception of the supplied articles advise the inspection committee head to this effect for taking action.

The committee's decision to accept or refuse the articles shall be considered as final, once such a decision shall be passed by the authority concerned with the approval.

Article (89) The entrepreneur shall present the invoice of the supplied articles of an original and two copies; and in case he shall make delivery upon the administration body orders, to a body other than that party of the contract; the invoices shall include documents supporting the additional transportation

130

costs in order that such expenses shall be refund to him .

Article (90) In case the inspection committee shall refuse one or more of the articles supplied or shall discover a shortage or violation of the specifications or the approved samples, then the contractor shall be notified in writing by registered mail with acknowledgement receipt of reasons for refusal and the necessity of his withdrawing the refused articles and have them replaces. Such a notification shall immediately be sent to the entrepreneur the same day the decision of the committee to this effect shall be adopted or the following day at most, and the entrepreneur shall carry the obligation of withdrawing the refused articles within seven days at most as of the day following that of his being notified. In case he shall delay in the withdrawal of these articles, then the administration body shall be entitled to collect storage expenses at the rate of 2 percent of the value of the refused article per any week of delay or a part thereof and for a maximum period of not more than four weeks. On the expiry of such a maximum period the administration body shall have the right to take steps towards their immediate sale and shall deduct from the proceeds what monies shall be due to it while sale of such articles shall be in accordance with the provisions of the present regulation.

Article (91) The value of the articles delivered, shall be imbursed within a period of fifteen working

days at most to be calculated as from the day next to that, where the measures of chemical analysis or technical inspection shall have been completed favourably.

Article (92) In case the entrepreneur shall delay in the delivery of all or part of the supplies required till after the date specified under the contract - including the refused supplies - then the authority concerned with giving the approval may, in case the public interest shall necessitate, grant him an additional delay for the delivery, provided a fine of one per cent per week or a part, there of, of the value of articles delayed by the entrepreneur shall be imposed, and with a maximum limit of four percent of such value.

In case the entrepreneur shall fail to deliver the supplies within the closing date specified in the contract or the additional period allowed, then the administration body shall apply one of the following two measures as dictated by the public interest:-

a) To purchase the articles which the entrepreneur shall have failed to supply, from third party whether through practice method, public or local adjudications or limited adjudications at the same conditions and specifications advertised and contracted.

* It shall be deducted from the deposit lodged by the contractor or from the amounts due to him by the Authority or any other administrative Authority, the amount of the increase in price plus administrative expenses, at the rate of 10% of the value of the items purchased at his expense and the fine due for the period of delay in delivery,

* Amended by D.NO.13/84 - Egyptian Wakaeh No.66 dated 17th March, 1984

136

without prejudice to the right of the Authority to confiscate the deposit lodged to the equivalent of 10% of the value of these items, obtain payment of all fines and compensations due to it and recover all expenses and losses incurred in excess of the contract value as a result of implementing the contract at the contractor's expense.

In case the price of purchasing any of these article shall be less than that of the entrepreneur, then he shall not have the right to claim the difference and he shall in addition endure the delay fine due and the administrative expenses.

b) To terminate contracting in so far such delayed articles shall be concerned, confiscate accounts from the performance bond deposit to the extent equivalent to 10 per cent of the value of such articles and all the monies due to the administration body including fines or compensation against damages suffered without having to file any claim with law courts since this body shall only notify the entrepreneur to this effect with registered mail accompanied by receipt of acknowledgement. The administration body shall not purchase the articles for which contracting shall have been terminated in the same financial year where contracting shall be terminated.

Article (93) In case the entrepreneur shall fail to supply articles contracted to be delivered, till after the end of the financial year where the supply should be completed, he shall then be notified of the termination of the contract as regards the undelivered quantity and the provisions of item (b) of article (92) thereof, shall be applied, unless otherwise decided by the administration body.

Chapter Four

Taking delivery of Articles

Article (94) The stores director shall, according to the contract provisions make follow up for the arrival of the articles, take delivery of same, observe the measures of inspection and analysis, record the invoices and fill storing forms and make follow up for providing the accounts department with documents to enable the latter adopt imbursement measures under the provisions of the present regulation.

Article (95) The central administration Head or the concerned department Head shall issue a decision erecting an inspection committee to be presided over by the stores director or an official of the competent department provided such a committee shall include one technical member or more and a member from the section where the articles shall be required and the head of the storekeepers. This committee shall convene within at most, five days as of the next day following that of the articles arrival .

Article (96) The entrepreneur shall at his own expense bring the workers required for opening the parcels and handing the goods, over, to the store keeper or to the inspection committee in his presence or the presence of his authorised representative at the specified date and in case of his failure to attend the stores director or the inspection committee shall have the right to take necessary measures at the expense of

of the entrepreneur to take delivery of the articles and hand same, over to the stores, and rectify the invoice if so required, without the entrepreneur having any right to object.

Article (97) The inspection committee shall check various percentages it shall choose by itself and under its own responsibility according to the importance of the article, in a manner as shall make the sample be , considered as representing the whole article and the committee shall be responsible for the article to be in all aspects in accordance with the specifications and the sealed sample, and a report of minutes shall be made in writing on the inspection form of two copies detailing the percentages of the inspection amounts checked by the committee, the names, specifications and amounts and reasons for recommendations to accept or refuse, then these munutes shall be submitted to the central administration Head or the competent department Head for action.

In case the accepted article shall be approved, a copy of the minutes shall be attached to the delivery order, the entrepreneur's invoice and the first copy of the reception voucher , while the other copy shall be kept with the copy of the invoice in a special file with the stores department.

Article (98) The power of deciding upon differences that may arise between the entrepreneurs and the inspection committees or among members of the inspection

committee themselves shall be the function of the competent central Administration Head who shall have the right to ask the consultancy of another inspection committee or refer the matter to the body to which the technical representative shall belong.

Article (99) On the arrival of articles to the stores from deals amounting to more than two thousand pounds(L.E 2000) and where samples shall have been sent on the submission of bids to the concerned government technical laboratory or where contract shall have been concluded on basis of the conditions and specifications of the administration body, then a sample of same shall be taken and divided,if possible,into two parts,otherwise two samples shall be chosen and in the presence of the inspection committee and the entrepreneur or his representative,the other sample shall have the stamp of the committee Head inscribed on it and signed by two members of the committee and a report of minutes shall be made in writing and signed by the inspection committee members and the entrepreneur or his representative to the effect that the sample shall be identical to that kept by the competent inspection committee Head and then this shall be sent to the chemical laboratory for analysis after giving it a secret number while inserting the number and date of the laboratory certificate for the original sample for ready guidance on the inspection. The analysis certificate

shall be enclosed to payment documents.

In case the sample shall be damaged during the analysis operation, then the administration body shall bear the value, if the sample shall be in conformity with the specifications but in case it shall be proved to be not in conformity with such specifications, then the entrepreneur shall not have the right to claim its value from such a body.

If the supplied articles bearing the name of the administration, shall be refused, then such a name shall be rubbed out of them before giving such rejected articles back to the entrepreneur.

Article (100) As regards deals where the value of articles shall not exceed two hundred pounds each in a contract, inspection and taking delivery may be carried by the director of the stores or under his responsibility and with the approval of the competent department Head. However, in respect of articles purchased through direct agreement, their inspection and taking delivery may be carried by the director of the stores and under his responsibility and the approval of the department Head in so far as the value shall not exceed L.E. 1,000 and the central adminstration , competent head in so far as the value shall not exceed L.E 2,000 after checking whether the price shall be reasonable and if the articles shall be conformant as regards type and specifications with the purpose for which they shall be needed.

BEST AVAILABLE COPY

Article (101) The bodies carrying the analysis or the technical inspection of the goods supplied shall detail in their reports of analysis or inspection the results revealed by their work as compared with the terms and specifications on basis of which the contract shall be concluded and the administration body shall always have to accept these results and to refuse the articles that shall not be in conformity with the specifications or samples on basis of which the contract shall be concluded.

However, articles not in conformity with the specifications or terms may be accepted if the proportion of shortage or offence shall not exceed 20 per cent of the contractual specifications and further provided that there shall be a dire need for accepting the article or articles, heedless of such shortage or offence and that the price after reduction shall be reasonable considering similar articles on the market.

The inspection committee shall decide the suitability of the articles to the purposes they shall be required for, and that their acceptance shall not result in harm to this body and the inspection committee shall specify the reduction in price in return for the shortage or difference. The inspection Committee may ask the consultancy of one or more of the technicians of the concerned technical bodies in case it shall deem it required to do so, possible that:-

BEST AVAILABLE COPY

(1) Articles where shortage in their specifications shall be up to 3 per cent shall be accepted at a reduction in price equivalent to the reduction in price estimated by the committee.

(2) Articles where decrease in their specifications shall be from 3 per cent up to 10 per cent shall be accepted at a reduction in price equivalent to both the reduction in price estimated by the committee and an additional fine of 50 per cent of such an amount, of reduction.

(3) Articles where decrease in their specifications shall be from 10 per cent up to 20 percent shall be accepted at a reduction in price equivalent to both the reduction in price as estimated by the committee and an additional fine of 100 per cent of such an amount, of reduction .

Provided always that final acceptance shall be left to the settlement committee and the authority empowered with giving approval, and that the entrepreneur shall accept in writing such discounts otherwise the article shall be refused and the provisions of the present regulation shall be enforced.

Article (102) The articles offered as un-conditional gifts may be accepted upon the approval of the department Head and a list of same shall be made in writing after having assessed their value by a committee. These shall then be added to the stores accounts exactly in the same way applied for the purchased articles provided the estimated prices for these shall appear

BEST AVAILABLE COPY

in the column of remarks while the phrase "cost free" shall be inserted in the price column. The same procedure shall be applied in respect of articles received as samples.

The view of the competent minister shall be secured before accepting articles offered as presents governed by limiting conditions , and endowments (Wakfs) and wills .

Article (103) On the arrival of articles directly from abroad, the inspection committee shall check these against the invoice contents after having made sure of the safety of the seals, marks or the cases these articles shall be packed there - in. An inspection report of minutes shall be made in writing on the form prepared to this purpose and the committee shall detail in this report any deficit, breakage or damage for which - if any - a special report of minutes on form 188 (accounts) shall be made in order that action may be taken while always observing the dates specified by the insurance companies in case of ensuring the goods so as to preserve the government right to the insurance money, otherwise the person causing such dates to pass without action shall be responsible for the payment of such money. The articles shall be added to the stores exactly as per the invoice contents without considering any breakage or shortage found by the committee .

However the amount of shortage or damage shall be excluded from the store balance in stock using form (111 G.A) and the accounts settlements shall be arranged according to financial rules in force.

In case the boxes shall be difficult to open and to add these as per the contents of the invoice for urgent reasons approved by the competent department Head in writing, the following shall be adopted:-

1- That, these cases shall be added by temporary reception vouchers in their same conditions to the Charge of responsible officials after having such cases sealed with the stamp of the director of the stores and in a manner as will guarantee the safety of such stamps till such time when the cases shall be reopened.

2- That, on the preparation of the temporary reception vouchers referred to, a copy of these shall be enclosed to payment documents in order that the crossing out of the amounts previously deducted from the concerned account, shall be made possible.

PART FIVE

Mobiles Sale REnting Buffets..etc.

Chapter One

General Provisions

Article (104) New articles shall not be sold unless to ministries, departments, local government units and general organisations.

In exception of the above, such articles may be sold to third party, only under the following circumstances:-

1- Articles authorised to be sold by the competent minister or whoever shall be delegated the minister's functions .

2- Model samples prepared by the administration body, provided these shall only be sold to those people who shall buy the documents of bids related to the articles required to be supplied.

3- Military attire and equipment and articles for military and police forces also articles needed by people working in deserts and borderland.

4- Articles authorised for certain administrative units to purchase with the intention of their sale to organisations and idividuals.

5- First aid and necessary drugs authorised by the Ministry of public Health to be sold under special circumstances.

6- Veterinary serums and inoculations and biological materials for diagnosis authorised by the Ministry of Agriculture to be sold to Arab and foreign countries.

7- Articles displayed with the intention of sale at certain ministries, departments and workshops.

8- Books and other publications , including charts, maps bulletins... etc prepared for sale.

In these exceptional cases, sale shall be performed without auction within the limits stipulated under the law of adjudications and auctions provided the following shall be observed:-

(a) Articles in cases stated under items (1) through (5) shall be sold at the record prices rates plus 10 per cent as administrative expenses as regards those articles that shall be sold to the bodies detailed in the present article and plus 20 per cent of such a book value in respect of other parties.

142

* The items which are authorized by the Minister of Finance to be sold.

(b) Articles stated under items (6) through (8) above shall be sold at prices to be fixed by pricing committees to be erected to their purpose by the selling bodies provided the basis supporting the adoption of the committee of these prices shall be detailed and further provided that a decree by the competent minister shall be issued detailing the fixed prices.

Article (105) The comptent central administration Head shall directly be responsible for taking the steps reuired in conformity with the law of adjudications and auctions and its executive regulation for the sale of aricles unfit for use; feared to deteriorate, being out of use or being in excess of requirements; provided that on issuing authorisation to take sale measures, such an authorisation shall expressly include the reasons for the existence of such articles in the stores and responsibility in case such articles shall have been kept in the stores for more than one financial year shall be determined. These steps shall be taken in order to avoid having stagnant stocks in stores and the results in this case shall be submitted to the competent minister for consideration.

Article (106) A decision shall be issued by the central administration Head or the competent department Head forming a committee from among the concerned officers and which shall assort the equipment and

* Added by D. NO.13/1984 - Egyptian Wakeeh No.66 dated 17th March 1984.

articles offered for sale into lots of homogenius groups with a view to enabling the largest number of auctioners to compete in the purchasing operation and to enable giving adequate specifications to avoid any change likely to take place in the assortment or the division of the lots and such information shall be detailed in a report of minutes to be handed over to the pricing committee head. On dividing the articles into lots, care shall be taken that the size of each lot shall be suitable in a manner as shall allow the participation of the greatest number possible of the competitives, a fact which shall not result in the formation of monopolis.

Article (107) The central administration Head or the Competent department head shall issue a decision forming the pricing committee which shall be presided over by a responsible official and with membership of the stores director or whoever he shall delegate, a representative from the accounts department and one or more of the technical officers of the same body or from other bodies having close connections with the articles desired to be sold and the committee shall be accompanied by the keeper of the stores to guide it to the articles required to be sold but he shall not participate in the pricing process.

The committee shall be guided with previous sale prices and the market conditions provided the articles condition shall be taken into account, along with

costs of acquiring them, age of utilisation, rates set for their depreciation and other elements of price evaluation in a manner as shall safeguard the financial interests of the state.

The evaluation made in this way shall be considered as the base price for sale after having it approved by the central administration Head or the competent department head.

Secrecy as regards the base price set by the committee shall be strictly observed, and this committee report shall be put in an envelope to be closed and sealed with red wax bearing the stamp of the administration and the singnature of the committee head beside it. This envelope accompanied by the assortment committee report shall be handed over to the sale committee chairman to be opened in the presence of the sale committee members on the date specified for the sale.

Chapter Two
Contracting steps and Measures

Article (108) Public Auction shall be announced according to the same measures and limits applied for the advertisement of the public adjudication , provided the advertisement shall include data and specifications of the articles offered for sale.

In case the administration body shall have concluded a contract with an entrepreneur for the sale process, he shall undertake to perform the measures of advertisement at his own expense in

conformity with the contract terms concluded with the administration body and provided that he shall be among those recorded in the register of pricing experts at the Ministry of trade and his function shall be confined to borkerage.

Article (109) Conditions related to sale shall include the following provisions:-

1- Before entering an auction, a public auction, an amount to be fixed by the central administration Head or the competent department Head according to the significance of the deal offered for sale, shall be paid by each participant in the auction and such an amount shall be considered as a temporary performance deposit.

2- The awarded competitor in an auction shall complete the amount of the temporary performance bond to 30 per cent of the deal price once the auction shall be awarded to him.

3- The awarded auctioner shall complete the payment of the price within ten days as of the date he shall have been notified of the awardness. However upon the approval of the central administration Head or the competent department Head, such a period may be extended by another ten days in case such an additional delay shall be in the interest of the treasury. In case he shall fail during this period to fulfill his obligation, then the performance bond deposit previously paid by him shall be confiscated and the contract shall be considered as breached without having to adopt any judicious measures.

The deal shall then be offered once again for sale according to the provisions of the present regulation.

4- In case the participant in the auction who shall have been awarded the deal, shall delay in taking delivery of the articles within ten days as of the date of his completing the price, then a storage duty shall be collected from him at the rate of 2 percent per week or a part there-of, and by the end of the third week of delay the administration body shall have the right to take measures for the sale of the articles as soon as possible and at his own account and such a sale shall be in accordance with the provisions of the present regulation. And in this case he shall have to endure the passive difference in prices, the storage expenses for the whole period, the articles shall have been stored up to the date of sale, measures shall have been finalised, and further the administrative expenses at the rate of 10 per cent of the new sale price. Any positive difference in the sale price that may have been realised shall not be refund to him .

5- The quantities offered for sale shall be liable to increase or decrease as revealed by the actual delivery of the articles.

Article (110) Decisions and recommendations adopted by the committee of sale or lease in a public auction shall be approved by the same authority empowered to do so, stipulated under the provisions of the present

regulation in respect of public adjudications.

The sale committee shall state to the auctioners, the weight, number of units, measurments and specifications in detail, of the deal as stated in the report of minutes of the assortment committee- each article separately- without giving information about the basic price. The committee shall make in writing its report of minutes of the steps taken, where it shall detail the amount of the preliminary performance bond deposit paid by each participant in the auction and the amounts refund to owners. The items of sale shall be recorded on the form prepared for this purpose and to which shall be attached the collection receipt. The authority empowered with giving approval, may authorise the sale committee to directly conclude the contract.

Article (111) In case of carrying out sale through the method of enclosed envelopes, the same rules, measures and authorities stated in this executive regulation in respect of purchases through public adjudications, shall be applied.

Article (112) The sale of articles subject to compulsory prices shall be adopted through the measure of closed envelopes auctions and the advertisement there-of shall state that sale shall be at the compulsory prices and to the first bidder whose bid shall not be accompanied by precautions for the whole of the deal and in case no such a bid of the kind shall be submitted, the bid offered for the biggest lot of the article shall be preferred then the second biggest part and so on and the bids shall be put in a downward order, as

regards quantities required to be purchased and in a chronological order as regards the arrival of applications for the same quantity, in a way that the bid of the older date of these, shall be preferred. Bids shall be accompanied by the preliminary performance bond deposit at the specified percentage by the administration body to the compulsory price stated for the article; while a closing date shall be stated for accepting applications.

On such a date falling due, the envelopes opening committee shall open the envelopes, make a tabulation of the bids and submit the results of its tabulation to the settlement committee for achieving its settlement in conformity with the rules detailed in the publicity advertisement.

Articles, the administration shall be unable to sell at the compulsory prices, shall be subject to measures stipulated for sale through public auctions provided that the compulsory prices shall represent the maximum prices in sales by auction.

Article (113) Sale or lease shall be through local auction in so far as the amount shall not exceed L.E 40,000 (forty thousand pounds) and the results of the local auction shall be approved by the competent department Head in so far as the amount shall not exceed L.E 20,000 (Twenty thousand pounds) and by the central administration Head in so far as the amount shall not exceed L.E 40,000 (Forty thousand pounds).

All rules concerning sale through public auctions shall apply to the local auction except those regarding the advertisement, since it shall be adequate to send invitations to local auctioners recorded in the register of the administration body. Such invitations shall be sent by registered mail accompanied by acknowledgement receipts and the invitation shall include all data required about the articles intended for sale and the date specified for the auction. The notification shall be sent at least one week before the date of the auction to be calculated as of the day following that where the notifications shall have been addressed.

Article (114) The auction shall be cnacelled upon a decision to this effect issued with justifications by the authority concerned in cases stipulated under the law organising adjudications and auctions and the administration body shall, in case of cancelling an auction, follow the rules, and apply the provisions of the measures set for selling articles anew whether as regards auctionering or practice method according to the provisions of the present regulations related to the market conditions.

Article (115) The preliminary performance bond deposits remitted by the auctioners who shall not be winners of the auction, shall be refund to them against withdrawing the receipts of the preliminary deposits and which shall be signed by them to the effect of recovering their amounts.

Article (116) Dispensing with articles, through sale

or lease using the practice method shall be applied in accordance with the provisions of the law organising adjudications and auctions upon a decision to this effect adopted by the competent central administration Head. The same rules, measures and powers organising purchase through practice method and as stipulated in this executive regulation shall be applied in dispensing or lease of articles provided that invitations shall be addressed to the largest number possible of the practitioners recorded in the registers of the administration body.

Article (117) Sale by direct agreement shall be made to the bodies subject to the provisions of the law organising adjudications and auctions provided the sale price shall not be less than the basic price reached by the pricing committee stipulated by the present regulation and to which shall be added 10 per cent as administrative charges. In case of necessity, however, and upon the authorisation of the authority concerned with giving the approval, sale may be effected through direct agreement to a third party other than these bodies in case the price shall for a deal not be less than L.E 1,000 (One thousand pounds) in the following two instances:-

a) Articles feared to deteriorate if they shall remain in the stores.
b) Under cincumstances of unpredictable emergency where these shall be no time to allow the adoption of the measures relative to auction or practice method.

Provided always that the sale price shall in both cases not be less than the basic price.

Article (118) The delivery of the sold articles shall be handed by a committee presided over by a responsible official delegated by the department Head and with the membership of the concerned store keeper, an official to be delegated by the stores director provided be shall not be one of the store keepers and a representative of the accounts department. This committee shall observe the delivery to be according to the division performed by the assortment committee as regards quantity, specifications and results revealed by decisions of sales.

Article (119) The selling administration body shall report to the Taxation Department what movables shall be sold to parties other than the units subject to the provisions of the law organising adjudications and auctions and such reporting shall include the following information:-

1- The buyer's name in triple, his capacity and full address.
2- His identity/family card number and its date and place of issue.
3- The number of commercial, industrial or professional registration of the buyer and his taxation card number.
4- The value and type of the sold movables .

Article (120) Renting of buffets (Cafeteria)..etc shall be concluded through public auction and within the limits of the provisions stipulated under the law

organising adjudications and auctions and the present regulation in respect of measures and rules for sale, provided that the pricing committee shall be concerned with setting the minimum limit for the lease of the place required to be rented while always observing the latest rental value of the place and value of other similar places in addition to other effective elements.

Buffets existing in administrative bodies may be leased through direct agreement to Co-Operative societies confined to members of these bodies working people in case such a step shall be included in their activities and upon permission and approval by the authority concerned with giving the approvals, in case the amount shall not exceed L.E 1,000 (One thousand pounds) per the year .

Under no circumstances shall the rental period exceed three years after which such a rental value shall be reconsidered by the committee concerned and then measures for concluding a new contract shall be adopted under the provisions of the present regulation

Issued on 20th Shaaban 1403 AH - 20th June 1983 AC.

Minister of Finance
Dr. Mahmoud Salah-Eddin Hamed

Al Wakaei Al Misriya Journal- Issue 162 On July 17, 1983 .

(1) THIS PARA WAS ADDED AS PER DECREE NO. 189/1986

Appendix C
1996 US COMMERCIAL GUIDE FOR EGYPT

154

COUNTRY COMMERCIAL GUIDE

1996/1997

EMBASSY OF THE UNITED STATES OF AMERICA

CAIRO, EGYPT

AMERICAN EMBASSY
THE COMMERCIAL SERVICE
3 LAZOGHLI STREET
GARDEN CITY, CAIRO
TEL: (20-2) 357-2340, 357-2223
FAX: (20-2) 355-8368

151

EXCERPT: Section on Egyptian Government Procurement

SELLING TO THE GOVERNMENT

In selling to the Egyptian Government one will of course deal directly with the client agency. Egyptian procurement is either done with national budgetary funds, or by using aid funds from USAID or other donors.

In the case of USAID-funded procurement, project announcements are made in the U.S. "Commerce Business Daily," published in Chicago. This journal publishes U.S. Government procurement needs, and is available in hard copy for $324 per year from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402-9371, phone 202-783-3238, fax 202-512-2233, or on line from Mead Data Central, Arlington, VA, phone 800-843-6476.

Other donor-funded projects open to U.S. bidders are from the Government of Japan's United Overseas Development Assistance (ODA), or multilateral assistance from entities such as the World Bank, African Development Bank, or Arab and Islamic development funds. A new Middle East Development Bank scheduled to open in Cairo in 1997 will be another funding source.

The following pertains to contracting directly to the Egyptian Government. It is also relevant for donor-financed projects to the extent that Egyptian law applies to them.

Tenders Law

Tenders Law No. 9 of 1983, supplemented by implementing regulations issued by the Ministry of Finance (Decree 157 of 1983, as amended), governs Egyptian government procurement by all civilian and military agencies ("ministries, departments, local government units, and public and general organizations") unless they are excused from this law. Some government corporations do have their own separate procurement procedures.

Law 9 requires that all foreign bidders on public sector tenders submit bids through an Egyptian commercial agent, except in the case of Ministry of Defense tenders for which commercial agents are prohibited. ("Consultants" may, however, be used in connection with military bids.) This means that tender documents generally can be purchased from issuing government offices only by the commercial agent. U.S. firms usually cannot get the documents by writing directly to the government agency or through the U.S. Embassy.

Public sector entities routinely request credit terms in their tenders for capital equipment. Typical payment guidelines for tenders worth more than $62,000 are 10% paid at contract signing, 10% against shipping documents, and the rest paid in semi-annual installments over two to five years.

Egypt's tender regulations are written by the government, for the government's benefit. Obligations and responsibilities of suppliers are spelled out in excruciating detail, but there are fewer explicit requirements placed on the government client agency. A contractor/supplier's safeguards, therefore,

156

must be negotiated before contract signing, particularly in defining force majeure, "final acceptance," drawdown of the performance bond, and dispute resolution.

What the Tenders Law says

Tenders Law No. 9 requires, with specified exceptions:

(A) open competition with publication for at least 30 days;

(B) 15% price preference for Egyptian bidders;

(C) a two-phase decision-making process: a bid opening committee that convenes a public session to which all bidders are invited and bid prices are read aloud; and a decision-making (settlement) committee that reviews the technical bids and either makes a decision or (if the value is over $62,000) recommends a decision to the minister concerned;

(D) bid bonds of one or two (generally two)%, and a performance bond by the winning firm of (generally) five%.

Favoritism is shown to Egyptian public sector companies and Egyptian cooperatives both of which are exempted from the bonding requirements provided they do the work themselves and do not request an advance payment;

(E) fraud, bribery ("either personally or through a third party, directly or indirectly"), or bankruptcy by the contracting party annuls the contract and allows any outstanding bid or performance bond to be confiscated;

(F) sole source decisions are permitted in special instances: monopoly sources of supply; goods whose import is monopolized; specialized products or services; and goods and services needed urgently;

(G) advance payments are permitted, against a letter of guarantee. U.S. standby letters of credit (which can be insured for political risk by the U.S. Overseas Private Investment Corp.) are acceptable in Egypt.

Law 106 of 1976 requires that insurance be provided to meet the decennial liability of the civil code.

Practical Problems of the Tenders Law

There is no time limit for the decision making committees to meet, make, or announce their decision. The law does not require publication of decision-making criteria, nor that losing bidders be told why they lost. If a bidder withdraws its bid prior to bid opening, it forfeits the bid bond. Bidders often are "held hostage" to a government agency that stalls the bid opening for varied reasons, including running out of funds for the project. Costs of extending bid bonds are borne by the bidders. If a winning firm withdraws from a project before beginning or completing a project, its performance bond similarly will be confiscated. This has happened when a client has delayed start-up because of budget shortfalls, expecting the contractor/supplier to carry the burden of maintaining the performance bond. By contrast, the government agency can cancel an order even after awarding it and after the supplier/contractor posts a performance bond.

Government agencies often delay giving the "final acceptance" of goods or works projects. This holds up final payment and final retirement of the performance bond. There are not time limits for making payment from the date of acceptance of a bid, nor any provision for implied or automatic

19

acceptance of a supplied good or service. The client must explicityly acknowledge "final acceptance" before the contractor can receive final payment, retire the performance bond, and close its books.

If award decisions are delayed beyond the validity date specified by a bidder, extra costs incurred by the delay cannot routinely be passed on. If the client adds new requirements to an ongoing contract, any extra monies requested by the supplier/contractor must be endorsed by a special "price study committee" which sometimes takes years to approve them. In the meantime, of course, the supplier/contractor is expected to fulfill the revised contract without delay or complaint.

The Tenders Law makes no reference to dispute resolution, which therefore must be negotiated prior to contract signing. Arbitration in Egypt or abroad (the latter can include foreign law and foreign arbitral procedures) is preferred to the court system, although enforcement of arbitral awards is not assured because the losing party can appeal Egyptian or foreign arbitral decisions in Egyptian courts. If no specific dispute settlement procedure is mentioned, any future dispute with a government party will go to the government's Council of State, a government agency that both reviews the constitutionality of proposed laws and regulations and functions as a court for all non-criminal matters in which the government is a party. If the government party does not honor an arbitration decision, the tenders law does not permit the winning party to use the arbitration settlement documents to settle claims with other government entities (customs, tax, social insurance, etc.).

There is no provision allowing the supplier to delay work if payments are delayed. There is no provision to reduce the performance bond progressively according to the rate of completion of the work.

For Letters of Credit/Guarantee offered as a performance bond, it is advisable to have separate L/C's for each procured commodity or distinct order, to avoid blocking the whole in case of dispute over one item.

Other Practical Considerations in Selling to the Government

Poorly written specifications make bidders guess what the customer wants. U.S. firms must stay in close touch with client agencies to minimize doubts and uncertainties. Do not assume the "best" is desired, since its superior features may not be understood or its price may be too high. The law is silent about who writes tender specifications and neither encourages nor discourages hiring of consultants to do so. Foreign firms that are trusted by government officials often voluntarily propose tender specifications to prospective tenderers, which gives them a chance to wire the specifications. In the decision making committee, the technical representative (typically an engineer) must concur in the award decision. Such persons carry much influence.

Government entities expect performance bonds to cover the full warranty period for the product or work in question and drawdowns proportional to work completed are not usual. U.S. suppliers, by contrast, generally want their warranty limited to safe delivery and/or set-up. Therein lies grounds for much misunderstanding and complaints over alleged delays in releasing performance bonds.

As for bid bargaining, although Article 16 of Law No. 9 says "no negotiations may take place with any of the tenderers to modify his tender" except in final negotiations with the lowest bidder, this is rarely practiced. Instead, freewheeling bargaining is routine with several competing low bidders, with the object being to extract maximum concessions from each bidder. Law 9 translations refer to this as "open negotiations" or "momarsa" in Arabic." Some bidders call it "Dutch Auction."

Influence peddling in procurement decisions is a much-discussed phenomenon. What is certain is that decision makers must feel comfortable with a supplier. They will not select a low-bidder unknown to them. Personal friendships and frequent visits to decision makers by foreign principals and their local representatives are important marketing factors. Some sweetheart deals are known to take place. However, many Egyptian sources affirm that most decisions are openly competitive and straight-forward. While the decision making process per se may be opaque, it is also porous in the sense that details of all bids are readily obtainable through back channels and become known quickly to all concerned.

Appendix D
GATT AGREEMENT ON GOVERNMENT PROCUREMENT

Results of the Uruguay Round

Agreement on Government Procurement

Text of the Agreement

Annexes[1]

Note: Pages 44 to 104 of the text, which are not included in this volume, contain the Spanish and French language editions of the Agreement.

Office of the United States Trade Representative
Executive Office of the President
Washington, D.C.

---

[1]The Annex of the United States contained in this document incorporates the results of the U.S. - European Unions (EU) bilateral procurement agreement reached on April 13, 1994, which has not yet been approved by the EU Council of Ministers. The EU Annex contained in this document does not reflect the results of that bilateral agreement. Both the U.S. and EU Annexes will beformally amended after the bilateral agreement has been approved by the EU Council of Ministers.

AGREEMENT ON

GOVERNMENT PROCUREMENT

ACCORD SUR

LES MARCHES PUBLICS

ACUERDO SOBRE

CONTRATACIÓN PÚBLICA

Marrakesh
15 April 1994

162

TABLE OF CONTENTS

		Page
Preamble		17
Article I	Scope and Coverage	18
Article II	Valuation of Contracts	18
Article III	National Treatment and Non-discrimination	19
Article IV	Rules of Origin	19
Article V	Special and Differential Treatment for Developing Countries	20
	- Objectives - Coverage - Agreed Exclusions - Technical Assistance for Developing Country Parties - Information Centres - Special Treatment for Least-Developed Countries - Review	
Article VI	Technical Specifications	22
Article VII	Tendering Procedures	23
Article VIII	Qualification of Suppliers	23
Article IX	Invitation to Participate Regarding Intended Procurement	25
Article X	Selection Procedures	27
Article XI	Time-limits for Tendering and Delivery	27
	- General - Deadlines	

163

		Page
Article XII	Tender Documentation	28
	- Forwarding of Tender Documentation by the Entities	
Article XIII	Submission, Receipt and Opening of Tenders and Awarding of Contracts	30
	- Receipt of Tenders - Opening of Tenders - Award of Contracts - Option Clauses	
Article XIV	Negotiation	31
Article XV	Limited Tendering	31
Article XVI	Offsets	33
Article XVII	Transparency	33
Article XVIII	Information and Review as Regards Obligations of Entities	34
Article XIX	Information and Review as Regards Obligations of Parties	35
Article XX	Challenge Procedures	36
	- Consultations - Challenge	
Article XXI	Institutions	37
Article XXII	Consultations and Dispute Settlement	37
Article XXIII	Exceptions to the Agreement	38

164

			Page
Article XXIV	Final Provisions		39
	-	Acceptance and Entry into Force	
	-	Accession	
	-	Transitional Arrangements	
	-	Reservations	
	-	National Legislation	
	-	Rectifications or Modifications	
	-	Reviews, Negotiations and Future Work	
	-	Information Technology	
	-	Amendments	
	-	Withdrawal	
	-	Non-application of this Agreement between Particular Parties	
	-	Notes, Appendices and Annexes	
	-	Secretariat	
	-	Deposit	
	-	Registration	
Notes			43

APPENDICES TO THE AGREEMENT ON GOVERNMENT PROCUREMENT

Appendix I	Annexes 1 through 5 setting out the scope of this Agreement		
	Austria -	Annex 1	105
		Annex 2	108
		Annex 3	109
		Annex 4	110
		Annex 5	112
		General Notes	113
	Canada (Authentic English version) -	Annex 1	116
		Annex 2	120
		Annex 3	121
		Annex 4	122
		Annex 5	125
		General Notes	126
	Canada (Authentic French version) -	Annex 1	128
		Annex 2	132
		Annex 3	133
		Annex 4	134
		Annex 5	138
		General Notes	139
	European Communities -	Annex 1	141
		Annex 2	173
		Annex 3	184
		Annex 4	185

165

		Page
European Communities (cont'd)	Annex 5	187
	General Notes	208
Finland -	Annex 1	211
	Annex 2	214
	Annex 3	216
	Annex 4	218
	Annex 5	220
	General Notes	221
Hong Kong -	Annex 1	224
	Annex 2	226
	Annex 3	227
	Annex 4	228
	Annex 5	230
	General Notes	231
Israel -	Annex 1	233
	Annex 2	235
	Annex 3	236
	Annex 4	237
	Annex 5	238
	General Notes	239
	Note	240
Japan -	Annex 1	241
	Annex 2	244
	Annex 3	246
	Annex 4	250
	Annex 5	252
	General Notes	253
Korea -	Annex 1	254
	Annex 2	257
	Annex 3	259
	Annex 4	261
	Annex 5	264
	General Notes	265
Norway -	Annex 1	266
	Annex 2	271
	Annex 3	273
	Annex 4	275
	Annex 5	277
	General Notes	278
Sweden -	Annex 1	284
	Annex 2	295
	Annex 3	296
	Annex 4	298
	Annex 5	300
	General Notes	301

166

			Page
	Switzerland -	Annex 1	306
		Annex 2	309
		Annex 3	311
		Annex 4	315
		Annex 5	317
		General Notes	323
	United States -	Annex 1	325
		Annex 2	329
		Annex 3	334
		Annex 4	335
		Annex 5	336
		General Notes	337
Appendix II	Publications utilized by Parties for the Publication of Notices of Intended Procurements - paragraph 1 of Article IX, and of Post-Award Notices - paragraph 1 of Article XVIII		339-341
Appendix III	Publications utilized by Parties for the Publication Annually of Information on Permanent Lists of Qualified Suppliers in the case of Selective Tendering Procedures - paragraph 9 of Article IX		349-351
Appendix IV	Publications utilized by Parties for the Publication of Laws, Regulations, Judicial Decisions, Administrative Rulings of General Application and Any Procedure Regarding Government Procurement covered by this Agreement - paragraph 1 of Article XIX		359-362

167

TABLE DES MATIERES

		Page
Préambule		44
Article premier	Portée et champ d'application	45
Article II	Evaluation des marchés	45
Article III	Traitement national et non-discrimination	46
Article IV	Règles d'origine	47
Article V	Traitement spécial et différencié en faveur des pays en développement	47
	- Objectifs	
	- Champ d'application	
	- Exceptions convenues	
	- Assistance technique aux pays en développement Parties à l'Accord	
	- Centres d'information	
	- Traitement spécial en faveur des pays les moins avancés	
	- Examen	
Article VI	Spécifications techniques	50
Article VII	Procédures de passation des marchés	51
Article VIII	Qualification des fournisseurs	51
Article IX	Invitation à soumissionner pour des marchés envisagés	52
Article X	Procédures de sélection	55
Article XI	Délais pour la présentation des soumissions et la livraison	55
	- Dispositions générales	
	- Délais	

168

		Page
Article XII	Documentation relative à l'appel d'offres	57
	- Communication, par les entités, de la documentation relative à l'appel d'offres	
Article XIII	Présentation, réception et ouverture des soumissions, et adjudication des marchés	58
	- Réception des soumissions - Ouverture des soumissions - Adjudication des marchés - Options	
Article XIV	Négociation	59
Article XV	Appel d'offres limité	60
Article XVI	Opérations de compensation	62
Article XVII	Transparence	62
Article XVIII	Information et examen concernant les obligations des entités	63
Article XIX	Information et examen concernant les obligations des Parties	64
Article XX	Procédures de contestation	65
	- Consultations - Contestation	
Article XXI	Institutions	66
Article XXII	Consultations et règlement des différends	66
Article XXIII	Exceptions à l'Accord	68

169

Page

Article XXIV Dispositions finales 68

- Acceptation et entrée en vigueur
- Accession
- Dispositions transitoires
- Réserves
- Législation nationale
- Rectifications ou modifications
- Examens, négociations et travaux futurs
- Technologies de l'information
- Amendements
- Retrait
- Non-application du présent accord entre des Parties
- Notes, Appendices et Annexes
- Secrétariat
- Dépôt
- Enregistrement

Notes 72

APPENDICES DE L'ACCORD SUR LES MARCHES PUBLICS

Appendice I Annexes 1 à 5 définissant la portée du présent accord

Autriche -	Annexe 1	105
	Annexe 2	108
	Annexe 3	109
	Annexe 4	110
	Annexe 5	112
	Notes générales	113
Canada - (Version française faisant foi)	Annexe 1	128
	Annexe 2	132
	Annexe 3	133
	Annexe 4	134
	Annexe 5	138
	Notes générales	139
Canada - (Version anglaise faisant foi)	Annexe 1	116
	Annexe 2	120
	Annexe 3	121
	Annexe 4	122
	Annexe 5	125
	Notes générales	126
Communautés - européennes	Annexe 1	141
	Annexe 2	173
	Annexe 3	184

170

		Page
Communautés européennes (suite)	Annexe 4	185
	Annexe 5	187
	Notes générales	208
Corée -	Annexe 1	254
	Annexe 2	257
	Annexe 3	259
	Annexe 4	261
	Annexe 5	264
	Notes générales	265
Etats-Unis -	Annexe 1	325
	Annexe 2	329
	Annexe 3	334
	Annexe 4	335
	Annexe 5	336
	Notes générales	337
Finlande -	Annexe 1	211
	Annexe 2	214
	Annexe 3	216
	Annexe 4	218
	Annexe 5	220
	Notes générales	221
Hong Kong -	Annexe 1	224
	Annexe 2	226
	Annexe 3	227
	Annexe 4	228
	Annexe 5	230
	Notes générales	231
Israël -	Annexe 1	233
	Annexe 2	235
	Annexe 3	236
	Annexe 4	237
	Annexe 5	238
	Notes générales	239
	Note	240
Japon -	Annexe 1	241
	Annexe 2	244
	Annexe 3	246
	Annexe 4	250
	Annexe 5	252
	Notes générales	253
Norvège -	Annexe 1	266
	Annexe 2	271
	Annexe 3	273
	Annexe 4	275

171

			Page
	Norvège (suite)	Annexe 5	277
		Notes générales	278
	Suède -	Annexe 1	284
		Annexe 2	295
		Annexe 3	296
		Annexe 4	298
		Annexe 5	300
		Notes générales	301
	Suisse -	Annexe 1	306
		Annexe 2	309
		Annexe 3	311
		Annexe 4	315
		Annexe 5	317
		Notes générales	323
Appendice II	Publications utilisées par les Parties en vue de la publication des avis de marchés envisagés - paragraphe 1 de l'article IX, et des avis postérieurs à l'adjudication des marchés - paragraphe 1 de l'article XVIII		342-344
Appendice III	Publications utilisées par les Parties en vue de la publication annuelle de renseignements sur les listes permanentes de fournisseurs qualifiés dans le cas des procédures sélectives - paragraphe 9 de l'article IX		352-354
Appendice IV	Publications utilisées par les Parties en vue de la publication des lois, règlements, décisions judiciaires, décisions administratives d'application générale et procédures, relatifs aux marchés publics visés par le présent accord - paragraphe 1 de l'article XIX		363-366

172

ÍNDICE

		Página
Preámbulo		73
Artículo I	Ámbito de aplicación	74
Artículo II	Valoración de los contratos	74
Artículo III	Trato nacional y no discriminación	75
Artículo IV	Normas de origen	76
Artículo V	Trato especial y diferenciado para los países en desarrollo	76
	- Objetivos - Alcance - Exenciones convenidas - Asistencia técnica a los países en desarrollo Partes - Centros de información - Trato especial para los países menos adelantados - Examen	
Artículo VI	Especificaciones técnicas	79
Artículo VII	Procedimiento de licitación	80
Artículo VIII	Calificación de los proveedores	80
Artículo IX	Invitación a participar en relación con el contrato previsto	81
Artículo X	Procedimientos de selección	84
Artículo XI	Plazos para la licitación y la entrega	84
	- Disposiciones generales - Plazos	

173

Página

Artículo XII	Pliego de condiciones	86
	- Envío del pliego de condiciones por las entidades	
Artículo XIII	Presentación, recepción y apertura de las ofertas, y adjudicación de los contratos	87
	- Recepción de las ofertas - Apertura de las ofertas - Adjudicación de los contratos - Cláusulas de opción	
Artículo XIV	Negociación	88
Artículo XV	Licitación restringida	89
Artículo XVI	Compensaciones	91
Artículo XVII	Transparencia	91
Artículo XVIII	Información y examen: obligaciones de las entidades	92
Artículo XIX	Información y examen: obligaciones de las Partes	93
Artículo XX	Procedimientos de impugnación	94
	- Consultas - Impugnación	
Artículo XXI	Instituciones	95
Artículo XXII	Consultas y solución de diferencias	96
Artículo XXIII	Excepciones a las disposiciones del Acuerdo	97
Artículo XXIV	Disposiciones finales	97
	- Aceptación y entrada en vigor - Adhesión	

174

Página

- Disposiciones transitorias
- Reservas
- Legislación nacional
- Rectificaciones o enmiendas
- Exámenes, negociaciones y labor futura
- Tecnología de la información
- Modificaciones
- Denuncia
- No aplicación del presente Acuerdo entre determinadas Partes
- Notas, Apéndices y Anexos
- Secretaría
- Depósito
- Registro

Notas 102

APÉNDICES DEL ACUERDO SOBRE CONTRATACIÓN PÚBLICA

Apéndice I Anexos 1 a 5, en los que se establece el alcance del presente Acuerdo:

Austria -	Anexo 1	105
	Anexo 2	108
	Anexo 3	109
	Anexo 4	110
	Anexo 5	112
	Notas de carácter general	113
Canadá - (versión auténtica en inglés)	Anexo 1	116
	Anexo 2	120
	Anexo 3	121
	Anexo 4	122
	Anexo 5	125
	Notas de carácter general	126
Canadá - (versión auténtica en francés)	Anexo 1	128
	Anexo 2	132
	Anexo 3	133
	Anexo 4	134
	Anexo 5	138
	Notas de carácter general	139
Comunidades - Europeas	Anexo 1	141
	Anexo 2	173
	Anexo 3	184
	Anexo 4	185
	Anexo 5	187
	Notas de carácter general	208

175

Página

Corea	-	Anexo 1	254
		Anexo 2	257
		Anexo 3	259
		Anexo 4	261
		Anexo 5	264
		Notas de carácter general	265
Estados Unidos	-	Anexo 1	325
		Anexo 2	329
		Anexo 3	334
		Anexo 4	335
		Anexo 5	336
		Notas de carácter general	337
Finlandia	-	Anexo 1	211
		Anexo 2	214
		Anexo 3	216
		Anexo 4	218
		Anexo 5	220
		Notas de carácter general	221
Hong Kong	-	Anexo 1	224
		Anexo 2	226
		Anexo 3	227
		Anexo 4	228
		Anexo 5	230
		Notas de carácter general	231
Israel	-	Anexo 1	233
		Anexo 2	235
		Anexo 3	236
		Anexo 4	237
		Anexo 5	238
		Notas de carácter general	239
		Nota	240
Japón	-	Anexo 1	241
		Anexo 2	244
		Anexo 3	246
		Anexo 4	250
		Anexo 5	252
		Notas de carácter general	253
Noruega	-	Anexo 1	266
		Anexo 2	271
		Anexo 3	273
		Anexo 4	275
		Anexo 5	277
		Notas de carácter general	278

176

			Página
Suecia	-	Anexo 1	284
		Anexo 2	295
		Anexo 3	296
		Anexo 4	298
		Anexo 5	300
		Notas de carácter general	301
Suiza	-	Anexo 1	306
		Anexo 2	309
		Anexo 3	311
		Anexo 4	315
		Anexo 5	317
		Notas de carácter general	323

Apéndice II	Medios utilizados por las Partes para la publicación de los anuncios de los contratos previstos - párrafo 1 del artículo IX - y los anuncios de las adjudicaciones - párrafo 1 del artículo XVIII.	345-347
Apéndice III	Medios utilizados por las Partes para la publicación anual de información sobre las listas permanentes de proveedores calificados en caso de licitaciones selectivas - párrafo 9 del artículo IX.	355-357
Apéndice IV	Medios utilizados por las Partes para la publicación de leyes, reglamentos, decisiones judiciales y resoluciones administrativas de aplicación general, así como de los procedimientos para la adjudicación de los contratos públicos comprendidos en el ámbito del presente Acuerdo - párrafo 1 del artículo XIX.	367-370

AGREEMENT ON GOVERNMENT PROCUREMENT

Parties to this Agreement (hereinafter referred to as "Parties"),

Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;

Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;

Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;

Recognizing the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;

Recognizing the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries;

Desiring, in accordance with paragraph 6(b) of Article IX of the Agreement on Government Procurement done on 12 April 1979, as amended on 2 February 1987, to broaden and improve the Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts;

Desiring to encourage acceptance of and accession to this Agreement by governments not party to it;

Having undertaken further negotiations in pursuance of these objectives;

Hereby *agree* as follows:

Article I

Scope and Coverage

1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.[1]

2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

3. Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply *mutatis mutandis* to such requirements.

4. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

Article II

Valuation of Contracts

1. The following provisions shall apply in determining the value of contracts[2] for purposes of implementing this Agreement.

2. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable.

3. The selection of the valuation method by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Agreement.

4. If an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:

(a) the actual value of similar recurring contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or

(b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.

---

[1]For each Party, Appendix I is divided into five Annexes:
- Annex 1 contains central government entities.
- Annex 2 contains sub-central government entities.
- Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
- Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.
- Annex 5 specifies covered construction services.

Relevant thresholds are specified in each Party's Annexes.

[2]This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article IX.

5. In cases of contracts for the lease, rental or hire purchase of products or services, or in the case of contracts which do not specify a total price, the basis for valuation shall be:

(a) in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for their duration, or, where their term exceeds 12 months, their total value including the estimated residual value;

(b) in the case of contracts for an indefinite period, the monthly instalment multiplied by 48.

If there is any doubt, the second basis for valuation, namely (b), is to be used.

6. In cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

Article III

National Treatment and Non-discrimination

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:

(a) that accorded to domestic products, services and suppliers; and

(b) that accorded to products, services and suppliers of any other Party.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:

(a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and

(b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.

Article IV

Rules of Origin

1. A Party shall not apply rules of origin to products or services imported or supplied for purposes of government procurement covered by this Agreement from other Parties, which are different from

the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same products or services from the same Parties.

2. Following the conclusion of the work programme for the harmonization of rules of origin for goods to be undertaken under the Agreement on Rules of Origin in Annex 1A of the Agreement Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement") and negotiations regarding trade in services, Parties shall take the results of that work programme and those negotiations into account in amending paragraph 1 as appropriate.

Article V

Special and Differential Treatment for Developing Countries

Objectives

1. Parties shall, in the implementation and administration of this Agreement, through the provisions set out in this Article, duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to:

(a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;

(b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;

(c) support industrial units so long as they are wholly or substantially dependent on government procurement; and

(d) encourage their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the World Trade Organization (hereinafter referred to as the "WTO") and not disapproved by it.

2. Consistently with the provisions of this Agreement, each Party shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development.

Coverage

3. With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 shall be duly taken into account in the course of negotiations with respect to the procurement of developing countries to be covered by the provisions of this Agreement. Developed countries, in the preparation of their coverage lists under the provisions of this Agreement, shall endeavour to include entities procuring products and services of export interest to developing countries.

Agreed Exclusions

4. A developing country may negotiate with other participants in negotiations under this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities,

products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in subparagraphs 1(a) through 1(c) shall be duly taken into account. A developing country participating in regional or global arrangements among developing countries referred to in subparagraph 1(d) may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, *inter alia*, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.

5. After entry into force of this Agreement, a developing country Party may modify its coverage lists in accordance with the provisions for modification of such lists contained in paragraph 6 of Article XXIV, having regard to its development, financial and trade needs, or may request the Committee on Government Procurement (hereinafter referred to as "the Committee") to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraphs 1(a) through 1(c). After entry into force of this Agreement, a developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraph 1(d). Each request to the Committee by a developing country Party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.

6. Paragraphs 4 and 5 shall apply *mutatis mutandis* to developing countries acceding to this Agreement after its entry into force.

7. Such agreed exclusions as mentioned in paragraphs 4, 5 and 6 shall be subject to review in accordance with the provisions of paragraph 14 below.

Technical Assistance for Developing Country Parties

8. Each developed country Party shall, upon request, provide all technical assistance which it may deem appropriate to developing country Parties in resolving their problems in the field of government procurement.

9. This assistance, which shall be provided on the basis of non-discrimination among developing country Parties, shall relate, *inter alia*, to:

- the solution of particular technical problems relating to the award of a specific contract; and

- any other problem which the Party making the request and another Party agree to deal with in the context of this assistance.

10. Technical assistance referred to in paragraphs 8 and 9 would include translation of qualification documentation and tenders made by suppliers of developing country Parties into an official language of the WTO designated by the entity, unless developed country Parties deem translation to be burdensome, and in that case explanation shall be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities.

Information Centres

11. Developed country Parties shall establish, individually or jointly, information centres to respond to reasonable requests from developing country Parties for information relating to, *inter alia*, laws,

regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.

Special Treatment for Least-Developed Countries

12. Having regard to paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203-205), special treatment shall be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of this Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries.

13. Each developed country Party shall, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

Review

14. The Committee shall review annually the operation and effectiveness of this Article and, after each three years of its operation on the basis of reports to be submitted by Parties, shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Article III, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of paragraphs 4 through 6 of this Article shall be modified or extended.

15. In the course of further rounds of negotiations in accordance with the provisions of paragraph 7 of Article XXIV, each developing country Party shall give consideration to the possibility of enlarging its coverage lists, having regard to its economic, financial and trade situation.

Article VI

Technical Specifications

1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2. Technical specifications prescribed by procuring entities shall, where appropriate:

(a) be in terms of performance rather than design or descriptive characteristics; and

(b) be based on international standards, where such exist; otherwise, on national technical regulations[3], recognized national standards[4], or building codes.

3. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.

4. Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

Article VII

Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.

2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

3. For the purposes of this Agreement:

(a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.

(b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.

(c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.

Article VIII

Qualification of Suppliers

In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:

---

[3]For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

[4]For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

(a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;

(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations;

(c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off a suppliers' list or from being considered for a particular intended procurement. Entities shall recognize as qualified suppliers such domestic suppliers or suppliers of other Parties who meet the conditions for participation in a particular intended procurement. Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;

(d) entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time;

(e) if, after publication of the notice under paragraph 1 of Article IX, a supplier not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification;

(f) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;

(g) each Party shall ensure that:

    (i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure; and

    (ii) efforts be made to minimize differences in qualification procedures between entities.

(h) nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

185

Article IX

Invitation to Participate Regarding Intended Procurement

1. In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV (limited tendering). The notice shall be published in the appropriate publication listed in Appendix II.

2. The invitation to participate may take the form of a notice of proposed procurement, as provided for in paragraph 6.

3. Entities in Annexes 2 and 3 may use a notice of planned procurement, as provided for in paragraph 7, or a notice regarding a qualification system, as provided for in paragraph 9, as an invitation to participate.

4. Entities which use a notice of planned procurement as an invitation to participate shall subsequently invite all suppliers who have expressed an interest to confirm their interest on the basis of information which shall include at least the information referred to in paragraph 6.

5. Entities which use a notice regarding a qualification system as an invitation to participate shall provide, subject to the considerations referred to in paragraph 4 of Article XVIII and in a timely manner, information which allows all those who have expressed an interest to have a meaningful opportunity to assess their interest in participating in the procurement. This information shall include the information contained in the notices referred to in paragraphs 6 and 8, to the extent such information is available. Information provided to one interested supplier shall be provided in a non-discriminatory manner to the other interested suppliers.

6. Each notice of proposed procurement, referred to in paragraph 2, shall contain the following information:

(a) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured;

(b) whether the procedure is open or selective or will involve negotiation;

(c) any date for starting delivery or completion of delivery of goods or services;

(d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;

(e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;

(f) any economic and technical requirements, financial guarantees and information required from suppliers;

(g) the amount and terms of payment of any sum payable for the tender documentation; and

(h) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.

7. Each notice of planned procurement referred to in paragraph 3 shall contain as much of the information referred to in paragraph 6 as is available. It shall in any case include the information referred to in paragraph 8 and:

(a) a statement that interested suppliers should express their interest in the procurement to the entity;

(b) a contact point with the entity from which further information may be obtained.

8. For each case of intended procurement, the entity shall publish a summary notice in one of the official languages of the WTO. The notice shall contain at least the following information:

(a) the subject matter of the contract;

(b) the time-limits set for the submission of tenders or an application to be invited to tender; and

(c) the addresses from which documents relating to the contracts may be requested.

9. In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following:

(a) the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;

(b) the conditions to be fulfilled by suppliers with a view to their inscription on those lists and the methods according to which each of those conditions will be verified by the entity concerned; and

(c) the period of validity of the lists, and the formalities for their renewal.

When such a notice is used as an invitation to participate in accordance with paragraph 3, the notice shall, in addition, include the following information:

(d) the nature of the products or services concerned;

(e) a statement that the notice constitutes an invitation to participate.

However, when the duration of the qualification system is three years or less, and if the duration of the system is made clear in the notice and it is also made clear that further notices will not be published, it shall be sufficient to publish the notice once only, at the beginning of the system. Such a system shall not be used in a manner which circumvents the provisions of this Agreement.

10. If, after publication of an invitation to participate in any case of intended procurement, but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be given the same circulation as the original documents upon which the amendment is based. Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

11. Entities shall make clear, in the notices referred to in this Article or in the publication in which the notices appear, that the procurement is covered by the Agreement.

Article X

Selection Procedures

1. To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.

2. Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the lists.

3. Suppliers requesting to participate in a particular intended procurement shall be permitted to submit a tender and be considered, provided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under Articles VIII and IX. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

4. Requests to participate in selective tendering procedures may be submitted by telex, telegram or facsimile.

Article XI

Time-limits for Tendering and Delivery

General

1. (a) Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points.

   (b) Each Party shall ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender.

Deadlines

2. Except in so far as provided in paragraph 3,

   (a) in open procedures, the period for the receipt of tenders shall not be less than 40 days from the date of publication referred to in paragraph 1 of Article IX;

   (b) in selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall not be less than 25 days from the date of publication referred to in paragraph 1 of Article IX; the period for receipt of tenders shall in no case be less than 40 days from the date of issuance of the invitation to tender;

(c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than 40 days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication referred to in paragraph 1 of Article IX.

3. The periods referred to in paragraph 2 may be reduced in the circumstances set out below:

(a) if a separate notice has been published 40 days and not more than 12 months in advance and the notice contains at least:

(i) as much of the information referred to in paragraph 6 of Article IX as is available;

(ii) the information referred to in paragraph 8 of Article IX;

(iii) a statement that interested suppliers should express their interest in the procurement to the entity; and

(iv) a contact point with the entity from which further information may be obtained,

the 40-day limit for receipt of tenders may be replaced by a period sufficiently long to enable responsive tendering, which, as a general rule, shall not be less than 24 days, but in any case not less than 10 days;

(b) in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 6 of Article IX, the 40-day limit for receipt of tenders may be reduced to not less than 24 days;

(c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods specified in paragraph 2 may be reduced but shall in no case be less than 10 days from the date of the publication referred to in paragraph 1 of Article IX; or

(d) the period referred to in paragraph 2(c) may, for procurements by entities listed in Annexes 2 and 3, be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days.

4. Consistent with the entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the points of supply or for supply of services.

Article XII

Tender Documentation

1. If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the WTO.

2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following:

(a) the address of the entity to which tenders should be sent;

(b) the address where requests for supplementary information should be sent;

(c) the language or languages in which tenders and tendering documents must be submitted;

(d) the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;

(e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;

(f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;

(g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials;

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment;

(i) the terms of payment;

(j) any other terms or conditions;

(k) in accordance with Article XVII the terms and conditions, if any, under which tenders from countries not Parties to this Agreement, but which apply the procedures of that Article, will be entertained.

Forwarding of Tender Documentation by the Entities

3. (a) In open procedures, entities shall forward the tender documentation at the request of any supplier participating in the procedure, and shall reply promptly to any reasonable request for explanations relating thereto.

(b) In selective procedures, entities shall forward the tender documentation at the request of any supplier requesting to participate, and shall reply promptly to any reasonable request for explanations relating thereto.

(c) Entities shall reply promptly to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

Article XIII

Submission, Receipt and Opening of Tenders and Awarding of Contracts

1. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:

(a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram or facsimile are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or facsimile. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or facsimile shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; and

(b) the opportunities that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.

Receipt of Tenders

2. A supplier shall not be penalized if a tender is received in the office designated in the tender documentation after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide.

Opening of Tenders

3. All tenders solicited under open or selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. Information on the opening of tenders shall remain with the entity concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

Award of Contracts

4. (a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.

(b) Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

(c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

Option Clauses

5. Option clauses shall not be used in a manner which circumvents the provisions of the Agreement.

Article XIV

Negotiation

1. A Party may provide for entities to conduct negotiations:

(a) in the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement); or

(b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.

2. Negotiations shall primarily be used to identify the strengths and weaknesses in tenders.

3. Entities shall treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants.

4. Entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:

(a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;

(b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;

(c) all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and

(d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.

Article XV

Limited Tendering

1. The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers:

(a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements

in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;

(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;

(d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services[5];

(e) when an entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of products or services shall be subject to Articles VII through XIV[6];

(f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract;

(g) for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with Articles VII through XIV and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for such new construction services;

(h) for products purchased on a commodity market;

(i) for purchases made under exceptionally advantageous conditions which only arise in the very short term. This provision is intended to cover unusual disposals by firms

---

[5]It is the understanding that "existing equipment" includes software to the extent that the initial procurement of the software was covered by the Agreement.

[6]Original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. It does not extend to quantity production or supply to establish commercial viability or to recover research and development costs.

193

which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers;

(j) in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as regards the publication, in the sense of Article IX, of an invitation to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners.

2. Entities shall prepare a report in writing on each contract awarded under the provisions of paragraph 1. Each report shall contain the name of the procuring entity, value and kind of goods or services procured, country of origin, and a statement of the conditions in this Article which prevailed. This report shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

Article XVI

Offsets

1. Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.[7]

2. Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation.

Article XVII

Transparency

1. Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards, nevertheless:

(a) specify their contracts in accordance with Article VI (technical specifications);

(b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers situated in countries Parties to this Agreement;

[7]Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.

(c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.

2. Governments not Parties to the Agreement which comply with the conditions specified in paragraphs 1(a) through 1(c), shall be entitled if they so inform the Parties to participate in the Committee as observers.

Article XVIII

Information and Review as Regards Obligations of Entities

1. Entities shall publish a notice in the appropriate publication listed in Appendix II not later than 72 days after the award of each contract under Articles XIII through XV. These notices shall contain:

(a) the nature and quantity of products or services in the contract award;

(b) the name and address of the entity awarding the contract;

(c) the date of award;

(d) the name and address of winning tenderer;

(e) the value of the winning award or the highest and lowest offer taken into account in the award of the contract;

(f) where appropriate, means of identifying the notice issued under paragraph 1 of Article IX or justification according to Article XV for the use of such procedure; and

(g) the type of procedure used.

2. Each entity shall, on request from a supplier of a Party, promptly provide:

(a) an explanation of its procurement practices and procedures;

(b) pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end and why it was not selected; and

(c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

3. Entities shall promptly inform participating suppliers of decisions on contract awards and, upon request, in writing.

4. However, entities may decide that certain information on the contract award, contained in paragraphs 1 and 2(c), be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers.

Article XIX

Information and Review as Regards Obligations of Parties

1. Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Agreement, in the appropriate publications listed in Appendix IV and in such a manner as to enable other Parties and suppliers to become acquainted with them. Each Party shall be prepared, upon request, to explain to any other Party its government procurement procedures.

2. The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.

3. Available information concerning procurement by covered entities and their individual contract awards shall be provided, upon request, to any other Party.

4. Confidential information provided to any Party which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without formal authorization from the party providing the information.

5. Each Party shall collect and provide to the Committee on an annual basis statistics on its procurements covered by this Agreement. Such reports shall contain the following information with respect to contracts awarded by all procurement entities covered under this Agreement:

(a) for entities in Annex 1, statistics on the estimated value of contracts awarded, both above and below the threshold value, on a global basis and broken down by entities; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value on a global basis and broken down by categories of entities;

(b) for entities in Annex 1, statistics on the number and total value of contracts awarded above the threshold value, broken down by entities and categories of products and services according to uniform classification systems; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value broken down by categories of entities and categories of products and services;

(c) for entities in Annex 1, statistics, broken down by entity and by categories of products and services, on the number and total value of contracts awarded under each of the cases of Article XV; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded above the threshold value under each of the cases of Article XV; and

(d) for entities in Annex 1, statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes.

To the extent that such information is available, each Party shall provide statistics on the country of origin of products and services purchased by its entities. With a view to ensuring that such statistics are comparable, the Committee shall provide guidance on methods to be used. With a view to ensuring effective monitoring of procurement covered by this Agreement, the Committee may decide unanimously to modify the requirements of subparagraphs (a) through (d) as regards the nature and the extent of statistical information to be provided and the breakdowns and classifications to be used.

Article XX

Challenge Procedures

Consultations

1. In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

Challenge

2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:

(a) participants can be heard before an opinion is given or a decision is reached;

(b) participants can be represented and accompanied;

(c) participants shall have access to all proceedings;

(d) proceedings can take place in public;

(e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;

(f) witnesses can be presented;

(g) documents are disclosed to the review body.

7. Challenge procedures shall provide for:

(a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;

(b) an assessment and a possibility for a decision on the justification of the challenge;

(c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

Article XXI

Institutions

1. A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary but not less than once a year for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.

2. The Committee may establish working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.

Article XXII

Consultations and Dispute Settlement

1. The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the "Dispute Settlement Understanding") shall be applicable except as otherwise specifically provided below.

2. If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of the failure of another Party or Parties to carry out its obligations under this Agreement, or the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter, make written representations or proposals to the other Party or Parties which it considers to be concerned. Such action shall be promptly notified to the Dispute Settlement Body established under the Dispute Settlement Understanding (hereinafter referred to as "DSB"), as specified below. Any Party thus approached shall give sympathetic consideration to the representations or proposals made to it.

3. The DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, make recommendations or give rulings on the matter, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under this

Agreement or consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible, provided that only Members of the WTO Party to this Agreement shall participate in decisions or actions taken by the DSB with respect to disputes under this Agreement.

4. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days of the establishment of the panel:

> "To examine, in the light of the relevant provisions of this Agreement and of (name of any other covered Agreement cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in this Agreement."

In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraph 3 shall apply only to those parts of the panel report concerning the interpretation and application of this Agreement.

5. Panels established by the DSB to examine disputes under this Agreement shall include persons qualified in the area of government procurement.

6. Every effort shall be made to accelerate the proceedings to the greatest extent possible. Notwithstanding the provisions of paragraphs 8 and 9 of Article 12 of the Dispute Settlement Understanding, the panel shall attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the panel are agreed. Consequently, every effort shall be made to reduce also the periods foreseen in paragraph 1 of Article 20 and paragraph 4 of Article 21 of the Dispute Settlement Understanding by two months. Moreover, notwithstanding the provisions of paragraph 5 of Article 21 of the Dispute Settlement Understanding, the panel shall attempt to issue its decision, in case of a disagreement as to the existence or consistency with a covered Agreement of measures taken to comply with the recommendations and rulings, within 60 days.

7. Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in the said Appendix 1.

Article XXIII

Exceptions to the Agreement

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.

Article XXIV

Final Provisions

1. *Acceptance and Entry into Force*

This Agreement shall enter into force on 1 January 1996 for those governments[8] whose agreed coverage is contained in Annexes 1 through 5 of Appendix I of this Agreement and which have, by signature, accepted the Agreement on 15 April 1994 or have, by that date, signed the Agreement subject to ratification and subsequently ratified the Agreement before 1 January 1996.

2. *Accession*

Any government which is a Member of the WTO, or prior to the date of entry into force of the WTO Agreement which is a contracting party to GATT 1947, and which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed. The Agreement shall enter into force for an acceding government on the 30th day following the date of its accession to the Agreement.

3. *Transitional Arrangements*

(a) Hong Kong and Korea may delay application of the provisions of this Agreement, except Articles XXI and XXII, to a date not later than 1 January 1997. The commencement date of their application of the provisions, if prior to 1 January 1997, shall be notified to the Director-General of the WTO 30 days in advance.

(b) During the period between the date of entry into force of this Agreement and the date of its application by Hong Kong, the rights and obligations between Hong Kong and all other Parties to this Agreement which were on 15 April 1994 Parties to the Agreement on Government Procurement done at Geneva on 12 April 1979 as amended on 2 February 1987 (the "1988 Agreement") shall be governed by the substantive[9] provisions of the 1988 Agreement, including its Annexes as modified or rectified, which provisions are incorporated herein by reference for that purpose and shall remain in force until 31 December 1996.

(c) Between Parties to this Agreement which are also Parties to the 1988 Agreement, the rights and obligations of this Agreement shall supersede those under the 1988 Agreement.

(d) Article XXII shall not enter into force until the date of entry into force of the WTO Agreement. Until such time, the provisions of Article VII of the 1988 Agreement shall apply to consultations and dispute settlement under this Agreement, which provisions are hereby incorporated in the Agreement by reference for that purpose. These provisions shall be applied under the auspices of the Committee under this Agreement.

---

[8]For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.

[9]All provisions of the 1988 Agreement except the Preamble, Article VII and Article IX other than paragraphs 5(a) and (b) and paragraph 10.

(e) Prior to the date of entry into force of the WTO Agreement, references to WTO bodies shall be construed as referring to the corresponding GATT body and references to the Director-General of the WTO and to the WTO Secretariat shall be construed as references to, respectively, the Director-General to the CONTRACTING PARTIES to GATT 1947 and to the GATT Secretariat.

4. *Reservations*

Reservations may not be entered in respect of any of the provisions of this Agreement.

5. *National Legislation*

(a) Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement.

(b) Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

6. *Rectifications or Modifications*

(a) Rectifications, transfers of an entity from one Annex to another or, in exceptional cases, other modifications relating to Appendices I through IV shall be notified to the Committee, along with information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement. If the rectifications, transfers or other modifications are of a purely formal or minor nature, they shall become effective provided there is no objection within 30 days. In other cases, the Chairman of the Committee shall promptly convene a meeting of the Committee. The Committee shall consider the proposal and any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification. In the event of agreement not being reached, the matter may be pursued in accordance with the provisions contained in Article XXII.

(b) Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.

7. *Reviews, Negotiations and Future Work*

(a) The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the periods covered by such reviews.

(b) Not later than the end of the third year from the date of entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries.

(c) Parties shall seek to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and shall, in the context of negotiations under subparagraph (b), seek to eliminate those which remain on the date of entry into force of this Agreement.

8. *Information Technology*

With a view to ensuring that the Agreement does not constitute an unnecessary obstacle to technical progress, Parties shall consult regularly in the Committee regarding developments in the use of information technology in government procurement and shall, if necessary, negotiate modifications to the Agreement. These consultations shall in particular aim to ensure that the use of information technology promotes the aims of open, non-discriminatory and efficient government procurement through transparent procedures, that contracts covered under the Agreement are clearly identified and that all available information relating to a particular contract can be identified. When a Party intends to innovate, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems.

9. *Amendments*

Parties may amend this Agreement having regard, *inter alia*, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with the procedures established by the Committee, shall not enter into force for any Party until it has been accepted by such Party.

10. *Withdrawal*

(a) Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO. Any Party may upon such notification request an immediate meeting of the Committee.

(b) If a Party to this Agreement does not become a Member of the WTO within one year of the date of entry into force of the WTO Agreement or ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date.

11. *Non-application of this Agreement between Particular Parties*

This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.

12. *Notes, Appendices and Annexes*

The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.

13. *Secretariat*

This Agreement shall be serviced by the WTO Secretariat.

14. *Deposit*

This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to paragraph 6 and of each amendment thereto pursuant to paragraph 9, and a notification of each acceptance thereof or accession thereto pursuant to paragraphs 1 and 2 and of each withdrawal therefrom pursuant to paragraph 10 of this Article.

15. *Registration*

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

NOTES

The terms "country" or "countries" as used in this Agreement, including the Appendices, are to be understood to include any separate customs territory Party to this Agreement.

In the case of a separate customs territory Party to this Agreement, where an expression in this Agreement is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

Article 1, paragraph 1

Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.

APPENDICES

APPENDICES

APÉNDICES

Appendix E
AUSTRIAN ANNEX TO GPA

AUSTRIA

(Authentic in the English language only)

ANNEX 1

Entities which Procure in Accordance With the Provisions of this Agreement

Supplies

Threshold: SDRs 130,000

List of Entities:

(A) Present coverage of entities:

1. Federal Chancellery - Procurement Office

2. Federal Ministry for Foreign Affairs

3. Federal Ministry of Health, Sports and Consumer Protection

4. Federal Ministry of Finance
   - (a) Procurement Office
   - (b) Division VI/5 (EDP procurement of the Federal Ministry of Finance and of the Federal Office of Accounts)
   - (c) Division III/1 (procurement of technical appliances, equipments and goods for the customs guard)

5. Federal Ministry for Environment, Youth and Family Procurement Office

6. Federal Ministry for Economic Affairs

7. Federal Ministry of the Interior
   - (a) Division I/5 (Procurement Office)
   - (b) EDP-Centre (procurement of electronical data processing machines (hardware))
   - (c) Division II/3 (procurement of technical appliances and equipments for the Federal Police)

Services

Threshold:
works SDRs 5,000,000;
other services SDRs 130,000

List of Entities which procure the services, specified in Annexes 4 and 5:

Same as for supply contracts, except Federal Ministry of Defence

Austria (cont'd)

(d) Division I/6 [procurement of goods (other than those procured by Division II/3) for the Federal Police]
(e) Division II/21

8. Federal Ministry for Justice, Procurement Office

9. Federal Ministry of Defence[10] (non-warlike materials contained in Annex I, Part II, Austria, of the GATT Agreement on Government Procurement)

10. Federal Ministry of Agriculture and Forestry

11. Federal Ministry of Labour and Social Affairs, Procurement Office

12. Federal Ministry of Education and Fine Arts

13. Federal Ministry for Public Economy and Transport

14. Federal Ministry of Science and Research

15. Austrian Central Statistical Office

16. Austrian State Printing Office

17. Federal Office of Metrology and Surveying

18. Federal Institute for Testing and Research, Arsenal (BVFA)

19. Federal Workshops for Artificial Limbs

20. AUSTRO CONTROL Österreichische Gesellschaft für Zivilluftfahrt mit beschränkter Haftung (Austro Control GmbH)

21. Federal Institute for Testing of Motor Vehicles

22. Headquarters of the Postal and Telegraph Administration (postal business only)

---

[10]Continuation of present exceptions

208

Austria (cont'd)

(B) All other central public authorities including their regional and local sub-divisions provided that they do not have an industrial or commercial character.

Austria (cont'd)

ANNEX 2

Entities which Procure in Accordance With the Provisions of this Agreement

Supplies

Threshold: SDR 200,000

List of Entities:

All regional and local public authorities and bodies governed by public law not having a commercial or industrial character established at the state, district and municipal level in the States of:

Lower Austria,
Upper Austria,
Styria,
Salzburg,
the Burgenland,
the Tirol,
Vorarlberg,
Vienna,
Carinthia.

Services

Threshold:
works SDRs 5,000,000;
other services SDRs 200,000

List of entities which procure the services, specified in Annexes 4 and 5:

Same as for supply contracts

Austria (cont'd)

ANNEX 3

Other Entities which Procure in Accordance With the Provisions of this Agreement

Supplies

Threshold: SDRs 400,000 for entities listed under pt. 1 and 2

List of Entities:

Public entities of the following headings

1. *Entities in the water and energy sector*

   The covered entities are those which exercise as a principal activity, the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport and distribution of drinking water, and electricity

   Austria offers entities covered by that description listed under Annexes 1 and 2

2. *Entities in the transport sector*

   The covered entities are those which exercise as a principal activity

(i) the operation of networks providing a service to the public in the field of transport by trolley bus, bus or cable

(ii) the exploitation of a geographical area for the purpose of the provision of inland port or other terminal facilities to carrier by inland waterway or the provision of airports or other terminal facilities by air

   Austria offers entities covered by that description listed in Annexes 1 and 2

Services

Threshold:
works SDRs 5,000,000;
other services SDRs 400,000

List of entities which procure the services, specified in Annexes 4 and 5:

Same as for supply contracts

211

Austria (cont'd)

ANNEX 4

Services

Of the Universal List of Services, as contained in document MTN.GNS/W/120, the following services are included:

		CPC Reference No.
1.	Maintenance and repair services	6112, 6122, 633, 886
2.	Land transport services, except transport of mail	712 (except 71235), 7512, 87304
3.	Air transport services of passengers and freight, except transport of mail	73 (except 7321)
4.	Transport of mail by land, except rail and by air	71235, 7321
5.	Telecommunications services	752* (except 7524, 7525, 7526)
6.	Financial services	ex 81
	(a) Insurance services	812, 814
	(b) Banking and investment services**	
7.	Computer and related services	84
8.	Accounting, auditing and bookkeeping services	862
9.	Market research and public opinion polling services	864
10.	Management consulting services and related services, except arbitration and conciliation services	865, 866
11.	Architectural services; Engineering services and integrated engineering services; Urban planning and landscape architectural services; Related scientific and technical consulting services; Technical testing and analysis services	867
12.	Advertising services	871
13.	Building-cleaning services and property management services	874, 82201, 82202
14.	Publishing and printing services on a fee or contract basis	88442
15.	Sewage and refuse disposal; sanitation and similar services	94

212

Austria (cont'd)

Notes to Annex 4

* except voice telephony, telex, radiotelephony, paging and satellite services

** except contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services

Austria (cont'd)

ANNEX 5

Construction Services

Threshold:

SDRs 5,000,000

Definition:

A construction services contract is a contract which has as its objective the realization by whatever means of civil or building works, in the sense of Division 51 of the Central Product Classification.

List of services contained in Division 51, CPC which are included:

511	Pre-erection work at construction sites
512	General construction works for buildings
513	General construction works for civil engineering
514 + 516	Installation and assembly works
515	Special trade construction work
517	Building completion and finishing works
518	Renting services related to equipment for construction or demolition of buildings or civil engineering works, with operator

Austria (cont'd)

GENERAL NOTES AND DEROGATIONS FROM THE PROVISIONS OF ARTICLE III

1. Austria will not extend the benefits of this Agreement:

- as regards the award of contracts by entities listed in Annex 2 to the suppliers and service providers of Canada and the USA,

- as regards municipalities under Annex 2 to Switzerland pending the outcome of bilateral negotiations,

- as regards the award of contracts by entities listed in Annex 3:

  (a) (water), to the suppliers and service providers of Canada and the USA;

  (b) (electricity), to the suppliers and service providers of Canada, Hong Kong, Japan and the USA;

  (c) (airports), to the suppliers and service providers of Canada, Korea and the USA;

  (d) (ports), to the suppliers and service providers of Canada and the USA;

  (e) (urban transport), to the suppliers and service providers of Canada, Israel, Japan, Korea and the USA

  until such time as Austria has accepted that the Parties concerned give comparable and effective access for Austria's undertakings to the relevant markets;

- to service providers of Parties which do not include service contracts for the relevant entities in Annexes 1 to 3 and the relevant service category under Annexes 4 and 5 in their own coverage.

2. The provisions of Article XX shall not apply to suppliers and service providers of:

- Israel, Japan and Korea in contesting the award of contracts by entities governed by public law as defined in any EC-directive relating to the co-ordination of procedures for the award of public works contracts referred to in Annex XVI to the EEA Agreement;

- Japan, Korea and the USA in contesting the award of contracts to a supplier or service provider of Parties other than those mentioned, which are small or medium-sized enterprises under the relevant provisions of Austrian law, until such time as Austria accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority business;

- Israel, Japan and Korea in contesting the award of contracts by Austria's entities, whose value is less than the threshold applied for the same category of contracts awarded by these Parties.

Austria (cont'd)

3. Until such time as Austria has accepted that the Parties concerned provide access for Austrian suppliers and service providers to their own markets, Austria will not extend the benefits of this Agreement to suppliers and service providers of:

   - Canada, as regards procurement of FSC 36, 70 and 74 (special industry machinery; general purpose automatic data processing equipment, software, supplies and support equipment (except 7010 ADPE configurations); office machines, visible record equipment and ADP equipment),

   - Canada as regards procurement of FSC 58 (communications, protection and coherent radiation equipment) and the USA as regards air traffic control equipment;

   - Korea and Israel as regards procurement by entities listed in Annex 3 as regards procurement of HS Nos 8504, 8535, 8537 and 8644 (electrical transformers, plugs, switches and insulated cables) and for Israel, HS Nos 8501, 8536 and 902830;

   - Canada and the USA as regards contracts for good or service components of contracts which, although awarded by an entity covered by this Agreement, are not themselves subject to this Agreement.

4. The Agreement shall not apply to contracts awarded under:

   - an international agreement and intended for the joint implementation or exploitation of a project by the signatory States;

   - an international agreement relating to the stationing of troops;

   - the particular procedure of an international organization.

5. The Agreement shall not apply to procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes.

6. Contracts awarded by entities in Annexes 1 and 2 in connection with activities in the fields of drinking water, energy, transport or telecommunications, are not included.

7. This Agreement shall not apply to contracts awarded by entities in Annex 3:

   - for the purchase of water and for the supply of energy or of fuels for the production of energy;

   - for purposes other than the pursuit of their activities as described in this Annex or for the pursuit of such activities in a non-EEA country;

   - for purposes of re-sale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.

8. This Agreement shall not be applicable to contracts:

   - for the acquisition or rental of land, existing buildings, or other immovable property or concerning rights thereon;

Austria (cont'd)

- for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time.

9. The thresholds in the Annexes will be applied so as to conform with the public procurement thresholds of the EEA Agreement.

10. The provision of services, including construction services, in the context of procurement procedures according to this Agreement is subject to the conditions and qualifications for market access and national treatment as will be required by Austria in conformity with her commitments under the GATS.

Appendix F
US GOVERNMENT PAPERS ON THE INTERIM AGREEMENT

ORIGIN STR-00

INFO	LOG-00	AGRE-00	AID-00	CEA-01	CIAE-00	OASY-00	DINT-00
	DODE-00	DOTE-00	SRPP-00	EB-00	EXIM-01	E-00	UTED-00
	FRB-00	H-01	TEDE-00	INR-00	ITC-01	LAB-01	L-01
	ADS-00	OMB-01	OPIC-01	PA-00	PRS-00	CIO-00	SP-00
	SSO-00	SS-00	USIE-00	G-00	/008R		

218912
SOURCE: KODAKA.190140
DRAFTED BY: BRYAN, USTR
APPROVED BY: RMEIER, USTR
EB/MTA:WCRAFT
ARA/EPSC : WMEMLER
EUR/ERA: PACETO
SA/RA:KLASON
USTR : DDWOSKIN
USTR: SCRONIN
AF/EPS :AADLER
EAP/EP : MWALL
NEA/PPR:VBENNETT
EB/OIA:CWALKER

----------71F899 191501Z /45

P R 190240Z OCT 96
FM SECSTATE WASHDC
TO WORLD TRADE ORGANIZATION COLLECTIVE PRIORITY
INFO CIA WASHDC 0000
SECDEF WASHDC 0000
NSC WASHDC 0000
TREASURY DEPT WASHDC 0000
USDOC WASHDC 0000
FT GEORGE G MEADE MD
US CUSTOMS SERVICE WASHDC
UNCLAS STATE 218912

GENEVA FOR USTR

E.O. 12958: N/A
TAGS: ETRD, WTRO
SUBJECT: WTO SINGAPORE MINISTERIAL: U.S. PROPOSAL ON GOVERNMENT PROCUREMENT

REFTEL: (A) STATE 054928
(B) GENEVA 01891
(C) BANGKOK 12298
(D) STATE 204150

1. THIS IS AN ACTION REQUEST FOR POSTS IN WTO MEMBER COUNTRIES THAT ARE NOT SIGNATORIES TO THE WTO GOVERNMENT PROCUREMENT AGREEMENT, WHICH INCLUDES ALL POSTS EXCEPT THOSE IN EU MEMBER STATES, USEU BRUSSELS, OSLO, SINGAPORE, TEL AVIV, LIECHTENSTEIN, SEOUL, OTTAWA, TOKYO, AND BERN.

2. SUMMARY AND ACTION REQUEST. QUAD (U.S., EU, CANADA AND JAPAN) MINISTERS AGREED IN KOBE TO PURSUE A TRANSPARENCY AGREEMENT IN GOVERNMENT PROCUREMENT THAT WOULD BE FORMALLY INITIATED AT THE WTO SINGAPORE MINISTERIAL IN DECEMBER.

EFFORTS CONTINUE TO BROADEN CONSENSUS FOR THE INITIATIVE. OTHER SIGNATORIES TO THE WTO GOVERNMENT PROCUREMENT AGREEMENT (GPA) ARE LIKELY TO SUPPORT THE INITIATIVE BUT PERSUADING NON-SIGNATORIES REMAIN A CHALLENGE. WHILE U.S. AND QUAD EFFORTS IN GENEVA WILL BE THE FOCAL POINT FOR PUSHING THE INITIATIVE, POSTS IN KEY CAPITALS CAN PLAY AN IMPORTANT ROLE. POSTS IN NON-GPA SIGNATORY WTO MEMBERS ARE REQUESTED TO EXPLAIN TO HOST GOVERNMENTS IN MORE DETAIL HOW THE UNITED

219

STATES ENVISIONS A POST-SINGAPORE AGENDA ON PROCUREMENT. U.S. WTO PROCUREMENT OBJECTIVES ARE PART OF A BROADER ADMINISTRATION STRATEGY FOR ADDRESSING PROBLEMS WITH BRIBERY AND CORRUPTION IN INTERNATIONAL TRANSACTIONS, BUT THEY ARE NOT INTENDED TO RESULT IN A WTO ANTI-CORRUPTION AGREEMENT. ACTION POSTS ARE REQUESTED TO APPROACH KEY GOVERNMENT TRADE OFFICIALS EARLY IN THE WEEK OF OCTOBER 21 TO EXPLAIN THE U.S. POSITION ON THE BASIS OF THE POINTS PROVIDED IN PARA 7 BELOW. POSTS SHOULD ALSO LEAVE THE CONTENTS OF PARAS 4 THROUGH 11 WITH HOST GOVERNMENTS. USTR GENEVA MAY USE THESE POINTS AS WELL IN APPROACHING GENEVA DELEGATIONS OF POSTS IDENTIFIED IN THE ACTION REQUEST. SEP POSTS MAY DELIVER THE DEMARCHE TO THE EXTENT RESOURCES PERMIT. END SUMMARY AND ACTION REQUEST.

3. FOR CARIBBEAN BASIN INITATIVE (CBI) POSTS (REF D): SINCE 1986 THE UNITED STATES HAS GRANTED CARIBBEAN BASIN INITIATIVE (CBI) COUNTRIES PREFERENTIAL GOVERNMENT PROCUREMENT TREATMENT NORMALLY RESERVED FOR COUNTRIES THAT ARE MEMBERS OF THE WTO GOVERNMENT PROCUREMENT AGREEMENT (GPA) AND OUR NAFTA PARTNERS. THIS PREFERENCE WAS DUE TO EXPIRE ON SEPTEMBER 30, 1996. USTR HAS RENEWED THE PREFERENCE THROUGH SEPTEMBER 30, 1997 HOWEVER, BENEFICIARIES GRANTED CONTINUED PREFERENTIAL GOVERNMENT PROCUREMENT TREATMENT FOR THE CBI NATIONS ARE EXPECTED TO SUPPORT OUR INITIATIVE FOR A TRANSPARENCY AGREEMENT IN THE WTO.

BACKGROUND

4. THE DECEMBER 9-13 SINGAPORE MEETING WILL BE THE FIRST MINISTERIAL CONFERENCE SINCE THE ENTRY-INTO-FORCE OF THE WTO AGREEMENTS AND AN OPPORTUNITY TO SET THE COURSE FOR WTO NEGOTIATIONS OVER THE NEXT TWO YEARS. ALTHOUGH THE UNITED STATES HAS EMPHASIZED THAT THE SINGAPORE MINISTERIAL SHOULD FOCUS PRIMARILY ON PROGRESS IN IMPLEMENTING WTO AGREEMENTS AND DEVELOPMENTS IN THE SO-CALLED "BUILT" IN AGENDA OF ONGOING NEGOTIATIONS, GOVERNMENT PROCUREMENT IS ONE PARTICULAR AREA IN WHICH THE WTO IS WELL-PLACED TO PROCEED. SIGNATORIES TO THE PLURILATERAL GOVERNMENT PROCUREMENT AGREEMENT ARE: U.S., KINGDOM OF THE NETHERLANDS WITH RESPECT TO ARUBA, CANADA, THE MEMBER STATES OF THE EUROPEAN UNION, ISRAEL, JAPAN, LIECHTENSTEIN, NORWAY, KOREA, AND SWITZERLAND. SINGAPORE'S ACCESSION HAS BEEN APPROVED BY GPA MEMBERS, BUT SINGAPORE HAS NOT YET FORMALLY ACCEDED.

HIGHLIGHTS OF U.S. PROPOSAL ON GOVERNMENT PROCUREMENT

---

5. SUMMARY: THE UNITED STATES HAS PROPOSED THAT MINISTERS AT SINGAPORE DIRECT NEGOTIATORS TO CONCLUDE IN BY THE END OF 1997 A MULTILATERAL AGREEMENT THAT WOULD OBLIGATE GOVERNMENTS TO PROVIDE TRANSPARENCY, OPENNESS AND DUE PROCESS, INCLUDING PROVISION FOR APPEAL, TO AN AGREED SET OF GOVERNMENT PURCHASES OF GOODS AND SERVICES. THE PROCEDURAL AGREEMENT ENVISIONED BY THE UNITED STATES WOULD BE LIMITED TO PROCEDURES AND PRINCIPLES TO PROMOTE TRANSPARENCY IN WTO MEMBERS

220

PROCUREMENT PRACTICES, FOR EXAMPLE, BY ESTABLISHING TRANSPARENCY PROCEDURES THAT WOULD COVER, AT LEAST INITIALLY, CENTRAL GOVERNMENT PURCHASES ABOVE A CERTAIN AGREED VALUE AND OTHER HIGH-VALUE CONTRACTS. SUCH A PROCEDURAL AGREEMENT SHOULD NOT REQUIRE ANY CHANGES TO EXISTING DOMESTIC PREFERENCES AND OTHER MEASURES TO DIRECT CONTRACTS TO NATIONAL SUPPLIERS.

THIS EXERCISE IS SEPARATE AND DISTINCT FROM THE CURRENT PLURILATERAL AGREEMENT ON GOVERNMENT PROCUREMENT WHICH OBLIGATES MEMBERS TO ALLOW FOREIGN SUPPLIERS TO COMPETE, ON A NON-DISCRIMINATORY BASIS, FOR CONTRACTS OFFERED BY AGREED GOVERNMENT ENTITIES. IT IS ALSO SEPARATE FROM THE CURRENT WORK ASSIGNED TO THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) GROUP. AGREEMENT TO PURSUE A MULTILATERAL PROCEDURAL AGREEMENT WOULD UNDER NO CIRCUMSTANCES OBLIGATE WTO MEMBERS TO ACCEDE TO THE EXISTING GPA OR ANY SUCCESSOR AGREEMENT. IT WOULD, HOWEVER, FACILITATE MEMBERS' ABILITY TO EVENTUALLY JOIN THE GPA OR ITS SUCCESSOR.

6. MARKET ACCESS BENEFITS: AS WITH OTHER WTO AGREEMENTS, A PROCEDURAL AGREEMENT THAT PROVIDES TRANSPARENCY IN GOVERNMENT PURCHASING WOULD PROVIDE MORE PREDICTABILITY TO THOSE CONDUCTING INTERNATIONAL COMMERCIAL TRANSACTIONS. PREDICTABILITY IS A MAJOR CONSIDERATION FOR ANY DECISION ON BIDDING, SOURCING AND INVESTMENT RELATED TO GOVERNMENT CONTRACTS. MARKET ACCESS PREDICTABILITY CAN BE ENHANCED THROUGH MULTILATERAL DISCIPLINES ON TRANSPARENCY, OPENNESS AND DUE PROCESS.

7. HIGHLIGHTS: IN THE PREPARATORY PROCESS FOR SINGAPORE, THE UNITED STATES HAS SUBMITTED THREE NON-PAPERS ON THIS ISSUE IN AN ATTEMPT TO CLARIFY THE PROPOSAL AND ADDRESS SPECIFIC QUESTIONS AND CONCERNS. THE FOLLOWING POINTS HAVE BEEN DISCUSSED IN MORE DETAIL IN THESE PAPERS.

-ç THE PROPOSAL IS A MODEST FIRST STEP, DESIGNED TO TAKE ACCOUNT OF CIRCUMSTANCES IN WTO MEMBERS AT ALL STAGES OF DEVELOPMENT. THE PROPOSAL TO BEGIN NEGOTIATIONS ON A PROCEDURAL AGREEMENT DOES NOT CALL FOR ANY CHANGES IN EXISTING NATIONAL PREFERENCES AND OTHER MEASURES TO DIRECT CONTRACTS TO NATIONAL SUPPLIERS.

-- AGREEMENT TO PURSUE NEGOTIATIONS DOES NOT REQUIRE ANY COUNTRY TO ACCEDE TO THE EXISTING GPA OR ITS SUCCESSOR. HOWEVER, A PROCEDURAL AGREEMENT CAN BE A FIRST STEP FOR GOVERNMENTS THAT MIGHT ULTIMATELY SEEK TO JOIN THE GPA OR ITS SUCCESSOR AND UNDERTAKE ITS MORE RIGOROUS OBLIGATIONS.

-- THE EXTENT OF COVERAGE OF TRANSPARENCY OBLIGATIONS AND THE TIMING FOR IMPLEMENTATION WOULD BE AN IMPORTANT SUBJECT FOR NEGOTIATION AND WOULD HAVE TO REFLECT THE ABILITY OF COUNTRIES TO ASSUME SUCH OBLIGATIONS THROUGH AGREED MODALITIES (E.G., PHASING-IN OF OBLIGATIONS AND TRANSITIONAL MEASURES).

-- INTEGRATION OF GOVERNMENT PROCUREMENT INTO THE WTO MUST BE A GRADUAL, DELIBERATE PROCESS.

221

FOR THIS REASON, NEGOTIATION OF SUCH A PROCEDURAL AGREEMENT MIGHT INITIALLY BEGIN WITH CENTRAL GOVERNMENT PROCUREMENT ACTIVITIES ABOVE A SPECIFIED VALUE, AND BY AGREEMENT BE EXTENDED TO SUBCENTRAL ACTIVITIES. ALL OF THESE ISSUES SHOULD BE THE SUBJECT OF NEGOTIATION.

-- THE DISCIPLINES TO BE NEGOTIATED AS PART OF THIS AGREEMENT WOULD BE STRICTLY LIMITED TO TRANSPARENCY, OPENNESS AND DUE PROCESS, AND WOULD HAVE TO TAKE ACCOUNT OF THE VARIETY OF EXISTING GOVERNMENT PROCUREMENT PRACTICES AMONG WTO MEMBERS. IT COULD NOT IMPOSE AN ADMINISTRATIVELY RIGID OR BURDENSOME SYSTEM ON ALL WTO MEMBERS.

-- THE NEGOTIATING OF THIS AGREEMENT WOULD BE INDEPENDENT OF SEPARATE NEGOTIATIONS ON THE EXISTING GPA, AND ANY DEADLINES THAT MAY BE SET IN NEGOTIATIONS UNDER THE GATS. GIVEN THE MODEST SCOPE OF A PROCEDURAL AGREEMENT, IT SHOULD BE POSSIBLE TO CONCLUDE THIS AGREEMENT IN BY THE END OF 1997.

-- SUCH AN AGREEMENT WOULD CREATE ADDITIONAL NEW PROCEDURAL OBLIGATIONS FOR WTO MEMBERS, AND AS SUCH, WOULD BE SUBJECT TO THE CONSULTATION AND DISPUTE SETTLEMENT MECHANISM OF THE WTO. THIS WOULD BE NO DIFFERENT, FOR EXAMPLE, FROM THE SITUATION THAT EXISTS TODAY WITH RESPECT TO THE PROCEDURAL OBLIGATIONS RESULTING FROM THE WTO AGREEMENT ON IMPORT LICENSING PROCEDURES.

-- IT IS CLEAR THAT TECHNICAL ASSISTANCE WILL BE NECESSARY AS PART OF NEGOTIATING AND IMPLEMENTING THIS AGREEMENT. DEVELOPED COUNTRIES COULD PROVIDE ADVICE AND ASSISTANCE THROUGH SEMINARS, WORKSHOPS AND ON-SITE MISSIONS.

-- A TRANSPARENCY AGREEMENT WOULD COMPLEMENT EFFORTS IN OTHER FORA, SUCH AS APEC AND THE FTAA, TO PROMOTE OPEN, COMPETITIVE PROCUREMENT PRACTICES. IT COULD SERVE AS THE MULTILATERAL FOUNDATION FOR WORK IN REGIONAL FORA TO FURTHER BUILD ON TRANSPARENCY, OPENNESS AND DUE PROCESS.

8. TALKING POINTS

-- WTO MEMBERS' GOVERNMENT PROCUREMENT MARKETS PRESENT TREMENDOUS COMMERCIAL OPPORTUNITIES FOR INTERNATIONAL TRADE. EVEN CONSERVATIVE ESTIMATES OF THE VALUE OF PROCUREMENT MARKETS AROUND THE WORLD SUGGEST A MINIMUM OF A TRILLION DOLLARS A YEAR IN GOVERNMENT CONTRACTING.

-- GOVERNMENTS EVERYWHERE PURCHASE A VARIETY OF GOODS AND SERVICES, FROM THE MOST BASIC COMMODITIES TO THE MOST SOPHISTICATED TECHNOLOGIES. MAKING MORE TRANSPARENT SUCH OPPORTUNITIES WILL PROVIDE NEW OPPORTUNITIES FOR PROVIDERS OF SUCH GOODS AND SERVICES.

-- DESPITE THE IMPORTANCE OF GOVERNMENT PROCUREMENT MARKETS IN INTERNATIONAL TRADE, THE WTO DOES NOT PRESENTLY EXTEND EVEN THE MOST BASIC, PROCEDURAL OBLIGATIONS TO PROCUREMENT PRACTICES. WE BELIEVE THAT IT IS TIME FOR THE WTO TO LOOK AT THE OPPORTUNITIES FOR TRADE EXPANSION IN THIS IMPORTANT AREA BY BEGINNING TO CREATE A MORE OPEN, TRANSPARENT ENVIRONMENT WHERE TRADE IS ALREADY

222

TAKING PLACE.

-- THE CURRENT WTO PLURILATERAL AGREEMENT ON PROCUREMENT (GPA) CONTAINS BOTH PROCEDURAL AND SUBSTANTIVE MARKET ACCESS OBLIGATIONS BETWEEN MEMBERS. FOR THIS REASON, MANY WTO MEMBERS HAVE BEEN HESITANT TO PARTICIPATE IN SUCH AN AGREEMENT.

-- SOME ARE CONCERNED ABOUT ELIMINATING THEIR EXISTING POLICIES FOR DIRECTING GOVERNMENT CONTRACTS TO NATIONAL SUPPLIERS, OTHERS WANT TO AVOID APPLYING COMPLICATED AND ADMINISTRATIVELY RIGID PROCEDURES TO THEIR PROCUREMENT ACTIVITIES, AND FINALLY, OTHERS DO NOT YET HAVE THE DOMESTIC PROCEDURES IN PLACE TO TAKE ADVANTAGE OF GPA MEMBERSHIP.

-- WE ARE SYMPATHETIC TO THESE CONCERNS.

-- EXPANSION OF COUNTRY PARTICIPATION IN THE GPA AND ITS SUCCESSOR REMAIN HIGH PRIORITIES FOR THE UNITED STATES. HOWEVER, WE RECOGNIZE THAT SOME GOVERNMENTS WILL NOT BE IN A POSITION TO DETERMINE THE BENEFITS OF GPA MEMBERSHIP WITHOUT SOME GREATER UNDERSTANDING AND EXPERIENCE IN THIS AREA AND THE ESTABLISHMENT OF DOMESTIC PROCEDURES.

-- FOR THIS REASON, WE HAVE PROPOSED NEGOTIATION OF A MODEST, PROCEDURAL AGREEMENT THAT SHOULD FACILITATE GREATER UNDERSTANDING OF PROCUREMENT PRACTICES AND AT THE SAME TIME PROMOTE GREATER TRANSPARENCY IN A SECTOR OF ALL OUR ECONOMIES THAT IS OF ENORMOUS COMMERCIAL BENEFIT.

-- (FOR CET -BENEFICIARIES) THE UNITED STATES HAS GRANTED A ONE YEAR EXTENSION OF PREFERENTIAL GOVERNMENT PROCUREMENT TREATMENT FOR ALL CBI BENEFICIARIES AND A TWO-YEAR EXTENSION FOR PANAMA IN RECOGNITION OF ITS COMMITMENT TO ACCEDE TO THE GPA IN ITS WTO PROTOCOL. RENEWAL OF THIS EXTENSION IN 1997 (1998 FOR PANAMA) WILL BE CONTINGENT ON DEMONSTRATED WILLINGNESS TO SUPPORT THE U.S. PROPOSAL ON GOVERNMENT PROCUREMENT AT THE SINGAPORE MINISTERIAL AND CONSTRUCTIVE PARTICIPATION IN THE FTAA WORKING GROUP ON GOVERNMENT PROCUREMENT.

-- (FOR PANAMA) WE APPRECIATE YOUR INTEREST IN LEARNING MORE REGARDING THE TRANSPARENCY AGREEMENT ON GOVERNMENT PROCUREMENT AND THE ROLE YOU COULD PLAY INSUPPORTING IT. WE HOPE THAT THE NON-PAPER WILL FACILITATE YOUR UNDERSTANDING OF THIS PROPOSAL. WE LOOK FORWARD TO WORKING WITH YOU IN SINGAPORE.

-- WE UNDERSTAND THAT MANY DEVELOPING COUNTRIES HAVE MISGIVINGS ABOUT THE EXISTING GPA AND ARE NOT PREPARED TO JOIN IT IN ITS PRESENT FORM. IN AGREEING TO NEGOTIATE THIS AGREEMENT, COUNTRIES WOULD NOT BE OBLIGATED TO JOIN THE CURRENT GPA OR ITS SUCCESSOR.

-- OUR PROPOSAL FOR A TRANSPARENCY AGREEMENT HAS ABSOLUTELY NO LINK TO ACCESSION TO THE EXISTING GPA. FOR THOSE COUNTRIES THAT MAY BE INTERESTED IN ACCEDING TO THE GPA IN THE FUTURE, THIS AGREEMENT COULD FACILITATE THEIR EFFORTS; BUT

723

THERE WOULD NO REQUIREMENT OR EXPECTATION OF GPA ACCESSION.

-- THE SINGAPORE MINISTERIAL PRESENTS AN EXCELLENT OPPORTUNITY TO AGREE TO A MANDATE FOR NEGOTIATIONS ON A TRANSPARENCY AGREEMENT. THIS MANDATE COULD DIRECT WTO MEMBERS TO BEGIN NEGOTIATIONS TO DEVELOP PROCEDURES AND PRINCIPLES ASSOCIATED WITH TRANSPARENCY, OPENNESS AND DUE PROCESS.

-- WE PROPOSE THAT SUCH NEGOTIATIONS BE CONCLUDED BY THE END OF 1997. THEY WOULD NOT BE TIED TO ANY TIMETABLES OR DEADLINES FOR WORK IN THE GPA OR THE GATS ON GOVERNMENT PROCUREMENT AND WOULD OCCUR IN A SPECIAL NEGOTIATING GROUP REPORTING DIRECTLY TO THE GENERAL COUNCIL.

-- TO ENSURE A GRADUAL, MEASURED PROCESS OF LIBERALIZATION, WE COULD START SLOWLY BY LIMITING DISCIPLINES ON TRANSPARENCY, OPENNESS AND DUE PROCESS TO CENTRAL GOVERNMENT PROCUREMENT ACTIVITIES AND ONLY FOR HIGHER-VALUED CONTRACTS. EXTENSION TO SUBCENTRAL GOVERNMENTS COULD OCCUR WHEN THE TIME IS RIGHT ON THE BASIS OF EXPERIENCE GAINED AT THE CENTRAL GOVERNMENT LEVEL.

-- ADDITIONALLY, A TRANSPARENCY AGREEMENT -- AS A MODEST FIRST STEP -- SHOULD NOT REQUIRE ANY CHANGES TO EXISTING NATIONAL PREFERENCE PROGRAMS AND OTHER MEASURES TO DIRECT CONTRACTS TO NATIONAL SUPPLIERS. WHILE THE LONG-TERM OBJECTIVE SHOULD BE LIBERALIZATION OF THESE MEASURES, SUCH NEGOTIATIONS SHOULD ONLY PROCEED AS COUNTRIES RECOGNIZE THE POTENTIAL MARKET ACCESS BENEFITS THAT CAN BE BUILT ON THIS AGREEMENT'S FOUNDATION OF TRANSPARENCY, OPENNESS AND DUE PROCESS.

-- THERE SHOULD BE NO DOUBT, HOWEVER, ON THE IMMEDIATE NEED TO BEGIN NEGOTIATIONS. OTHERWISE, THE WTO RISKS BEING LEFT BEHIND BY REGIONAL FORA IN THIS AREA. WORK IS ALREADY UNDERWAY IN APEC AND THE FTAA ON GOVERNMENT PROCUREMENT. THE WTO IS THE ONLY MULTILATERAL FORUM THAT CAN GIVE DIRECTION AND COHESION TO THIS WORK IN REGIONAL FORA.

9. BEGIN TEXT OF FIRST PAPER:

NON - PAPER
NEXT STEPS ON GOVERNMENT PROCUREMENT
(TABLED IN APRIL IN GENEVA)

THE PROBLEM

GOVERNMENTS TEND TO BE THE SINGLE LARGEST PURCHASERS OF GOODS AND SERVICES IN THE WORLD, YET WITH THE EXCEPTION OF COVERAGE UNDER THE WTO GOVERNMENT PROCUREMENT AGREEMENT (GPA), PROCUREMENT ACTIVITIES ARE NOT SUBJECT TO BASIC WTO RULES ON MARKET ACCESS AND NATIONAL TREATMENT. THE RESULT IS AN ENVIRONMENT IN WHICH ANTI-COMPETITIVE BEHAVIOR CAN DISTORT THE MARKET. WITHOUT DEPATING THE PRESENT WTO RULES ON PROCUREMENT, WTO MEMBERS CAN CREATE AN ENVIRONMENT FOR GREATER MARKET ACCESS OPPORTUNITY BY TAKING

Note: The Cable continu with a recitation of the three papers following attached in hard copy.

224

NON - PAPER
NEXT STEPS ON GOVERNMENT PROCUREMENT
(Tabled in April in Geneva)

The Problem

Governments tend to be the single largest purchasers of goods and services in the world, yet with the exception of coverage under the WTO Government Procurement Agreement (GPA), procurement activities are not subject to basic WTO rules on market access and national treatment. The result is an environment in which anti-competitive behavior can distort the market. Without debating the present WTO rules on procurement, WTO members can create an environment for greater market access opportunity by taking steps to address the lack of transparency, openness and due process that characterizes much of procurement worldwide.

The Opportunity

Procurement markets worldwide account for trillions of dollars in commercial transactions. Large, commercially attractive procurement occurs at all levels of government. Municipal governments procure heavily for police and fire departments and local public works. Provincial and other second-tier governments often administer health and social security programs, which involve substantial procurement of goods and services. In many countries, central governments are responsible for national telecommunications networks, electrical power grids and transportations systems.

Current Activity in the WTO

Activity on government procurement in the WTO is limited and diffuse.

- The new GPA, which covers both goods and services, is a substantial improvement over the Tokyo Round Agreement. Additional negotiations are envisioned by 1999 among signatories. As a plurilateral, Annex 4 agreement it is not part of the WTO's single undertaking.

- GATS Article XIII:2, calls for negotiations among all WTO members within two years on procurement of services, and work is now underway.

Future Work in the WTO

In light of the potential stake that all WTO members have in increasing market access associated with government procurement, we should use the opportunity of the Singapore Ministerial to consider how to develop an agreement that can be fully incorporated into the WTO's single undertaking and include both goods and services.

- A long term objective for current GPA signatories is to expand the coverage and membership of the Agreement. This long-term objective should not preclude, however,

225

efforts among all WTO members immediately to address the problems exporters are facing around the globe in their ability to compete for substantial market access opportunities in procurement of goods and services.

The Post-Singapore Agenda

While it may be desirable to simply multilateralize the current GPA, it is also clear that this may not be possible in the short-term. Many non-signatories view GPA requirements as being too administratively rigid and burdensome. Nevertheless, the Singapore Ministerial should give direction to the WTO that will put government procurement on the path to an eventual comprehensive multilateral agreement.

- Recognizing the urgent need to establish a more competitive and predictable bidding environment, a first step could be to achieve an agreement that focusses on transparency, openness and due process, setting the stage for progressive application of national treatment obligations.

- Interim agreement, accepted by all WTO members, on this basis would improve the environment for bidding worldwide and address the real and growing concerns of our exporters immediately. Countries could use this as a vehicle to introduce domestic reforms that increase public confidence in the integrity of national systems.

FURTHER IDEAS ON A WTO GOVERNMENT PROCUREMENT INITIATIVE
(Tabled June 18 in Geneva)

As the result of consultations with interested delegations, the United States is prepared to elaborate on the proposal for negotiations on an interim arrangement on transparency, openness and due process in government procurement practices.

The Rationale for an Interim Arrangement

Government procurement has long been viewed as trade-related. As noted in the Analytical Index, the original draft of the ITO Charter provided for national and most-favored-nation treatment with respect to government procurement, but these provisions were deleted from later drafts when it became apparent to the Preparatory Committee that "an attempt to reach agreement on such a commitment would lead to exceptions almost as broad as the commitment itself."

While recognizing that government procurement is trade-related, most countries have been hesitant to engage in negotiations to liberalize their procurement markets. In recent years, much of this hesitancy seems to have stemmed from the common perception that the single multilateral agreement in this sector, the Government Procurement Agreement (GPA), is highly complicated and administratively burdensome.

For this reason, the United States has joined others in looking to alternative approaches that could involve more gradual opening up of government procurement markets. It is clear that full integration of government procurement into the WTO will be a long-term enterprise. A measured, realistic first step should be negotiation of an interim arrangement on transparency, openness and due process.

The Path to an Interim Arrangement

A number of WTO Members have made suggestions and several elements have grown out of discussions in other fora. The common thread among all of these ideas appears to be the following:

- A Singapore Ministerial mandate for negotiations on an interim arrangement must be without prejudice to WTO Members' positions on membership in the existing GPA or even an improved GPA envisioned as the result of future negotiations among its signatories.

- Negotiations on an interim arrangement under the auspices of the General Council, while institutionally separate, should take account of related developments in other WTO fora, in particular the GATS Rules Group and the Government Procurement Committee.

- It would be best to have an integrated approach on goods and services in an interim arrangement. As part of the terms of reference, countries should review whether

227

negotiations on an interim arrangement could be merged with ongoing negotiations in the GATS Rules Group.

- In principle, an interim arrangement should apply across-the-board to all government procurement, recognizing that due account should be given to the variety of governmental structures in place in WTO Member countries.

The Elements of an Interim Arrangement

An interim arrangement should focus on basic elements or principles of transparency, openness and due process in government procurement practices. By their very nature, these elements or principles, once in place, would apply equally among all WTO Members on a non-discriminatory basis. However, while an interim arrangement should establish basic procedural guarantees that are available to all WTO Members, such an arrangement, as a first step, would not address existing preferential or discriminatory procurement requirements.

Negotiations on an interim arrangement are likely to reveal a variety of perspectives on transparency, openness and due process. However, provisions in existing WTO agreements and ongoing work on procurement in other fora can provide helpful guideposts. For example, the Agreement on Import Licensing Procedures has specific provisions on transparency and openness in application of import licensing requirements. The Agreement on Implementation of Article VII of the GATT 1994 has provisions related to due process. Additionally, Article X of the GATT 1994 requires transparency in the form of publication and administration of trade regulations. In other fora, discussions are commencing on transparency in government procurement practices.

An interim arrangement should include basic procedural guarantees that increase information flow on procurement opportunities but do not require administratively rigid or centralized systems. Foreign suppliers should have access to information on what entities are procuring in their sector, notification of specific procurement opportunities and guarantees that all suppliers will have access to the same information on an equal basis. An interim arrangement should also include the provision of review mechanisms when disputes arise.

An added benefit of starting first with an interim arrangement in the WTO is that it should provide new information bases on government procurement practices of WTO Members and on the quantitative and qualitative importance of government procurement in multilateral trade. Compilation of such information will be key to future efforts to integrate government procurement into the WTO, which is likely to proceed in stages, just as the lowering of tariff barriers has required a series of negotiations.

The Benefits of Staged-Integration of Government Procurement Practices

Government procurement accounts for a substantial value of commercial activity in all countries. While current measures of the total value of government procurement are not sophisticated, it is clear that literally trillions of dollars annually are spent by governments in procuring goods and services. Transparency, openness and due process are important first steps because they provide

vital information to foreign suppliers on the circumstances under which they may bid on contracts. They will help to create greater certainty as to the likelihood of winning contracts. Future steps towards full integration will generate increased opportunities for suppliers to compete on an equal basis in government procurement markets worldwide.

U.S. RESPONSE TO QUESTIONS
SINGAPORE MINISTERIAL INITIATIVE ON GOVERNMENT PROCUREMENT
(Tabled July 9 in Geneva)

Introduction

At the June 18 Heads of Delegation meeting, the United States tabled a second paper on government procurement entitled "Further Ideas on a WTO Government Procurement Initiative." A number of delegations asked the United States to elaborate further. Several points warrant emphasis, as they are recurring themes in the questions raised at the June 18 meeting.

1) The proposed agreement -- an "Interim Arrangement" -- is to be a first step in the integration of government procurement into the multilateral system. The Arrangement should lead to enhanced security of market access in government procurement and promote transparency related to procurement. It will also coexist with the separate WTO Government Procurement Agreement (GPA) for a period of time. The process for fully integrating government procurement into the WTO is likely to be a long-term venture and approaches for integration will evolve over time.

2) The United States and others have proposed commencing integration of procurement into the WTO by focusing first on transparency, openness and due process. These are fundamental principles on which further market liberalization must be built. These principles would apply equally to all WTO Members regardless of their level of development, just as current transparency provisions in the WTO are obligations undertaken by all countries. For example, GATT 1994 Article X already requires transparency, openness and due process in the administration of trade regulations.

3) Under an Interim Arrangement, countries would apply principles of transparency, openness and due process on an MFN and national treatment basis, without modifying existing domestic procurement preferences.

4) The principles of transparency, openness and due process envisioned in an Interim Arrangement should be flexible enough to accommodate a variety of existing national procurement regimes. They also should realistically take into account reduced government resources and efforts to decrease the role of government in many countries.

Answers to Specific Questions

The following responds to specific questions posed at the June 18 meeting.

Question 1:

How are transparency, openness and due process defined with respect to government procurement? How would national treatment apply?

Answer:

Views on the precise definition of transparency, openness and due process in government procurement are likely to vary among countries. Agreement on these definitions should emerge through negotiations on an Interim Arrangement. The WTO GPA imposes a relatively high level of procedural discipline and rigor in the areas of transparency, openness and due process. Of course, it is not the only model. Discussions have already started on these concepts in other fora, for example, APEC and the FTAA.

Transparency generally relates to making information on procurement procedures and opportunities widely available to interested suppliers, domestic and foreign. This can occur through publication in official or centralized government journals. Such information can also be made available through contact points in specific procuring entities. Electronic databases and Internet linkages may lead over time to significant improvements in access to procurement markets by allowing transmission of information around the globe instantaneously.

Openness relates to there being sufficient guarantees of competitive treatment so that interested suppliers can expect a predictable bidding environment. Openness includes the terms of access to the procurement process and the time periods provided to submit responsive bids. One could look to the procedural disciplines in the Agreement on Import Licensing Procedures as an example. Other important guarantees in procurement relate to development of technical specifications and identification of evaluation criteria for awarding contracts.

Due process relates to domestic procedures permitting interested suppliers to challenge procurement decisions and seek an objective and independent review and decision on their challenges. It is an important mechanism for allowing bidders to directly resolve complaints, keeping government-to-government procurement disputes to a minimum. As an example, the Agreement on Implementation of Article VII of the GATT 1994 has due process provisions.

National treatment should be guaranteed with respect to specific obligations in an Interim Arrangement on transparency, openness and due process. However, an Interim Arrangement would not modify domestic preferences. This should be the subject of further negotiations after the establishment of an Interim Arrangement.

Question 2:

What would be the scope of coverage in an Interim Arrangement?

Answer:

The concepts of transparency, openness and due process are so basic that they should apply to all public sector procurement, including procurement by central, subcentral and state-owned

enterprises. Across-the-board coverage should not necessarily preclude exchanging information on procuring entities and on existing preferential requirements.

Question 3:

Will negotiations on an Interim Arrangement lead to the elimination of all discriminatory requirements on an MFN basis in the WTO? Would it involve GPA signatories offering GPA benefits to non-signatories?

Answer:

An Interim Arrangement would be the first step in the gradual integration of government procurement into the WTO. An Interim Arrangement would be procedural in nature and guarantee transparency, openness and due process on an MFN and national treatment basis to all WTO members. For example, a procuring entity generally would have to allow access to information regarding a procurement process and to bid challenge mechanisms to suppliers of all WTO Members on a non-discriminatory basis. WTO Members would not, however, be obligated to eliminate or waive domestic preferences under an Interim Arrangement.

While GPA signatories will continue to encourage non-signatories to accede to the GPA, a Singapore Ministerial mandate on an Interim Arrangement would be without prejudice to individual countries' positions on acceding to the GPA. However, since the obligations of an Interim Arrangement would be procedural and would not extend to domestic preference programs, GPA signatories would not be obligated under an Interim Arrangement to extend GPA obligations with respect to such preferences to non-signatories. The two separate WTO agreements -- the GPA and the Interim Arrangement -- would coexist, and over time, further integration steps in the WTO could allow the two agreements to converge.

Question 4:

Would the United States envisage special and differential treatment for developing countries within the context of an Interim Arrangement?

Answer:

The procedural nature of an Interim Arrangement makes it difficult to envision a situation where any WTO Member would be exempt from disciplines. This would not preclude exploration of transitional provisions and technical assistance.

Question 5:

What would be the duration of an Interim Arrangement?

232

Answer:

Negotiations on an Interim Arrangement could be realistically completed by the end of 1997, with implementation to begin 1 January 1998. Thereafter, an Interim Arrangement could continue indefinitely, although further negotiations would continue to integrate government procurement into the WTO and could lead to convergence with the GPA. GPA signatories are likely to take this into account as they commence further negotiations by the end of 1998, as required under GPA Article XXIV:7(b).

Question 6:

Would the Interim Arrangement have some sort of dispute settlement procedure? If so, how would it relate to GPA dispute settlement and to the DSU?

Answer:

The United States sees no reason why an Interim Arrangement should not be a covered agreement under the DSU. It should have obligations, albeit limited to provisions on transparency, openness and due process, that could be enforced through application of the DSU. As a separate agreement, however, an Interim Arrangement would not have a direct link to GPA dispute settlement, except, perhaps, to the extent a signatory to both agreements would raise issues under both in seeking establishment of a panel under the DSU.

Question 7:

What additional benefits would members of an Interim Arrangement expect to realize as a result of its transparency provisions?

Answer:

Transparency, openness and due process in government procurement are fundamental to market access, influencing bidding decisions, sourcing options and investment strategies, among other things. Suppliers in all countries have an immediate stake in creating a more predictable bidding environment in government procurement markets, which can account for a substantial proportion of economic activity in many countries. Additionally, governments will benefit from increased competition that is likely to result from application of these principles to their procurement activities. Finally, it is important to keep in mind that an Interim Arrangement is only the first step, but a necessary one, in a long-term process of increasing market access in government procurement.

Appendix G
UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

I. UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

PREAMBLE

WHEREAS the [Government] [Parliament] of . . . considers it desirable to regulate procurement of goods and of construction so as to promote the objectives of:

(a) maximizing economy and efficiency in procurement;

(b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;

(c) promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;

(d) providing for the fair and equitable treatment of all suppliers and contractors;

(e) promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application*

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.

(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:

(a) procurement involving national defence or national security;

(b) . . . (the enacting State may specify in this Law additional types of procurement to be excluded); or

(c) procurement of a type excluded by the procurement regulations.

(3) This Law applies to the types of procurement referred to in paragraph (2) of this article 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.

Article 2. *Definitions*

For the purposes of this Law:

(a) "procurement" means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves;

(b) "procuring entity" means:

(i) *Option I for subparagraph (i)*

any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except . . .; (and)

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except . . .; (and)

(ii) (the enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(c) "goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity; (the enacting State may include additional categories of goods)

(d) "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 drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract;

(e) "supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

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

(g) "tender security" means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 30(1)*(f)* 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;

(h) "currency" includes monetary unit of account.

Article 3. *International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]*

To the extent that this Law conflicts with an obligation of this State under or arising out of any

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

(b) agreement entered into by this State with an intergovernmental international financing institution, or

(c) agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

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

Article 4. *Procurement regulations*

The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

Article 5. *Public accessibility of legal texts*

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

Article 6. *Qualifications of suppliers and contractors*

(1) *(a)* This article applies to the ascertainment 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 in the particular procurement proceedings:

(i) that they possess the 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 this State;

(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 ... years (the enacting State specifies the period of time) 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 paragraph (1)*(b)*.

(3) Any requirement established pursuant to this article 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 article.

(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.

(5) Subject to articles 8(1) and 32(4)*(d)*, 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.

(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 subparagraph *(a)* of this paragraph 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.

Article 7. *Prequalification proceedings*

(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 chapter III or IV, suppliers and contractors that are qualified. The provisions of article 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 prequalification documents shall include, at a minimum, the information required to be specified in the invitation to tender by article 23(1)*(a)* to *(e)*, *(h)* and, if already known, *(j)*, as well as the following information:

(a) instructions for preparing and submitting prequalification applications;

(b) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(c) any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) 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;

(e) any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.

236

(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.

Article 8. *Participation by suppliers or contractors*

(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 law, 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 paragraph (1) of this article 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 paragraph (1) of this article, it shall so declare to them.

Article 9. *Form of communications*

(1) Subject to other provisions of this Law 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 Law 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 articles 7(4) and (6), 29(2)*(a)*, 30(1)*(d)*, 32(1), 33(3), 35(1) and 37(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.

Article 10. *Rules concerning documentary evidence provided by suppliers or contractors*

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 laws of this State relating to the legalization of documents of the type in question.

Article 11. *Record of procurement proceedings*

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) a brief description of the goods or construction 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 and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to article 32(4)*(d)*;

(f) if all tenders were rejected pursuant to article 33, a statement to that effect and the grounds therefor, in accordance with article 33(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 article 13, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 16(2) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(j) in procurement proceedings in which the procuring entity, in accordance with article 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;

(k) 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 article 31(3), the portion of the record referred to in subparagraphs *(a)* and *(b)* of paragraph (1) of this article 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 article 31(3), the portion of the record referred to in subparagraphs *(c)* to *(g)*, and *(k)*, of paragraph (1) of this article 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 subparagraphs *(c)* to *(e)*, and *(k)*, 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 law, would impede law 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 paragraph (1)*(e)*.

(4) The procuring entity 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 article.

Article 12. *Public notice of procurement contract awards*

(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 paragraph (1).

(3) Paragraph (1) is not applicable to awards where the contract price is less than [. . .].

Article 13. *Inducements from suppliers or contractors*

(Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

Article 14. *Rules concerning description of goods or construction*

(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, 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 shall be based on the relevant objective technical and quality characteristics of the goods or construction 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 or construction 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 or construction 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 or 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.

Article 15. *Language*

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in . . . (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

(a) the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) the procuring entity decides, in view of the low value of the goods or construction to be procured, that only domestic suppliers or contractors are likely to be interested).

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 16. *Methods of procurement*

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

(2) A procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 17, 18, 19 or 20, and, if it does, it shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that particular method of procurement.

238

Article 17. *Conditions for use of two-stage tendering, request for proposals or competitive negotiation*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 36, or request for proposals in accordance with article 38, or competitive negotiation in accordance with article 39, in the following circumstances:

(a) it is not feasible for the procuring entity to formulate detailed specifications for the goods or construction and, in order to obtain the most satisfactory solution to its procurement needs,

(i) it seeks proposals as to various possible means of meeting its needs; or,

(ii) because of the technical character of the goods or construction, 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 leading to the procurement of a prototype, 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 Law, pursuant to article 1(3), to procurement involving national defence 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 articles 13, 32(3) or 33, 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 enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) there is an urgent need for the goods or construction, 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 or construction, making it impractical to use other methods of procurement because of the time involved in using those methods.

Article 18. *Conditions for use of restricted tendering*

(Subject to approval by . . . (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 37, when:

(a) the goods or construction, 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 or construction to be procured.

Article 19. *Conditions for use of request for quotations*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance with article 40 for the procurement of readily available goods that are not specially produced to the particular specifications of the procuring entity and for which there is an established market, provided that 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 paragraph (1) of this article.

Article 20. *Conditions for use of single-source procurement*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 41 when:

(a) the goods or construction are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods or construction, and no reasonable alternative or substitute exists;

(b) there is an urgent need for the goods or construction, 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;

(c) owing to a catastrophic event, there is an urgent need for the goods or construction, 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 or technology 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 or technology, 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 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 leading to the procurement of a prototype, 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 Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by . . . (the enacting State designates an organ to issue the approval), 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 article 32(4)*(c)*(iii), provided that procurement from no other supplier or contractor is capable of promoting that policy.

CHAPTER III. TENDERING PROCEEDINGS

Section I. Solicitation of tenders and of applications to prequalify

Article 21. *Domestic tendering*

In procurement proceedings in which

(a) participation is limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) the procuring entity decides, in view of the low value of the goods or construction 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 articles 22(2), 23(1)*(h)*, 23(1)*(i)*, 23(2)*(c)*, 23(2)*(d)*, 25*(j)*, 25*(k)*, 25*(s)* and 30(1)*(c)* of this Law.

Article 22. *Procedures for soliciting tenders or applications to prequalify*

(1) 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 published in . . . (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) 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 journal of wide international circulation.

Article 23. *Contents of invitation to tender and invitation to prequalify*

(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 or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

(d) the criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 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 article 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;

(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 paragraph (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

(e) the place and deadline for the submission of applications to prequalify.

Article 24. *Provision of solicitation documents*

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.

Article 25. *Contents of solicitation documents*

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 article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 32(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 article 14, of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; any incidental services to be performed; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(e) the factors to be used by the procuring entity in determining the successful tender, including any margin of preference and any factors other than price to be used pursuant to article 32(4)*(b)*, *(c)* or *(d)* and the relative weight of such factors;

(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, 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 or construction 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 or construction themselves, such as 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 article 27, 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

240

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 article 28;

(o) the means by which, pursuant to article 26, 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 article 29;

(q) the place, date and time for the opening of tenders, in conformity with article 31;

(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 article 32(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 Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 42 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 article 42 of this Law to seek review of an unlawful 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 article 33, 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 article 35, 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;

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

Article 26. *Clarifications and modifications of solicitation documents*

(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.

Section II. Submission of tenders

Article 27. *Language of tenders*

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.

Article 28. *Submission of tenders*

(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 article 26, 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 subparagraph *(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 subparagraph *(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.

(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.

Article 29. *Period of effectiveness of tenders; modification and withdrawal of tenders*

(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.

Article 30. *Tender securities*

(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 subparagraph *(b)* of this paragraph, 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 this State if the tender security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State);

(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;

(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;

(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.

Section III. Evaluation and comparison of tenders

Article 31. *Opening of tenders*

(1) Tenders shall be opened at the 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 article 11.

Article 32. *Examination, evaluation and comparison of tenders*

(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 subparagraph *(a)* of this paragraph, 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 subparagraph *(b)* of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents.

242

(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 paragraph (1)*(b)* of this article;

(c) if the tender is not responsive;

(d) in the circumstances referred to in article 13.

(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 subparagraph *(b)* of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. 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 subparagraph *(d)* of this paragraph; or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors 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 subparagraph *(b)*(ii) of this paragraph, the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph *(d)* of this paragraph;

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods or construction;

(iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods 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 [. . . (the enacting State may expand subparagraph (iii) by including additional factors)]; and

(iv) national defence and security considerations.

(d) If authorized by the procurement regulations, (and subject to approval by . . . (the enacting State designates an organ to issue the approval),) 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. 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 article 25*(s)*, for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4)*(b)* of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 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 paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 33(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 article 11.

Article 33. *Rejection of all tenders*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval), and) if so specified in the solicitation documents, the procuring entity may reject all tenders at any time prior to the acceptance of a tender. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender the grounds for its rejection of all tenders, but is not required to justify those grounds.

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

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

Article 34. *Prohibition of negotiations with suppliers or contractors*

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.

Article 35. *Acceptance of tender and entry into force of procurement contract*

(1) Subject to articles 32(7) and 33, the tender that has been ascertained to be the successful tender pursuant to article 32(4)*(b)* shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

243

(2) *(a)* Notwithstanding the provisions of paragraph (4) of this article, 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 (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph *(a)* of this paragraph, 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 paragraph (1) of this article 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 article 29(1) or the period of effectiveness of tender securities that may be required pursuant to article 30(1).

(4) Except as provided in paragraphs (2)*(b)* and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article 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 article 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 shall select a successful tender in accordance with article 32(4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 33(1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article 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.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 36. *Two-stage tendering*

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(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 or construction as well as to contractual terms and conditions of their supply.

(3) The procuring entity may engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 13, 32(3) or 33 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 or construction 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 Law. 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 article 32(4)*(b)*.

Article 37. *Restricted tendering*

(1) *(a)* When the procuring entity engages in restricted tendering on the grounds referred to in article 18*(a)*, it shall solicit tenders from all suppliers and contractors from whom the goods or construction to be procured are available.

(b) When the procuring entity engages in restricted tendering on the grounds referred to in article 18*(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 published in . . . (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) The provisions of chapter III of this Law, except article 22, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

Article 38. *Request for proposals*

(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 journal of wide international circulation a notice seeking expression 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;

(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 time-frames, 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 paragraph (3) of this article, 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 article 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;

(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 paragraph (3) of this article 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;

(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.

Article 39. *Competitive negotiation*

(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 article 11, 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 shall select the successful offer on the basis of such best and final offers.

Article 40. *Request for quotations*

(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 themselves, such as 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.

Article 41. *Single-source procurement*

In the circumstances set forth in article 20 the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single supplier or contractor.

CHAPTER V. REVIEW*

Article 42. *Right to review*

(1) Subject to paragraph (2) of this article, 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 Law may seek review in accordance with articles 43 to [47].

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

(a) the selection of a method of procurement pursuant to articles 16 to 20;

*States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

245

(b) the limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(c) a decision by the procuring entity under article 33(1) to reject all tenders;

(d) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 38(2);

(e) an omission referred to in article 25*(t)*.

Article 43. *Review by procuring entity (or by approving authority)*

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure.) A reference in this Law to the head of the procuring entity (or the head of the approving authority) includes any person designated by the head of the procuring entity (or by the head of the approving authority, as the case may be).

(2) The head of the procuring entity (or of the approving authority) 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 head of the procuring entity (or of the approving authority) 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 head of the procuring entity (or of the approving authority) 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 head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [44 or 47]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [44 or 47].

Article 44. *Administrative review**

(1) A supplier or contractor entitled under article 42 to seek review may submit a complaint to [insert name of administrative body]:

(a) if the complaint cannot be submitted or entertained under article 43 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

(b) if the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) pursuant to article 43(5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 43(4); or

(d) if the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 43, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]* one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) require the payment of compensation for

Option I

any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings

Option II

loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings

as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

(g) order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 47.

Article 45. *Certain rules applicable to review proceedings under article 43 [and article 44]*

(1) Promptly after the submission of a complaint under article 43 [or article 44], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case

*States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 44 and provide only for judicial review (article 47).

*Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

ay be,] 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.

) 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 head of the procuring entity (or the approving authority) [, or of the [insert name of administrative body], as the case may be,] 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 law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

Article 46. *Suspension of procurement proceedings*

) The timely submission of a complaint under article 43 [or article 44] 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 article 44 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] 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 article 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 article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

Article 47. *Judicial review*

The [insert name of court or courts] has jurisdiction over actions pursuant to article 42 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 article 3 [or 44].

247

Appendix H
WORLD BANK PROCUREMENT GUIDELINES

248

Guidelines Procurement under IBRD Loans and IDA Credits

The World Bank
1818 H Street, N.W.
Washington, D.C. 20433

249

© 1985, 1986, 1988, 1992, 1995
Fifth edition, revised and expanded 1995
Revised January and August 1996
The International Bank for Reconstruction
and Development / THE WORLD BANK
1818 H Street, N.W.
Washington, D.C. 20433, U.S.A.

First printing January 1995
Second printing January 1996
Third printing August 1996
All rights reserved
ISBN 0-8213-3218-X

CONTENTS

I. Introduction 1

1.1 Purpose 1
1.2 General Considerations 1
1.5 Applicability of Guidelines 3
1.6 Eligibility 3
1.9 Advance Contracting and Retroactive Financing 5
1.10 Joint Ventures 5
1.11 Bank Review 5
1.12 Reserved Procurement 6
1.13 Misprocurement 6
1.14 References to Bank 6
1.15 Fraud and Corruption 7

II. International Competitive Bidding 9

A. General 9
2.1 Introduction 9
2.2 Type and Size of Contracts 9
2.6 Two-Stage Bidding 10
2.7 Notification and Advertising 11
2.9 Prequalification of Bidders 12

B. Bidding Documents 13
2.11 General 13
2.13 Validity of Bids and Bid Security 14
2.15 Language 14
2.16 Clarity of Bidding Documents 14
2.19 Standards 15
2.20 Use of Brand Names 16
2.21 Pricing 16
2.24 Price Adjustment 17
2.26 Transportation and Insurance 18
2.28 Currency Provisions 19
2.29 Currency of Bid 19
2.31 Currency Conversion for Bid Comparison 19
2.32 Currency of Payment 20
2.34 Terms and Methods of Payment 20
2.37 Conditions of Contract 21
2.38 Performance Security 21
2.40 Liquidated Damages and Bonus Clauses 22
2.41 Force Majeure 22
2.42 Applicable Law and Settlement of Disputes 23

250

C. Bid Opening, Evaluation, and Award of Contract 23
2.43 Time for Preparation of Bids 23
2.44 Bid Opening Procedures 24
2.45 Clarifications or Alterations of Bids 24
2.46 Confidentiality 24
2.47 Examination of Bids 24
2.48 Evaluation and Comparison of Bids 25
2.54 Domestic Preferences 26
2.56 Extension of Validity of Bids 27
2.57 Postqualification of Bidders 27
2.58 Award of Contract 27
2.59 Rejection of All Bids 28

D. Modified ICB 29
2.63 Quick Disbursement Operations 29
2.65 Procurement of Commodities 29

III. Other Methods of Procurement 31

3.1 General 31
3.2 Limited International Bidding 31
3.3 National Competitive Bidding 31
3.5 Shopping (International and National) 32
3.7 Direct Contracting 33
3.8 Force Account 33
3.9 Procurement from United Nations Agencies 34
3.10 Procurement Agents 34
3.11 Inspection Agents 35
3.12 Procurement in Loans to Financial Intermediaries 35
3.13 Procurement under BOT and Similar Private Sector Arrangements 35
3.14 Procurement under Loans Guaranteed by the Bank 36
3.15 Community Participation in Procurement 36

Appendices

Appendix 1 — Review by the Bank of Procurement Decisions 38
Appendix 2 — Domestic Preferences 42
Appendix 3 — Disbursements 45
Appendix 4 — Guidance to Bidders 47

I. INTRODUCTION

Purpose

1.1 The purpose of these Guidelines is to inform those carrying out a project that is financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD) or a credit from the International Development Association (IDA),[1] of the arrangements to be made for procuring the goods and works[2] (including related services) required for the project. The Loan Agreement governs the legal relationships between the Borrower and the Bank, and the Guidelines are made applicable to procurement of goods and works for the project, as provided in the agreement. The rights and obligations of the Borrower and the providers of goods and works for the project are governed by the bidding[3] documents, and by the contracts signed by the Borrower with the providers of goods and works, and not by these Guidelines or the Loan Agreements. No party other than the parties to the Loan Agreement shall derive any rights therefrom or have any claim to loan proceeds.

General Considerations

1.2 The responsibility for the implementation of the project, and therefore for the award and administration of contracts under the project, rests with the Borrower.[4] The Bank, for its part, is

[1] Procurement requirements of IBRD and IDA are identical, and references in these Guidelines to the Bank include both IBRD and IDA, and references to loans include credits and project preparation facilities (PPFs). Loan Agreement includes Development Credit Agreement and Project Agreement.

[2] References to "goods" and "works" in these Guidelines include related services such as transportation, insurance, installation, commissioning, training, and initial maintenance. "Goods" includes commodities, raw material, machinery, equipment, and industrial plant. The provisions of these Guidelines also apply to services which are bid and contracted on the basis of performance of a measurable physical output, such as drilling, mapping, and similar operations. These Guidelines do not refer to Consultants' services, to which the current *Guidelines: Use of Consultants by World Bank Borrowers and by the World Bank as Executing Agency* apply (referred to herein as Consultant Guidelines).

[3] For the purposes of these Guidelines, the words "bid" and "tender" shall have the same meaning.

[4] In some cases, the Borrower acts only as an intermediary, and the project is carried out by another agency or entity. References in these Guidelines to the Borrower include such agencies and entities, as well as Sub-Borrowers under on-lending arrangements.

251

required by its Articles of Agreement to "...ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations,"[5] and it has established detailed procedures for this purpose. While in practice the specific procurement rules and procedures to be followed in the implementation of a project depend on the circumstances of the particular case, four considerations generally guide the Bank's requirements:

(a) the need for economy and efficiency in the implementation of the project, including the procurement of the goods and works involved;
(b) the Bank's interest, as a cooperative institution, in giving all eligible bidders from developed and developing countries[6] an opportunity to compete in providing goods and works financed by the Bank;
(c) the Bank's interest, as a development institution, in encouraging the development of domestic contracting and manufacturing industries in the borrowing country; and
(d) the importance of transparency in the procurement process.

1.3 The Bank has found that, in most cases, these needs and interests can best be realized through International Competitive Bidding (ICB), properly administered, and with suitable allowance for preferences for domestically manufactured goods and, where appropriate, for domestic Contractors[7] for works under prescribed conditions. In such cases, therefore, the Bank requires its Borrowers to obtain goods and works through ICB open to eligible Suppliers and Contractors.[8] Section II of these Guidelines describes the procedures for ICB.

1.4 On the other hand, where ICB is clearly not the most economic and efficient method of procurement, other methods of procurement are specified in the Loan Agreement. Section III describes these other methods of procurement and the circumstances under which their application would be more appropriate. The particular methods to be followed for the procurement of goods and works for a given project are specified in the Loan Agreement for such project.

Applicability of Guidelines

1.5 Generally the Bank finances only a part of the cost of the project. The procedures outlined in these Guidelines apply to all contracts for goods and works financed in whole or in part from Bank loans. For the procurement of those contracts for goods and works not financed from a Bank loan, the Borrower may adopt other procedures. In such cases the Bank shall be satisfied that the procedures to be used will fulfill the Borrower's obligations to cause the project to be carried out diligently and efficiently, and that the goods and works to be procured:

(a) are of satisfactory quality and are compatible with the balance of the project;
(b) will be delivered or completed in timely fashion; and
(c) are priced so as not to affect adversely the economic and financial viability of the project.

Eligibility

1.6 Funds from Bank loans are disbursed only on account of expenditures for goods and works provided by nationals of, and produced in or supplied from, Bank member countries.[9] Under this policy, nationals of other countries or bidders offering goods and works from other countries shall be disqualified from bidding for contracts intended to be financed in whole or in part from Bank loans.

1.7 In connection with any contract to be financed in whole or in part from a Bank loan, the Bank does not permit a Borrower to deny prequalification, if required, to a firm for reasons unrelated to its

[5] The Bank's Articles of Agreement; Article III, Section 5(b).

[6] See para. 1.6.

[7] For purposes of these Guidelines, "Contractor" refers only to a firm providing construction services.

[8] See para. 1.6.

[9] See Section 5.01 of *General Conditions Applicable to Loan and Guarantee Agreements*, dated January 1, 1985. The Bank maintains a list of countries from which bidders, goods, and services are not eligible to participate in procurement financed by the Bank. The list is regularly updated and can be obtained from the Public Information Center of the World Bank.

252

capability and resources to successfully perform the contract; nor does it permit a Borrower to disqualify any bidder for such reasons.

1.8 As exceptions to the foregoing:

(a) Firms of a member country or goods manufactured in a member country may be excluded if, (i) as a matter of law or official regulation, the Borrower's country prohibits commercial relations with that country, provided that the Bank is satisfied that such exclusion does not preclude effective competition for the supply of goods or works required, or (ii) by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the Borrower's country prohibits any import of goods from that country or any payments to persons or entities in that country.

(b) A firm which has been engaged by the Borrower to provide consulting services for the preparation or implementation of a project, and any of its affiliates, shall be disqualified from subsequently providing goods or works (other than a continuation of the firm's earlier consulting services) for the same project. This provision does not apply to the various firms (Consultants, Contractors, or Suppliers) which together are performing the Contractor's obligations under a turnkey or design and build contract.[10]

(c) Government-owned enterprises in the Borrower's country may participate only if they can establish that they (i) are legally and financially autonomous, and (ii) operate under commercial law. No dependent agency of the Borrower or Sub-Borrower under a Bank-financed project shall be permitted to bid or submit a proposal for the procurement of goods or works under the project.[11]

(d) A firm declared ineligible by the Bank in accordance with subparagraph (d) of paragraph 1.15 of these Guidelines shall be ineligible to be awarded a Bank-financed contract during the period of time determined by the Bank.

[10] See para. 2.5.

[11] Other than Force Account units, as permitted under para. 3.8.

Advance Contracting and Retroactive Financing

1.9 In certain circumstances, such as to accelerate project implementation, the Borrower may wish to proceed with the initial steps of procurement before signing the related Bank loan. The procurement procedures, including advertising, shall be in accordance with the Guidelines in order for the eventual contracts to be eligible for Bank financing, and the normal review process by the Bank shall be followed. A Borrower undertakes such advance contracting at its own risk, and any concurrence by the Bank with the procedures, documentation, or proposal for award does not commit the Bank to make a loan for the project in question. If the contract is signed, reimbursement by the Bank of any payments made by the Borrower under the contract prior to loan signing is referred to as retroactive financing and is only permitted within the limits specified in the Loan Agreement.

Joint Ventures

1.10 Suppliers and Contractors in the Borrower's country are encouraged to participate in the procurement process since the Bank encourages the development of domestic industry. They may bid independently or in joint venture with foreign firms, but the Bank will not accept conditions of bidding which require mandatory joint ventures or other forms of mandatory association between domestic and foreign firms.

Bank Review

1.11 The Bank reviews the Borrower's procurement procedures, documents, bid evaluations, award recommendations, and contracts to ensure that the procurement process is carried out in accordance with the agreed procedures. These review procedures are described in Appendix 1. The Loan Agreement shall specify the extent to which these review procedures shall apply in respect of the different categories of goods and works to be financed, in whole or in part, from the Bank loan.

Reserved Procurement

1.12 When open competition would be the appropriate method of procurement for particular goods or works of the project, but the Borrower wishes to reserve this procurement for one or more specific firms or enterprises, the Bank may accept such reserved procurement only on condition that:

(a) it is not eligible for financing out of the Bank loan; and

(b) it will not significantly affect the satisfactory project implementation in terms of costs, quality, and completion time.

Misprocurement

1.13 The Bank does not finance expenditures for goods and works which have not been procured in accordance with the agreed procedures in the Loan Agreement, and it is the policy of the Bank to cancel that portion of the loan allocated to the goods and works that have been misprocured. The Bank may, in addition, exercise other remedies under the Loan Agreement.

References to Bank

1.14 If the Borrower wishes to refer to the Bank in procurement documents, the following language shall be used:

> "(name of Borrower) has received (or in appropriate cases 'has applied for') a loan from the International Bank for Reconstruction and Development in various currencies equivalent to USD... toward the cost of (name of project), and intends to apply a portion of the proceeds of this loan to eligible payments under this contract. Payment by the International Bank for Reconstruction and Development will be made only at the request of (name of Borrower or designate) and upon approval by the International Bank for Reconstruction and Development, and will be subject, in all respects, to the terms and conditions of the Loan Agreement. The Loan Agreement prohibits a withdrawal from the Loan Account for the purpose of any payment to persons or entities, or for any import of goods, if such payment or import, to the knowledge of the Bank, is prohibited by a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations. No party other than (name of Borrower) shall derive any rights from the Loan Agreement or have any claim to loan proceeds."[12]

Fraud and Corruption

1.15 It is the Bank's policy to require that Borrowers (including beneficiaries of Bank loans), as well as bidders/Suppliers/Contractors under Bank-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy, the Bank:

(a) defines, for the purposes of this provision, the terms set forth below as follows:
   (i) "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution; and
   (ii) "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Borrower, and includes collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, non-competitive levels and to deprive the Borrower of the benefits of free and open competition;

(b) will reject a proposal for award if it determines that the bidder recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question;

(c) will cancel the portion of the loan allocated to a contract for goods or works if it at any time determines that corrupt or fraudulent practices were engaged in by representatives of the Borrower or of a beneficiary of the loan

[12] Substitute "credit," "International Development Association," and "Credit Agreement," as appropriate.

254

during the procurement or the execution of that contract, without the Borrower having taken timely and appropriate action satisfactory to the Bank to remedy the situation;

(d) will declare a firm ineligible, either indefinitely or for a stated period of time, to be awarded a Bank-financed contract if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for, or in executing, a Bank-financed contract; and

(e) will have the right to require that, in contracts financed by a Bank loan, a provision be included requiring Suppliers and Contractors to permit the Bank to inspect their accounts and records relating to the performance of the contract and to have them audited by auditors appointed by the Bank.

II. INTERNATIONAL COMPETITIVE BIDDING

A. General

Introduction

2.1 The objective of International Competitive Bidding (ICB), as described in these Guidelines, is to provide all eligible prospective bidders[13] with timely and adequate notification of a Borrower's requirements and an equal opportunity to bid for the required goods and works.

Type and Size of Contracts

2.2 The bidding documents shall clearly state the type of contract to be entered into and contain the proposed contract provisions appropriate therefor. The most common types of contracts provide for payments on the basis of a lump sum, unit prices, reimbursable cost plus fees, or combinations thereof. Reimbursable cost contracts are acceptable to the Bank only in exceptional circumstances such as conditions of high risk or where costs cannot be determined in advance with sufficient accuracy. Such contracts shall include appropriate incentives to limit costs.

2.3 The size and scope of individual contracts will depend on the magnitude, nature, and location of the project. For projects requiring a variety of goods and works, separate contracts generally are awarded for the supply and/or installation of different items of equipment and plant[14] and for the works.

2.4 For a project requiring similar but separate items of equipment or works, bids may be invited under alternative contract options that would attract the interest of both small and large firms, which could be allowed, at their option, to bid for individual contracts (slices) or for a group of similar contracts (package). All bids and combinations of bids shall be received by the same deadline and opened and evaluated simultaneously so as to

[13] See para. 1.6.

[14] For purposes of these Guidelines, "plant" refers to instal equipment, as in a production facility.

255

determine the bid or combination of bids offering the lowest evaluated cost to the Borrower.[15]

2.5 In certain cases, such as special processes, closely integrated manufacturing, or works of a special nature, the Bank may accept or require a turnkey contract under which the design and engineering, the supply and installation of equipment, and the construction of a complete industrial plant or works are provided under one contract. Alternatively, the Borrower may remain responsible for the design and engineering, and invite bids for a single responsibility contract for the supply and installation of all goods and works required for the project component. Design and build, and management contracting[16] contracts are also acceptable where appropriate.

Two-Stage Bidding

2.6 Detailed design and engineering of the goods and works to be provided, including the preparation of technical specifications and other bidding documents, normally precede the invitation to bid for major contracts. However, in the case of turnkey contracts or contracts for large complex plants or works of a special nature, it may be undesirable or impractical to prepare complete technical specifications in advance. In such a case, a two-stage bidding procedure may be used, under which first unpriced technical proposals on the basis of a conceptual design or performance specifications are invited, subject to technical as well as commercial clarifications and adjustments, to be followed by amended bidding documents and the submission of final technical proposals and priced bids in the second stage. These procedures are also appropriate in the procurement of equipment which is subject to rapid technological advances, such as major computer and communications systems.[17]

Notification and Advertising

2.7 Timely notification of bidding opportunities is essential in competitive bidding. For projects which include procurement on the basis of ICB, the Borrower is required to prepare and submit to the Bank a draft General Procurement Notice. The Bank will arrange for its publication in *Development Business* (UNDB).[18] The Notice shall contain information concerning the Borrower (or prospective Borrower), amount and purpose of the loan, scope of procurement under ICB, and the name and address of the Borrower's agency responsible for procurement. If known, the scheduled date for availability of prequalification or bidding documents should be indicated. The Borrower shall maintain a list of responses to the Notice. The related prequalification or bidding documents, as the case may be, shall not be released to the public earlier than eight weeks after the date of publication of the Notice. The General Procurement Notice shall be updated annually for all outstanding procurement.

2.8 The international community shall also be notified in a timely manner of the opportunities to bid for specific contracts. To that end, invitations to prequalify or to bid, as the case may be, shall be advertised as Specific Procurement Notices in at least one newspaper of national circulation in the Borrower's country (and in the official gazette, if any). Such invitations shall also be transmitted to those who have expressed interest in bidding in response to the General Procurement Notice. Publication of the invitations in *Development Business* is also encouraged. Borrowers are also strongly encouraged to transmit such invitations to embassies and trade representatives of countries of

---

[15] See paras. 2.48–2.53 for the bid evaluation procedures.

[16] In construction, a management Contractor usually does not perform the work directly but contracts out and manages the work of other Contractors, taking on the full responsibility and risk for price, quality, and timely performance. Conversely, a construction manager is a Consultant for, or agent of, the Borrower, but does not take on such risks. (If financed by the Bank, the services of the construction manager should be procured under the Consultant Guidelines. See footnote 2.)

[17] As opposed to two-stage bidding, the Bank does not accept the two- or three-envelope system in which bidders are required to submit separate qualification, technical, and price proposals at the same time, but which are opened sequentially in separate sessions and evaluated.

[18] *Development Business* is a publication of the United Nations Department of Public Information, UN Plaza, New York, New York, 10017, U.S.A. A *Development Business* office is maintained at the World Bank, 1818 H Street, N.W., Washington, D.C., 20433, U.S.A.

256

likely Suppliers and Contractors. Additionally, for large, specialized, or important contracts, Borrowers shall advertise the invitations in *Development Business* and/or well-known technical magazines, newspapers, and trade publications of wide international circulation. Notification shall be given in sufficient time to enable prospective bidders to obtain prequalification or bidding documents and prepare and submit their responses.[19]

Prequalification of Bidders

2.9 Prequalification is usually necessary for large or complex works, or in any other circumstances in which the high costs of preparing detailed bids could discourage competition, such as custom-designed equipment, industrial plant, specialized services, and contracts to be let under turnkey, design and build, or management contracting. This also ensures that invitations to bid are extended only to those who have adequate capabilities and resources. Prequalification may also be useful to determine eligibility for preference for domestic Contractors where this is allowed.[20] Prequalification shall be based entirely upon the capability and resources of prospective bidders to perform the particular contract satisfactorily, taking into account their (i) experience and past performance on similar contracts, (ii) capabilities with respect to personnel, equipment, and construction or manufacturing facilities, and (iii) financial position.[21]

2.10 The invitation to prequalify for bidding on specific contracts or groups of similar contracts shall be advertised and notified as described in paragraphs 2.7 and 2.8 above. The scope of the contract and a clear statement of the requirements for qualification shall be sent to those who responded to the invitation. All such applicants that meet the specified criteria shall be allowed to bid. Borrowers shall inform all applicants of the results of prequalification. As soon as prequalification is completed, the bidding documents shall be made available to the qualified prospective bidders. For

[19] See para. 2.43.

[20] See paras. 2.54–2.55.

[21] The Bank has prepared a Standard Prequalification Document for use by its Borrowers, where appropriate.

prequalification for groups of contracts to be awarded over a period of time, a limit for the number or total value of awards to any one bidder may be made on the basis of the bidder's resources. The list of prequalified firms in such instances shall be updated periodically. Verification of the information provided in the submission for prequalification shall be confirmed at the time of award of contract, and award may be denied to a bidder that is judged to no longer have the capability or resources to successfully perform the contract.

B. Bidding Documents

General

2.11 The bidding documents shall furnish all information necessary for a prospective bidder to prepare a bid for the goods and works to be provided. While the detail and complexity of these documents may vary with the size and nature of the proposed bid package and contract, they generally include: invitation to bid; instructions to bidders; form of bid; form of contract; conditions of contract, both general and special; specifications and drawings; list of goods or bill of quantities; delivery time or schedule of completion; and necessary appendices, such as formats for various securities. The basis for bid evaluation and selection of the lowest evaluated bid shall be clearly outlined in the instructions to bidders and/or the specifications. If a fee is charged for the bidding documents, it shall be reasonable and reflect only the cost of their printing and delivery to prospective bidders, and shall not be so high as to discourage qualified bidders. Guidance on critical components of the bidding documents are given in the following paragraphs.

2.12 Borrowers shall use the appropriate *Standard Bidding Documents* (SBDs) issued by the Bank with minimum changes, acceptable to the Bank, as necessary to address country- and project-specific issues. Any such changes shall be introduced only through bid or contract data sheets, or through special conditions of contract, and not by introducing changes in the standard wording of the Bank's SBDs. Where no relevant standard bid [illegible] documents have been issued, the Bo[illegible] use other internationally recognized [illegible] ns

257

of contract and contract forms acceptable to the Bank.

Validity of Bids and Bid Security

2.13 Bidders shall be required to submit bids valid for a period specified in the bidding documents which shall be sufficient to enable the Borrower to complete the comparison and evaluation of bids, review the recommendation of award with the Bank (if required by the Loan Agreement), and obtain all the necessary approvals so that the contract can be awarded within that period.

2.14 Bid security, in the amount specified in the bidding documents, affording the Borrower reasonable protection against irresponsible bids, may be required, but it shall not be set so high as to discourage bidders. The bid security, at the bidder's option, shall be in the form of a certified check, a letter of credit or a bank guarantee from a reputable bank. Bidders shall be allowed to submit bank guarantees directly issued by a bank of their choice located in any eligible country. Bid security shall remain valid for a period of four weeks beyond the validity period for the bids, in order to provide reasonable time for the Borrower to act if the security is to be called. Bid security shall be released to unsuccessful bidders once it is determined that they will not be awarded a contract.

Language

2.15 Prequalification and bidding documents shall be prepared in either English, French, or Spanish, and shall specify that the text of the contract documents in that language is governing. However, contracts entered into with local bidders (excluding joint ventures between local and foreign firms) may, at the Borrower's option, be in the national language of the Borrower, which shall be the governing language for such contracts.

Clarity of Bidding Documents

2.16 Bidding documents shall be so worded as to permit and encourage international competition and shall set forth clearly and precisely the work to be carried out, the location of the work, the goods to be supplied, the place of delivery or installation, the

schedule for delivery or completion, minimum performance requirements, and the warranty and maintenance requirements, as well as any other pertinent terms and conditions. In addition, the bidding documents, where appropriate, shall define the tests, standards, and methods that will be employed to judge the conformity of equipment as delivered, or works as performed, with the specifications. Drawings shall be consistent with the text of the specifications, and an order of precedence between the two shall be specified.

2.17 The bidding documents shall specify any factors, in addition to price, which will be taken into account in evaluating bids, and how such factors will be quantified or otherwise evaluated. If bids based on alternative designs, materials, completion schedules, payment terms, etc., are permitted, conditions for their acceptability and the method of their evaluation shall be expressly stated.

2.18 All prospective bidders shall be provided the same information, and shall be assured of equal opportunities to obtain additional information on a timely basis. Borrowers shall provide reasonable access to project sites for visits by prospective bidders. For works or complex supply contracts, particularly for those requiring refurbishing existing works or equipment, a pre-bid conference may be arranged whereby potential bidders may meet with the Borrower representatives to seek clarifications. Minutes of the conference shall be provided to all prospective bidders with a copy to the Bank. Any additional information, clarification, correction of errors, or modifications of bidding documents shall be sent to each recipient of the original bidding documents in sufficient time before the deadline for receipt of bids to enable bidders to take appropriate actions. If necessary, the deadline shall be extended.

Standards

2.19 Standards and technical specifications quoted in bidding documents shall promote the broadest possible competition, while assuring the critical performance or other requirements for the goods and/or works under procurement. As far as possible, the Borrower shall specify internationally accepted standards such as those issued by the International Standards Organization with which the equipment or

258

materials or workmanship shall comply. Where such international standards are unavailable or are inappropriate, national standards may be specified. In all cases, the bidding documents shall state that equipment, material, or workmanship meeting other standards, which promise at least substantial equivalence, will also be accepted.

Use of Brand Names

2.20 Specifications shall be based on relevant characteristics and/or performance requirements. References to brand names, catalog numbers, or similar classifications shall be avoided. If it is necessary to quote a brand name or catalog number of a particular manufacturer to clarify an otherwise incomplete specification, the words "or equivalent" shall be added after such reference. The specification shall permit the acceptance of offers for goods which have similar characteristics and which provide performance at least substantially equivalent to those specified.

Pricing

2.21 Bids for goods shall be invited on the basis of CIF (port of destination), or CIP[22] (place of destination) for all goods offered from abroad, and EXW[23] (ex works, ex factory, or off-the-shelf) for locally available or manufactured or assembled goods, including those previously imported. Bidders shall be allowed to arrange for ocean and other transportation and related insurance from any eligible source.[24] Where inland transportation, installation, commissioning, or other similar services are required to be performed by the bidder, as in the case of "supply and installation" contracts, the bidder shall be required to quote for these services, in addition.

[22] Refer to *INCOTERMS 1990* for further definitions. Published by the International Chamber of Commerce, 38 Cours Albert 1er, 75008 Paris, France. CIF is cost, insurance, and freight for maritime transportation. CIP is cost, carriage, and insurance in the case of multimodular transportation. Both terms are for duty unpaid, payment for which is the responsibility of the Borrower.

[23] The EXW price shall include all duties, sales, and other taxes already paid or payable for the components and raw materials used in the manufacture or assembly of the equipment, or the prior import of the equipment, offered in the bid.

[24] See para. 1.6.

2.22 In the case of turnkey contracts, the bidder shall be required to quote the price of the installed plant at site, including all costs for supply of equipment, marine and local transportation and insurance, installation, and commissioning, as well as associated works and all other services included in the scope of contract such as design, maintenance, operation, etc. Unless otherwise specified in the bidding documents, the turnkey price shall include all duties, taxes, and other levies.[25]

2.23 Bidders for works contracts shall be required to quote unit prices or lump sum prices for the performance of the works, and such prices shall include all duties, taxes, and other levies. Bidders shall be allowed to obtain all inputs (except for unskilled labor) from any eligible sources so that they may offer their most competitive bids.

Price Adjustment

2.24 Bidding documents shall state either that (i) bid prices will be fixed or (ii) that price adjustments will be made to reflect any changes (upwards or downwards) in major cost components of the contract, such as labor, equipment, materials, and fuel. Price adjustment provisions are usually not necessary in simple contracts involving delivery of goods or completion of works within eighteen months, but shall be included in contracts which extend beyond eighteen months. However, it is normal commercial practice to obtain firm prices for some types of equipment regardless of the delivery time and, in such cases, price adjustment provisions are not needed.

2.25 Prices may be adjusted by the use of a prescribed formula (or formulae) which breaks down the total price into components that are adjusted by price indices specified for each component or, alternatively, on the basis of documentary evidence (including actual invoices) provided by the Supplier or Contractor. The use of the formula method of price adjustment is preferable to that of documentary evidence. The method to be used, the formula (if

[25] Borrowers may prefer to exclude customs duties on imported equipment from the bid price [illegible] ascertain or, alternatively, to incl[illegible] sement of actual [illegible]

259

applicable), and the base date for application shall be clearly defined in the bidding documents. If the payment currency is different from the source of the input and corresponding index, a correction factor shall be applied in the formula, to avoid incorrect adjustment.

Transportation and Insurance

2.26 Bidding documents shall permit Suppliers and Contractors to arrange transportation and insurance from any eligible source. Bidding documents shall state the types and terms of insurance to be provided by the bidder. The indemnity payable under transportation insurance shall be at least 110 percent of the contract amount in the currency of the contract or in a freely convertible currency to enable prompt replacement of lost or damaged goods. For works, a Contractor's All Risk form of policy usually shall be specified. For large projects with several Contractors on a site, a "wrap-up" or total project insurance arrangement may be obtained by the Borrower, in which case the Borrower shall seek competition for such insurance.

2.27 As an exception, if a Borrower wishes to reserve transportation and insurance for the import of goods to national companies or other designated sources, bidders shall be asked to quote FOB (port of shipment) or CFR (port of destination)[26] prices in addition to the CIF (port of destination) or CIP (place of destination) price specified in paragraph 2.21. Selection of the lowest evaluated bid shall be on the basis of the CIF or CIP price, but the Borrower may sign the contract on FOB or CFR terms and make its own arrangement for transportation and/or insurance. Under such circumstances, disbursements under the Bank loan shall be limited to the FOB or CFR cost. If the Borrower does not wish to obtain insurance coverage in the market, evidence shall be provided to the Bank that resources are readily available for prompt payment in a freely convertible currency of the indemnities required to replace lost or damaged goods.

[26] *INCOTERMS 1990* for free on board port of shipment, and for cost and freight to port of destination, respectively.

Currency Provisions

2.28 Bidding documents shall state the currency or currencies in which bidders are to state their prices, the procedure for conversion of prices expressed in different currencies into a single currency for the purpose of comparing bids, and the currencies in which the contract price will be paid. The following provisions (paragraphs 2.29–2.33) are intended to (i) ensure that bidders have the opportunity to minimize any exchange risk with regard to the currency of bid and of payment, and hence may offer their best prices; (ii) give bidders in countries with weak currencies the option to use a stronger currency and thus provide a firmer basis for their bid price; and (iii) ensure fairness and transparency in the evaluation process.

Currency of Bid

2.29 Bidding documents shall state that the bidder may express the bid price in the currency of any member country, or in ECUs.[27] If the bidder wishes to express the bid price as a sum of amounts in different foreign currencies, he may do so, provided the price includes no more than three foreign currencies. Furthermore, the Borrower may require bidders to state the portion of the bid price representing local costs in the currency[28] of the country of the Borrower.

2.30 In bidding documents for works, the Borrower may require bidders to state the bid price entirely in the local currency, along with the requirements for payments in up to three foreign currencies of their choice for expected inputs from outside the Borrower's country (which inputs the bidders may be required to list), expressed as a percentage of the bid price, together with the exchange rates used in such calculations.

Currency Conversion for Bid Comparison

2.31 The bid price is the sum of all payments in various currencies required by the bidder. For the purpose of comparing prices, bid prices shall be

[27] For purposes of these Guidelines, the European Currency Unit (ECU) is also considered an eligible currency.

[28] Referred to hereafter as local currency.

converted to a single currency selected by the Borrower (local currency or fully convertible foreign currency) and stated in the bidding documents. The Borrower shall make this conversion by using the selling (exchange) rates for those currencies quoted by an official source (such as the Central Bank) or by a commercial bank or by an internationally circulated newspaper for similar transactions on a date selected in advance, such source and date to be specified in the bidding documents, provided that the date shall not be earlier than four weeks prior to the deadline for the receipt of bids, nor later than the original date for the expiry of the period of bid validity.

Currency of Payment

2.32 Payment of the contract price shall be made in the currency or currencies in which the bid price is expressed in the bid of the successful bidder.

2.33 When the bid price is required to be stated in the local currency but the bidder has requested payment in foreign currencies expressed as a percentage of the bid price, the exchange rates to be used for purposes of payments shall be those specified by the bidder in the bid, so as to ensure that the value of the foreign currency portions of the bid is maintained without any loss or gain.

Terms and Methods of Payment

2.34 Payment terms shall be in accordance with the international commercial practices applicable to the specific goods and works.

(a) Contracts for supply of goods shall provide for full payment on the delivery and inspection, if so required, of the contracted goods except for contracts involving installation and commissioning, in which case a portion of the payment may be made after the Supplier has complied with all its obligations under the contract. The use of letters of credit is encouraged so as to assure prompt payment to the Supplier. In major contracts for equipment and plant, provision shall be made for suitable advances and, in contracts of long duration, for progress payments during the period of manufacture or assembly.

(b) Contracts for works shall provide in appropriate cases for mobilization advances, advances on Contractor's equipment and materials, regular progress payments, and reasonable retention amounts to be released upon compliance with the Contractor's obligations under contract.

2.35 Any advance payment for mobilization and similar expenses, made upon signature of a contract for goods or works, shall be related to the estimated amount of these expenses and be specified in the bidding documents. Amounts and timing of other advances to be made, such as for materials delivered to the site for incorporation in the works, shall also be specified. The bidding documents shall specify the arrangements for any security required for advance payments.

2.36 Bidding documents shall specify the payment method and terms offered, whether alternative payment methods and terms would be allowed and, if so, under what circumstances. The method of payment shall take into account the available procedures for withdrawals of the proceeds of the loan, as described in Appendix 3.

Conditions of Contract

2.37 The contract documents shall clearly define the scope of work to be performed, the goods to be supplied, the rights and obligations of the Borrower and of the Supplier or Contractor, and the functions and authority of the engineer, architect, or construction manager, if one is employed by the Borrower, in the supervision and administration of the contract. In addition to the general conditions of contract, any special conditions particular to the specific goods or works to be procured and the location of the project shall be included.

Performance Security

2.38 Bidding documents for works shall require security in an amount sufficient to protect the Borrower in case of breach of contract by the Contractor. This security shall be provided by a performan[illegible] bond or a bank guarantee in an [illegible] form and amount, as specified by the [illegible] the bidding docum[illegible] The amount of

261

the bond or guarantee may vary, depending on the type of security furnished and on the nature and magnitude of the works. A portion of this security shall extend sufficiently beyond the date of completion of the works to cover the defects liability or maintenance period up to final acceptance by the Borrower; alternatively, contracts may provide for a percentage of each periodic payment to be held as retention money until final acceptance. Contractors may be allowed to replace retention money with an equivalent security after provisional acceptance.

2.39 In contracts for the supply of goods, the need for performance security depends on the market conditions and commercial practice for the particular kind of goods. Suppliers or manufacturers may be required to provide a bank guarantee to protect against nonperformance of the contract. Such security in an appropriate amount may also cover warranty obligations or, alternatively, a percentage of the payments may be held as retention money to cover warranty obligations, and any installation or commissioning requirements. The security or retention money shall be reasonable in amount.

Liquidated Damages and Bonus Clauses

2.40 Provisions for liquidated damages or similar provisions in an appropriate amount shall be included in the conditions of contract when delays in the delivery of goods, completion of works or failure of the goods or works to meet performance requirements would result in extra cost, or loss of revenue or loss of other benefits to the Borrower. Provision may also be made for a bonus to be paid to Suppliers or Contractors for completion of works or delivery of goods ahead of the times specified in the contract when such earlier completion or delivery would be of benefit to the Borrower.

Force Majeure

2.41 The conditions of contract shall stipulate that failure on the part of the parties to perform their obligations under the contract will not be considered a default if such failure is the result of an event of force majeure as defined in the conditions of contract.

Applicable Law and Settlement of Disputes

2.42 The conditions of contract shall include provisions dealing with the applicable law and the forum for the settlement of disputes. International commercial arbitration may have practical advantages over other methods for the settlement of disputes. Borrowers are, therefore, encouraged to provide for this type of arbitration in contracts for the procurement of goods and works. The Bank shall not be named arbitrator or be asked to name an arbitrator.[29] In case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision shall also include mechanisms such as dispute review boards or adjudicators, which are designed to permit a speedier dispute settlement.

C. Bid Opening, Evaluation, and Award of Contract

Time for Preparation of Bids

2.43 The time allowed for the preparation and submission of bids shall be determined with due consideration of the particular circumstances of the project and the magnitude and complexity of the contract. Generally, not less than six weeks from the date of the invitation to bid or the date of availability of bidding documents, whichever is later, shall be allowed for ICB. Where large works or complex items of equipment are involved, this period shall generally be not less than twelve weeks to enable prospective bidders to conduct investigations before submitting their bids. In such cases, the Borrower is encouraged to convene pre-bid conferences and arrange site visits. Bidders shall be permitted to submit bids by mail or by hand. The deadline and place for receipt of bids shall be specified in the invitation to bid.

[29] It is understood, however, that officials of the International Centre for Investment Disputes (ICSID) shall remain free to name arbitrators in their capacity as ICSID officials.

262

Bid Opening Procedures

2.44 The time for the bid opening shall be the same as for the deadline for receipt of bids or promptly[30] thereafter, and shall be announced, together with the place for bid opening, in the invitation to bid. The Borrower shall open all bids at the stipulated time and place. Bids shall be opened in public; that is, bidders or their representatives shall be allowed to be present. The name of the bidder and total amount of each bid, and of any alternative bids if they have been requested or permitted, shall be read aloud and recorded when opened and a copy of this record shall be promptly sent to the Bank. Bids received after the time stipulated, as well as those not opened and read out at bid opening, shall not be considered.

Clarifications or Alterations of Bids

2.45 Except as otherwise provided in paragraphs 2.61 and 2.62 of these Guidelines, bidders shall not be requested or permitted to alter their bids after the deadline for receipt of bids. The Borrower shall ask bidders for clarification needed to evaluate their bids but shall not ask or permit bidders to change the substance or price of their bids after the bid opening. Requests for clarification and the bidders' responses shall be made in writing.

Confidentiality

2.46 After the public opening of bids, information relating to the examination, clarification, and evaluation of bids and recommendations concerning awards shall not be disclosed to bidders or other persons not officially concerned with this process until the successful bidder is notified of the award.

Examination of Bids

2.47 The Borrower shall ascertain whether the bids (i) meet the eligibility requirements specified in paragraph 1.6 of these Guidelines, (ii) have been properly signed, (iii) are accompanied by the required securities, (iv) are substantially responsive to the bidding documents, and (v) are otherwise generally in order. If a bid is not substantially

[30] To allow sufficient time to take the bids to the place announced for public bid opening.

responsive, that is, it contains material deviations from or reservations to the terms, conditions, and specifications in the bidding documents, it shall not be considered further. The bidder shall not be permitted to correct or withdraw material deviations or reservations once bids have been opened.[31]

Evaluation and Comparison of Bids

2.48 The purpose of bid evaluation is to determine the cost to the Borrower of each bid in a manner that permits a comparison on the basis of their evaluated cost. Subject to paragraph 2.57, the bid with the lowest evaluated cost,[32] but not necessarily the lowest submitted price, shall be selected for award.

2.49 The bid price read out at the bid opening shall be adjusted to correct any arithmetical errors. Also, for the purpose of evaluation, adjustments shall be made for any quantifiable nonmaterial deviations or reservations. Price adjustment provisions applying to the period of implementation of the contract shall not be taken into account in the evaluation.

2.50 The evaluation and comparison of bids shall be on CIF or CIP prices for the supply of imported goods and EXW prices for goods offered from within the Borrower's country, together with prices for any required installation, training, commissioning, and other similar services.

2.51 Bidding documents shall also specify the relevant factors in addition to price to be considered in bid evaluation and the manner in which they will be applied for the purpose of determining the lowest evaluated bid. For goods and equipment, other factors which may be taken into consideration include, among others, costs of inland transport and insurance to the specified site, payment schedule, delivery time, operating costs, efficiency and compatibility of the equipment, availability of service and spare parts, and related training, safety, and environmental benefits. The factors other than price to be used for determining the lowest evaluated bid shall, to the extent practicable, be expressed in

[31] See para. 2.49 regarding corrections.

[32] See para. 2.51.

monetary terms, or given a relative weight in the evaluation provisions in the bidding documents.

2.52 Under works and turnkey contracts, Contractors are responsible for all duties, taxes, and other levies,[33] and bidders shall take these factors into account in preparing their bids. The evaluation and comparison of bids shall be on this basis. Bid evaluation for works shall be strictly in monetary terms. Any procedure under which bids above or below a predetermined assessment of bid values are automatically disqualified is not acceptable. If time is a critical factor, the value of early completion to the Borrower may be taken into account according to criteria presented in the bidding documents, only if the conditions of contract provide for commensurate penalties for noncompliance.

2.53 The Borrower shall prepare a detailed report on the evaluation and comparison of bids setting forth the specific reasons on which the recommendation is based for the award of the contract.

Domestic Preferences

2.54 At the request of the Borrower, and under conditions to be agreed under the Loan Agreement and set forth in the bidding documents, a margin of preference may be provided in the evaluation of bids for:

(a) goods manufactured in the country of the Borrower when comparing bids offering such goods with those offering goods manufactured abroad; and
(b) works in member countries below a specified threshold of GNP[34] per capita, when comparing bids from eligible domestic Contractors with those from foreign firms.

2.55 Where preference for domestically manufactured goods or for domestic Contractors is allowed, the methods and stages set forth in Appendix 2 to these Guidelines shall be followed in the evaluation and comparison of bids.

[33] Unless bidding documents specify otherwise for some turnkey contracts (see para. 2.22 and footnote 25).

[34] Gross national product as defined annually by the Bank.

Extension of Validity of Bids

2.56 Borrowers shall complete evaluation of bids and award of contract within the initial period of bid validity so that extensions are not necessary. An extension of bid validity, if justified by exceptional circumstances, shall be requested in writing from all bidders before the expiration date. The extension shall be for the minimum period required to complete the evaluation, obtain the necessary approvals, and award the contract. In the case of fixed price contracts, requests for second and subsequent extensions will be permissible only if the request for extension provides for an appropriate adjustment mechanism of the quoted price to reflect changes in the cost of inputs for the contract over the period of extension. Whenever an extension of bid validity period is requested, bidders shall not be requested or be permitted to change the quoted (base) price or other conditions of their bid. Bidders shall have the right to refuse to grant such an extension without forfeiting their bid security, but those who are willing to extend the validity of their bid shall be required to provide a suitable extension of bid security.

Postqualification of Bidders

2.57 If bidders have not been prequalified, the Borrower shall determine whether the bidder whose bid has been determined to offer the lowest evaluated cost has the capability and resources to effectively carry out the contract as offered in the bid. The criteria to be met shall be set out in the bidding documents, and if the bidder does not meet them, the bid shall be rejected. In such an event, the Borrower shall make a similar determination for the next-lowest evaluated bidder.

Award of Contract

2.58 The Borrower shall award the contract, within the period of the validity of bids, to the bidder who meets the appropriate standards of capability and resources and whose bid has been determined (i) to be substantially responsive to the bidding documents and (ii) to offer the lowest evaluated cost.[35] A bidder

[35] Referred to as "lowest evaluated bidder" and "lowest evaluated bid," respectively.

shall not be required, as a condition of award, to undertake responsibilities for work not stipulated in the bidding documents or otherwise to modify the bid as originally submitted.

Rejection of All Bids

2.59 Bidding documents usually provide that Borrowers may reject all bids. Rejection of all bids is justified when there is lack of effective competition, or bids are not substantially responsive. However, lack of competition shall not be determined solely on the basis of the number of bidders. If all bids are rejected, the Borrower shall review the causes justifying the rejection and consider making revisions to the conditions of contract, design and specifications, scope of the contract, or a combination of these, before inviting new bids.

2.60 If the rejection of all bids is due to lack of competition, wider advertising shall be considered. If the rejection is due to most or all of the bids being nonresponsive, new bids may be invited from the initially prequalified firms, or with the agreement of the Bank from only those that submitted bids in the first instance.

2.61 All bids shall not be rejected and new bids invited on the same bidding and contract documents solely for the purpose of obtaining lower prices. If the lowest evaluated responsive bid exceeds the Borrower's pre-bid cost estimates by a substantial margin, the Borrower shall investigate causes for the excessive cost and consider requesting new bids as described in the previous paragraphs. Alternatively, the Borrower may negotiate with the lowest evaluated bidder to try to obtain a satisfactory contract through a reduction in the scope and/or a reallocation of risk and responsibility which can be reflected in a reduction of the contract price. However, substantial reduction in the scope or modification to the contract documents may require rebidding.

2.62 The Bank's prior concurrence shall be obtained before rejecting all bids, soliciting new bids, or entering into negotiations with the lowest evaluated bidder.

D. Modified ICB

Quick Disbursement Operations

2.63 Where the loan provides financing for an imports program, as in the case of adjustment operations and other quick disbursement loans, ICB with simplified advertising and currency provisions shall be used for large value contracts, as defined in the Loan Agreement.[36]

2.64 The simplified provisions for notification of ICB procurement do not require a General Procurement Notice. Specific Procurement Notices shall be inserted in at least one newspaper of national circulation in the Borrower's country (and in the official gazette, if any) in addition to either: (i) *Development Business*; or (ii) a newspaper, periodical, or technical journal of wide multinational circulation. The period allowed for submission of bids may be reduced to four weeks. Bidding and payment may be limited to one currency widely used in international trade.

Procurement of Commodities

2.65 Market prices of commodities, such as grain, animal feed, cooking oil, fuel, fertilizer, and metals, fluctuate, depending upon the demand and supply at any particular time. Many are quoted in established commodity markets. Procurement often involves multiple awards for partial quantities to assure security of supply and multiple purchases over a period of time to take advantage of favorable market conditions and to keep inventories low. A list of prequalified bidders may be drawn up to whom periodic invitations are issued. Bidders may be invited to quote prices linked to the market price at the time of or prior to the shipments. Bid validities shall be as short as possible. A single currency in which the commodity is usually priced in the market, may be used for bidding and payment. The currency shall be specified in the bidding document. Bidding documents may permit telexed or faxed bids, if there is no requirement for bid security, or if standing bid

[36] Other procurement is normally carried out in accordance with procedures followed by the private or public entity handling the imports, or other established commercial practices acceptable to the Bank, as described in para. 3.12.

265

securities valid over a specified period of time have been submitted by prequalified bidders. Standard contract conditions and forms consistent with market practices shall be used.

III. OTHER METHODS OF PROCUREMENT

General

3.1 There are circumstances where ICB would not be the most economic and efficient method of procurement, and where other methods are deemed more appropriate. The particular procurement methods and the categories of goods and works to which they apply are determined by agreement between the Bank and the Borrower, and are specified in the Loan Agreement.[37] The Bank's policies with respect to margins of preference for domestically manufactured goods and Contractors do not apply to methods of procurement other than ICB. The more common procurement methods which are generally considered in situations where ICB may not be suitable are set forth in this section.

Limited International Bidding

3.2 Limited International Bidding (LIB) is essentially ICB by direct invitation without open advertisement. It may be an appropriate method of procurement where (i) the contract values are small, or (ii) there is only a limited number of Suppliers, or (iii) other exceptional reasons may justify departure from full ICB procedures. Under LIB, Borrowers shall seek bids from a list of potential Suppliers broad enough to assure competitive prices, such list to include all Suppliers when there are only a limited number. Domestic preferences are not applicable in the evaluation of bids under LIB. In all respects other than advertisement and preferences, ICB procedures shall apply.

National Competitive Bidding

3.3 National Competitive Bidding (NCB) is the competitive bidding procedure normally used for public procurement in the country of the Borrower, and may be the most efficient and economical way of procuring goods or works which, by their nature or scope, are unlikely to attract foreign competition. To

[37] Contracts shall not be divided into smaller units in order to make them less attractive for ICB procedures; any proposal to divide a contract into smaller packages shall require the prior approval of the Bank.

266

be acceptable for use in Bank-financed procurement, these procedures shall be reviewed and modified as necessary to assure economy, efficiency, transparency, and broad consistency with the provisions included in Section I of these Guidelines. NCB may be the preferred method of procurement where foreign bidders are not expected to be interested because (i) the contract values are small, (ii) works are scattered geographically or spread over time, (iii) works are labor intensive, or (iv) the goods or works are available locally at prices below the international market. NCB procedures may also be used where the advantages of ICB are clearly outweighed by the administrative or financial burden involved.

3.4 Publication of a General Procurement Notice is not required for NCB, and advertising may be limited to the national press or official gazette. Bidding documents may be in an official language of the country, and local currency is generally used for the purposes of bidding and payment. Adequate response time for preparation and submission of bids shall be provided. The procedures shall provide for adequate competition in order to ensure reasonable prices, and methods used in the evaluation of bids and the award of contracts shall be made known to all bidders and not be applied arbitrarily. If foreign firms wish to participate under these circumstances, they shall be allowed to do so.

Shopping (International and National)

3.5 Shopping is a procurement method based on comparing price quotations obtained from several Suppliers, usually at least three, to assure competitive prices, and is an appropriate method for procuring readily available off-the-shelf goods or standard specification commodities that are small in value. Requests for quotations shall indicate the description and quantity of the goods, as well as desired delivery time and place. Quotations may be submitted by telex or facsimile. The evaluation of quotations shall follow sound public or private sector practices of the purchaser. The terms of the accepted offer shall be incorporated in a purchase order.

3.6 International shopping shall solicit quotations from at least three Suppliers in two different countries. National shopping may be used where the

desired goods are ordinarily available from more than one source in the country of the Borrower at competitive prices.

Direct Contracting

3.7 Direct contracting without competition (single source) may be an appropriate method under the following circumstances:

(a) An existing contract for goods or works, awarded in accordance with procedures acceptable to the Bank, may be extended for additional goods or works of a similar nature. The Bank shall be satisfied in such cases that no advantage could be obtained by further competition and that the prices on the extended contract are reasonable. Provisions for such an extension, if considered likely in advance, shall be included in the original contract.

(b) Standardization of equipment or spare parts, to be compatible with existing equipment, may justify additional purchases from the original Supplier. For such purchases to be justified, the original equipment shall be suitable, the number of new items shall generally be less than the existing number, the price shall be reasonable, and the advantages of another make or source of equipment shall have been considered and rejected on grounds acceptable to the Bank.

(c) The required equipment is proprietary and obtainable only from one source.

(d) The Contractor responsible for a process design requires the purchase of critical items from a particular Supplier as a condition of a performance guarantee.

(e) In exceptional cases, such as in response to natural disasters.

Force Account

3.8 Force account, that is, construction by the use of the Borrower's own personnel and equipment,[38]

[38] A government-owned construction unit that is not managerially and financially autonomous shall be considered a force account unit. "Force account" is otherwise known as "direct labor," "departmental forces," or "direct work."

267

may be the only practical method for constructing some kinds of works. The use of force account may be justified where:

(a) quantities of work involved cannot be defined in advance;
(b) works are small and scattered or in remote locations for which qualified construction firms are unlikely to bid at reasonable prices;
(c) work is required to be carried out without disrupting ongoing operations;
(d) risks of unavoidable work interruption are better borne bv the Borrower than by a Contractor: ınd
(e) there are emergencies needing prompt attention.

Procurement from United Nations Agencies

3.9 There may be situations in which procurement from specialized agencies of the United Nations (UN), acting as Suppliers, pursuant to their own procedures, may be the most economical and efficient way of procuring small quantities of off-the-shelf goods, primarily in the fields of education, health, and rural water supply and sanitation.

Procurement Agents

3.10 Where Borrowers lack the necessary organization, resources, and experience, Borrowers may wish (or be required by the Bank) to employ, as their agent, a firm specializing in handling international procurement. The agent shall strictly follow all the procurement procedures outlined in the Loan Agreement on behalf of the Borrower, including use of Bank *Standard Bidding Documents* (SBDs), review procedures, and documentation. This also applies in cases where UN agencies act as procurement agents.[39] Management Contractors may be employed in a similar manner for a fee to contract for miscellaneous works involving reconstruction, repairs, rehabilitation, and new constructions in emergency situations, or where large numbers of small contracts are involved.

Inspection Agents

3.11 Preshipment inspection and certification of imports is one of the safeguards for the Borrower, particularly where the country has a large import program. The inspection and certification usually covers quality, quantity, and reasonableness of price. Imports procured through ICB procedures shall not be subject to price verification, but only verification for quality and quantity. However, imports not procured through ICB may additionally be subjected to price verification. The inspection agents are ordinarily paid for on a fee basis levied on the value of the goods. Costs for certification of imports shall not be considered in the evaluation of bids under ICB.

Procurement in Loans to Financial Intermediaries

3.12 Where the loan provides funds to an intermediary institution such as an agricultural credit institution or a development finance company, to be re-lent to beneficiaries such as individuals, private sector enterprises, or autonomous commercial enterprises in the public sector for the partial financing of subprojects, the procurement is usually undertaken by the respective beneficiaries in accordance with established local private sector or commercial practices, which are acceptable to the Bank. However, even in these situations, ICB may be the more efficient and economic procurement method for the purchase of large single items or in cases where large quantities of like goods can be grouped together for bulk purchasing.

Procurement under BOT and Similar Private Sector Arrangements

3.13 Where the Bank is participating in financing the cost of a project procured under a BOO/BOT/BOOT[40] or similar type of private sector arrangement, either of the following procurement

[39] The Consultant Guidelines shall apply for the selection of procurement and inspection agents. The cost or fee of the procurement or inspection agent is eligible for financing from the Bank loan, if so provided in the Loan Agreement, and provided the terms and conditions of selection and employment are acceptable to the Bank.

[40] BOO: Build, Own, Operate.
BOT: Build, Operate, Transfer.
BOOT: Build, Own, Operate, Transfer.

procedures shall be used, as set forth in detail in the Staff Appraisal Report, the President's Report, and the Loan Agreement:

(a) The entrepreneur under the BOO/BOT/BOOT or similar type of contract[41] shall be selected under ICB or LIB procedures acceptable to the Bank, which may include several stages in order to arrive at the optimal combination of evaluation criteria, such as the cost and magnitude of the financing offered, the performance specifications of the facilities offered, the cost charged to the user or purchaser, other income generated for the Borrower or purchaser by the facility, and the period of the facility's depreciation. The said entrepreneur selected in this manner shall then be free to procure the goods, works, and services required for the facility from eligible sources, using its own procedures. In this case, the Staff Appraisal Report, the President's Report, and the Loan Agreement shall specify the type of expenditures incurred by the said entrepreneur towards which Bank financing will apply.

Or,

(b) If the said entrepreneur has not been selected in the manner set forth in subparagraph (a) above, the goods, works, or services required for the facility and to be financed by the Bank shall be procured in accordance with ICB or LIB procedures.

Procurement under Loans Guaranteed by the Bank

3.14 If the Bank guarantees the repayment of a loan made by another lender, the goods and works financed by the said loan shall be procured with due attention to economy and efficiency and in accordance with procedures which meet the requirements of paragraph 1.5.

Community Participation in Procurement

3.15 Where, in the interest of project sustainability, or to achieve certain specific social objectives of the

[41] For projects such as toll roads, tunnels, harbors, bridges, power stations, waste disposal plants, and water distribution systems.

project, it is desirable in selected project components to (i) call for the participation of local communities and/or nongovernmental organizations (NGOs), or (ii) increase the utilization of local know-how and materials, or (iii) employ labor-intensive and other appropriate technologies, the procurement procedures, specifications, and contract packaging shall be suitably adapted to reflect these considerations, provided these are efficient. The procedures proposed shall be outlined in the Staff Appraisal Report, the President's Report, and the Loan Agreement.

Appendix I

REVIEW BY THE BANK OF PROCUREMENT DECISIONS

Scheduling of Procurement

1. The Bank shall review the procurement arrangements proposed by the Borrower, including contract packaging, applicable procedures, and the scheduling of the procurement process, for its conformity with these Guidelines and proposed implementation program and disbursement schedule. The Borrower shall promptly inform the Bank of any delay, or other changes in the scheduling of the procurement process, which could significantly affect the timely and successful implementation of the project contracts, and agree with the Bank on corrective measures.

Prior Review

2. With respect to all contracts which, in accordance with the Loan Agreement, are made subject to the Bank's prior review:

(a) In cases where prequalification is used, the Borrower shall, before prequalification submissions are invited, furnish the Bank with the draft documents to be used, including the text of the invitation to prequalify, the prequalification questionnaire, and the evaluation methodology, together with a description of the advertising procedures to be followed, and shall introduce such modifications in said procedure and documents, as the Bank shall reasonably request. The list of prequalified bidders, together with a statement of their qualifications and of the reasons for the exclusion of any applicant for prequalification, shall be furnished by the Borrower to the Bank for its comments before the applicants are notified of the Borrower's decision, and the Borrower shall make such additions to, deletions from, or modifications in the said list as the Bank shall reasonably request.

(b) Before bids are invited, the Borrower shall furnish to the Bank for its comments, draft bidding documents, including the invitation to bid; instructions to bidders, including the basis of bid evaluation and contract award; and the conditions of contract and specifications for the civil works, supply of goods, or installation of equipment, etc., as the case may be, together with a description of the advertising procedures to be followed for the bidding (if prequalification has not been used), and shall make such modifications in the said documents as the Bank shall reasonably request. Any further modification shall require the Bank's concurrence before it is issued to the prospective bidders.

(c) After bids have been received and evaluated, the Borrower shall, before a final decision on the award is made, furnish to the Bank, in sufficient time for its review, a detailed report (prepared, if the Bank shall so request, by experts acceptable to the Bank), on the evaluation and comparison of the bids received, together with the recommendations for award and such other information as the Bank shall reasonably request. The Bank shall, if it determines that the intended award would be inconsistent with the Loan Agreement, promptly inform the Borrower and state the reasons for such determination.

(d) If the Borrower requires an extension of bid validity to complete the process of evaluation, obtain necessary approvals and clearances, and to make the award, it should seek the Bank's prior concurrence for the first request for extension, if it is longer than eight weeks, and for all subsequent requests for extension, irrespective of the period.

(e) The terms and conditions of a contract shall not, without the Bank's concurrence, materially differ from those on which bids were asked or prequalification of Contractors, if any, was invited.

(f) One conformed copy of the contract shall be furnished to the Bank promptly after its execution and prior to delivery to the Bank of the first application for withdrawal of funds from the Loan Account in respect of such contract. Where payments for the contract are

to be made out of a Special Account (SA), a copy of the contract shall be furnished to the Bank prior to the making of the first payment out of the SA in respect of such contract.

(g) All evaluation reports shall be accompanied with a summary of the procurement on a form provided by the Bank. The description and amount of the contract, together with the name and address of the successful bidder, shall be subject to release by the Bank upon confirmation by the Borrower of contract award.

Modifications

3. In the case of contracts subject to prior review, before granting a material extension of the stipulated time for performance of a contract, agreeing to any modification or waiver of the conditions of such contract, including issuing any change order or orders under such contract (except in cases of extreme urgency) which would in aggregate increase the original amount of the contract by more than 15 percent of the original price, the Borrower shall inform the Bank of the proposed extension, modification, or change order and the reasons therefor. If the Bank determines that the proposal would be inconsistent with the provisions of the Loan Agreement, it shall promptly inform the Borrower and state the reasons for its determination. A copy of all amendments to the contract shall be furnished to the Bank for its record.

Post Review

4. With respect to each contract not governed by paragraph 2, the Borrower shall furnish to the Bank, promptly after its signing and prior to delivery to the Bank of the first application for withdrawal of funds from the Loan Account in respect of such contract, one conformed copy of such contract, together with the analysis of the respective bids, recommendations for award, and such other information as the Bank shall reasonably request. Where payments for the contract are to be made out of a Special Account, a copy of the contract, together with the other information required to be furnished to the Bank, shall be furnished to the Bank prior to delivery to the Bank of the first replenishment application in respect of such contract. The Bank shall, if it determines

that the award of the contract or the contract itself is not consistent with the Loan Agreement, promptly inform the Borrower and state the reasons for such determination. These provisions shall not apply to contracts on account of which withdrawals from the loan are to be made on the basis of Statements of Expenditure,[42] for which case all such documents shall be retained by the Borrower for subsequent examination by independent auditors and Bank supervision missions.

Translations

5. If a contract awarded under ICB procedures to a local bidder is written in the national language,[43] a certified translation of the contract in either English, French, or Spanish shall be furnished to the Bank together with the conformed copy of the contract. Such certified translations shall also be furnished to the Bank, for any subsequent modifications of such contracts.

[42] Refer to Appendix 3.

[43] Refer to para. 2.15.

271

Appendix 2

DOMESTIC PREFERENCES

Preference for Domestically Manufactured Goods

1. The Borrower may, with the agreement of the Bank, grant a margin of preference in the evaluation of bids under ICB procedures to bids offering certain goods manufactured in the country of the Borrower, when compared to bids offering such goods manufactured elsewhere. In such cases, bidding documents shall clearly indicate any preference to be granted to domestic manufactured goods and the information required to establish the eligibility of a bid for such preference. The nationality of the manufacturer or Supplier is not a condition for such eligibility. The methods and stages set forth hereunder shall be followed in the evaluation and comparison of bids.

2. For comparison, responsive bids shall be classified in one of the following three groups:

(a) Group A: bids offering goods manufactured in the country of the Borrower if the bidder establishes to the satisfaction of the Borrower and the Bank that (i) labor, raw material, and components from within the country of the Borrower will account for more than 30 percent of the EXW price of the product offered, and (ii) the production facility in which those goods will be manufactured or assembled has been engaged in manufacturing/assembling such goods at least since the time of bid submission.

(b) Group B: all other bids offering goods from within the country of the Borrower.

(c) Group C: bids offering the goods from abroad and to be directly imported.

3. The EXW price quoted by a Group A bidder shall include all duties and taxes paid or payable on the basic materials or components purchased in the domestic market or imported. Similarly, prices quoted by Group B bidders shall include all duties and taxes on components and raw materials. The price quoted by Group A and B bidders shall exclude the sales and similar taxes on the finished product. The price quoted by Group C bidders shall be on CIF

or CIP border point or other destination, exclusive of customs duties and other import taxes.

4. In the first step, all evaluated bids in each group shall be compared to determine the lowest evaluated bid in each. Such lowest evaluated bids shall then be compared with each other and if, as a result of this comparison, a bid from Group A or Group B is the lowest, it shall be selected for the award.

5. If, as a result of the comparison under paragraph 4 above, the lowest evaluated bid is a bid from Group C, all Group C bids shall be further compared with the lowest evaluated bid from Group A after adding to the evaluated bid price of the imported goods offered in each Group C bid, for the purpose of this further comparison only, an amount equal to: (i) the amount of duties and other related import charges which a nonexempt importer would have to pay for the importation of the goods offered in such Group C bid; or (ii) 15 percent of the CIF or CIP bid price of such goods if said duties and charges exceed 15 percent of such price. If the Group A bid in such further comparison is the lowest, it shall be selected for the award; if not, the lowest evaluated bid from Group C, as determined from the comparison under paragraph 4, shall be selected.

6. In the case of single responsibility, supply and installation or turnkey[44] contracts in which a number of discrete items of equipment is grouped into one contract package, the preference margin shall not be applied to the whole package, but only to the locally-manufactured equipment within the package. Equipment offered from abroad shall be quoted CIF or CIP, and equipment offered locally EXW (free of sales and similar taxes); all other components, such as design, works, installation, and supervision, shall be quoted separately. Bids should not be classified into groups A, B, or C. In the comparison of bids, only the CIF or CIP price in each bid of the equipment offered from outside the Borrower's country shall be increased by the applicable duty and other taxes payable by a nonexempt importer or 15

[44] These provisions apply only if customs duties are excluded from the bid prices, and the price of imported goods quoted is on a CIF or CIP basis.

272

percent, whichever is less. If duties vary from item to item within a package, the appropriate tariff for each piece of equipment shall apply. No preference shall be applied for any associated services or works included in the package.

Preference for Domestic Contractors

7. For contracts for works to be awarded on the basis of ICB, eligible Borrowers may, with the agreement of the Bank, grant a margin of preference of 7.5 percent to domestic Contractors,[45] in accordance with, and subject to, the following provisions:

(a) Contractors applying for such preference shall be asked to provide, as part of the data for qualification,[46] such information, including details of ownership, as shall be required to determine whether, according to the classification established by the Borrower and accepted by the Bank, a particular Contractor or group of Contractors qualifies for a domestic preference. The bidding documents shall clearly indicate the preference and the method that will be followed in the evaluation and comparison of bids to give effect to such preference.

(b) After bids have been received and reviewed by the Borrower, responsive bids shall be classified into the following groups:
   (i) Group A: bids offered by domestic Contractors eligible for the preference.
   (ii) Group B: bids offered by other Contractors.

For the purpose of evaluation and comparison of bids, an amount equal to 7.5 percent of the bid amount shall be added to bids received from Contractors in Group B.

[45] Preference for domestic Contractors is applicable only in countries which qualify. See subpara. 2.54(b).

[46] At the prequalification and/or at the bidding stage.

Appendix 3

DISBURSEMENTS

1. The responsibility for the implementation of the project, and therefore for the payment of goods, works, and services under the project, rests solely with the Borrower. The Bank, for its part, is required by its Articles of Agreement to ensure that funds are paid from a Bank loan only as expenditures are incurred. Disbursements of the proceeds of a loan are made only at the Borrower's request. Supporting evidence that the funds are used in accordance with the Loan Agreement shall be submitted with the Borrower's withdrawal application. Payment may be made (i) to reimburse the Borrower for payment(s) already made from its own resources, (ii) directly to a third party (usually to a Supplier or Consultant), or (iii) to a commercial bank for expenditures against a World Bank Special Commitment covering a commercial bank's letter of credit.

2. Two widely used procedures with special requirements are Statements of Expenditure (SOEs) and Special Accounts (SAs). The SOE method is used to reimburse the Borrower when documentation would otherwise be cumbersome or voluminous (for example, expenditures on civil works carried out by force account or payments against small contracts or purchase orders). For withdrawals against SOEs, the Borrower submits a form with details of the expenditures (the SOE form) and retains the actual supporting documentation in the field for subsequent examination by independent auditors and Bank supervision missions.

3. Special Accounts (SAs) are revolving accounts funded with an advance from a Bank loan for use by the Borrower exclusively to cover the Bank's share of eligible expenses in both local and foreign currencies. The primary objective of the SA is to help the Borrower overcome cash flow problems and speed disbursements. The Borrower makes payments from the account to Contractors, Suppliers, and others when the payments are due. The Bank replenishes the SA regularly upon receipt of a withdrawal application with appropriate supporting documentation from the Borrower. Towards the end of loan disbursements, the Bank initiates a recovery

procedure to obtain full documentation for the amount of the outstanding advance.

4. The Loan Agreement and the disbursement letter outline the disbursement procedures to be followed for the loan, including retroactive financing provisions, items eligible for disbursement under the Statement of Expenditure (SOE) procedure, requirements for the operation of a Special Account (SA), and a minimum application value. The minimum value varies among loans depending on the size of the loan and the nature of the project. Where there is an SA, the minimum value is generally between 10 percent and 33 percent of the total advanced to the SA. The method of payment specified in the bidding documents shall take into account the disbursement procedures applicable to the concerned loan.

5. A complete description of the Bank's disbursement procedures is provided in the *Disbursement Handbook.*

Appendix 4

GUIDANCE TO BIDDERS

Purpose

1. This Appendix provides guidance to potential bidders wishing to participate in Bank-financed procurement.

Responsibility for Procurement

2. As emphasized in paragraph 1.2 of the Guidelines, the Borrower is legally responsible for the procurement. It invites, receives, and evaluates bids, and awards the contract. The contract is between the Borrower and the Supplier or Contractor. The Bank is not a party to the contract.

Bank's Role

3. As stated in paragraph 1.11 of the Guidelines, the Bank reviews the procurement procedures, documents, bid evaluations, award recommendations, and the contract to ensure that the process is carried out in accordance with agreed procedures, as required in the Loan Agreement. In the case of major contracts (defined usually by a dollar threshold in each Loan Agreement), the documents are reviewed by the Bank prior to their issue, as described in Appendix 1. Also, if, at any time in the procurement process (even after the award of contract), the Bank concludes that the agreed procedures were not followed in any material respect, the Bank may declare misprocurement, as described in paragraph 1.13. However, if a Borrower has awarded a contract after obtaining the Bank's "no objection," the Bank will declare misprocurement only if the "no objection" was issued on the basis of incomplete, inaccurate, or misleading information furnished by the Borrower. Furthermore, if the Bank determines that corrupt or fraudulent practices were engaged in by representatives of the Borrower or of the bidder, the Bank may impose the applicable sanctions set forth in paragraph 1.15 of the Guidelines.

4. The Bank has published *Standard Bidding Documents* (SBDs) for various types of procurement. As stated in paragraph 2.12 of the Guidelines, it is

mandatory for the Borrower to use these documents, with minimum changes to address country- and project-specific issues. The prequalification and bidding documents are finalized and issued by the Borrower.

Information on Bidding

5. Information on bidding opportunities under ICB may be obtained from the General Procurement Notice and the Specific Invitation to prequalify or to bid, as described in paragraphs 2.7 and 2.8 of the Guidelines. General guidance on participation,[47] as well as advance information on business opportunities in upcoming projects, may be obtained from publications which can be obtained through subscription to the United Nations *Development Business* (UNDB), as well as from the Public Information Center.[48] Staff Appraisal Reports are also available from the Public Information Center upon approval of the loan.

Bidder's Role

6. Once a bidder receives the prequalification or bidding document, the bidder should study the documents carefully to decide if it can meet the technical, commercial, and contractual conditions, and if so, proceed to prepare its bid. The bidder should then critically review the documents to see if there is any ambiguity, omission, or internal contradiction, or any feature of specifications or other conditions which are unclear or appear discriminatory or restrictive; if so, it should seek clarification from the Borrower, in writing, within the time period specified in the bidding documents for seeking clarifications.

7. The criteria and methodology for selection of the successful bidder are outlined in the bidding documents, generally under Instructions to Bidders and Specifications. If these are not clear, clarification should be similarly sought from the Borrower.

[47] The *Guide to International Business Opportunities*.

[48] The UNDB address is listed in footnote 18. The Public Information Center address is the World Bank address at 1818 H Street, N.W., Washington, D.C., 20433, U.S.A.

8. In this connection it should be emphasized that the specific bidding documents issued by the Borrower govern each procurement, as stated in paragraph 1.1 of the Guidelines. If a bidder feels that any of the provisions in the documents are inconsistent with the Guidelines, it should also raise this with the Borrower.

9. It is the responsibility of the bidder to raise any issue of ambiguity, contradiction, omission, etc., prior to the submission of its bid, to assure submission of a fully responsive and compliant bid, including all the supporting documents requested in the bidding documents. Noncompliance with critical (technical and commercial) requirements will result in rejection of the bid. If a bidder wishes to propose deviations to a noncritical requirement, or propose an alternative solution, the bidder should quote the price for the fully compliant bid and then separately indicate the adjustment in price that can be offered if the deviation or alternative solution is accepted. Once bids are received and publicly opened, bidders will not be required or permitted to change the price or substance of a bid.

Confidentiality

10. As stated in paragraph 2.46, the process of bid evaluation shall be confidential until the award is notified. This is essential to enable the Borrower and Bank reviewers to avoid either the reality or perception of improper interference. If at this stage a bidder wishes to bring additional information to the notice of the Borrower, the Bank, or both, it should do so in writing.

Action by the Bank

11. Bidders are free to send copies of their communications on issues and questions with the Borrower to the Bank or to write to the Bank directly, when Borrowers do not respond promptly, or the communication is a complaint against the Borrower. All such communications should be addressed to the Chief of the Division for the relevant sector for the borrowing country, with a copy to the Regional Procurement Adviser.

12. References received by the Bank from potential bidders, prior to the closing date for

215

submission of the bids, will, if appropriate, be referred to the Borrower with the Bank's comments and advice, for action or response.

13. Communication received from bidders after the opening of the bids, will be handled as follows. In the case of contracts not subject to prior review by the Bank, the communication will be sent to the Borrower for due consideration and appropriate action, if any, and these will be reviewed during subsequent supervision of the project by Bank staff. In the cases of contracts subject to the prior review process, the communication will be examined by the Bank, in consultation with the Borrower. If additional data is required to complete this process, these will be obtained from the Borrower. If additional information or clarification is required from the bidder, the Bank will ask the Borrower to obtain it and comment or incorporate it, as appropriate, in the evaluation report. The Bank's review will not be completed until the communication is fully examined and considered.

14. Except for acknowledgment, the Bank will not enter into discussion or correspondence with any bidder during the evaluation and review process of the procurement, until award of the contract is notified.

Debriefing

15. If, after notification of award, a bidder wishes to ascertain the grounds on which its bid was not selected, it should address its request to the Borrower. If the bidder is not satisfied with the explanation given and wishes to seek a meeting with the Bank, it may do so by addressing the Regional Procurement Adviser for the borrowing country, who will arrange a meeting at the appropriate level and with the relevant staff. In this discussion, only the bidder's bid can be discussed and not the bids of competitors.

276

Appendix I
US DEFENSE SECURITY ASSISTANCE AGENCY'S GUIDELINES FOR FOREIGN FINANCING OF DIRECT COMMERCIAL CONTRACTS

DEFENSE SECURITY ASSISTANCE AGENCY

WASHINGTON, DC 20301-2900

GUIDELINES FOR FOREIGN MILITARY FINANCING OF DIRECT COMMERCIAL CONTRACTS

January 1995

In 1984 the U.S. Department of Defense (DoD) established guidelines for the processing and review of commercial contracts for direct purchase from U.S. firms of U.S. defense articles and services to be financed with funds appropriated by the Congress. These guidelines have been revised as necessary and this guideline revision supersedes the guidelines dated 22 July 1991.

The financing of direct commercial contracts is under continual review including scrutiny by the General Accounting Office, the DoD Inspector General, the Department of Justice, and the Congress. Accordingly, this revision of the guidelines reflects DoD's effort to minimize vulnerability to waste, fraud, and abuse.

Currently, there are specific policies and procedures in the Federal Acquisition Regulation (FAR) and the Security Assistance Management Manual (SAMM), DoD 5105.38-M, which apply to government-to-government Foreign Military Sales (FMS) cases. The following guidelines establish similar policies and procedures for the use of foreign military financing of direct commercial contracts between U.S. industry and foreign countries.

Foreign military financing (FMF) may be used, when approved on a case-by-case basis by the Defense Security Assistance Agency (DSAA), for the purchase of defense articles, defense services, and design and construction services from U.S. defense contractors on a direct commercial basis. However, as indicated in the financing agreement to which the U.S. Government and the foreign governments are parties, the U.S. Government is under no obligation to approve any specific commercial contract for FMF.

278

The following guidelines serve as the basis for DSAA review of the purchasers request for approval to use FMF to fund direct commercial contracts (NOTE: Guideline changes are indicated by bold face type):

1. Direct commercial contracts (DCCs) normally will not be permitted for items that are standard to DoD, e.g., items that have national stock numbers. However, the purchasing country may request exceptions from DSAA for the commercial procurement of standard DoD items. When doing so, the purchasing country must provide written justification to DSAA supporting its request. The justification should include the item description, required delivery date, and any other information which may be pertinent to the exception decision. In those instances where additional information regarding availability, performance, characteristics, releasability, etc. are required, DSAA will consult with the appropriate U.S. military department (MilDep).

A. Purchaser representatives should allow approximately 60 days for DSAA to process an exception request and provide a decision in writing on the exception.

B. If DSAA has approved use of the direct commercial contracting channel to meet the requirement, the purchaser may then submit a contract to DSAA for consideration of FMF. When the contract is submitted for review, the purchaser must attach the exception letter issued by DSAA.

2. Direct commercial contracts will be permitted for procurement of non-standard items, e.g., items that do not have a national stock number. The purchasing country must demonstrate that the items are non-standard by providing cataloging data or information received from the MilDeps.

279

3. The use of FMF for DCCs will be permitted for the development and procurement of major country-unique systems. The purchaser should consult with DSAA and receive approval prior to proceeding with contract negotiations on major unique systems. Written justification supporting the purchaser's request to use the DCC channel should be provided to DSAA as far in advance as possible, but not less than 60 days before solicitation of offers or initiation of contract negotiations. This will allow sufficient time to evaluate the proposed acquisition and, if necessary, consult with the appropriate U.S. MilDep. If justification is not provided to the DSAA prior to submission of a contract, it may result in a delay in the processing of the request for funding approval or in the return of the contract without review.

4. Purchases must be from U.S. incorporated firms licensed to do business in the United States.

5. The goods and services purchased must be manufactured and assembled in the United States, purchased from U. S. firms, and composed of U.S.-origin components and services. An exception for FMF may be considered for those items originally manufactured in the U.S. and purchased by a U.S. contractor from foreign sources. In the event that the purchase of a U.S. end item consists of both U.S. and non-U.S. components and services, only the value of the U.S. components and services will normally be financed.

A. Non-U.S. content which is an integral part of end items manufactured in the United States may be eligible for FMF under certain limited circumstances. Such financing will be considered when the DoD has procured or is procuring the item from the same source.

280

B. Contracts should specify any non-U.S.-origin content, e.g., items, components or services. If not identified in the contract, non-U.S. content must be identified to DSAA by the purchaser in supporting documents. To facilitate this, the contractor is required to identify to the purchaser any non-U.S. content, the corresponding value contained in the contract, and where applicable, supporting documentation to demonstrate that DoD has procured or is procuring the non-U.S. origin items, components, or services from the same non-U.S. source. Supporting documentation should include the DoD contract number(s) under which the non-U.S. content was purchased, if appropriate, and any other pertinent information. Assembly is required to be performed in the United States.

C. Any license fee to be paid by the contractor to a non-U.S. entity should be identified as non-U.S. content.

D. Expenses incurred by foreign subsidiaries of U.S. companies are not considered to be U.S.-content. Reasonable expenses for support of U.S. contractor personnel in-country are considered U.S. content and may be FMF-funded.

6. Contracts for less than $100,000 will not normally be approved for FMF. All amendments to commercial contracts funded with FMF must be submitted to DSAA for review and approval. The amendments should be submitted in chronological order and numbered accordingly. The total value of each contract, purchase order, or amendment must be for $100,000 or more. Contracts, purchase orders, or amendments for less than $100,000 will not be approved for FMF. (Note: No-cost amendments which do not change contract scope must be reviewed and approved in the same manner).

281

A. Any contract change which adds or deletes previously contracted items must be accomplished through contract amendment, e.g., substituting items for items being deleted, adding new items to the contract or deleting items from the contract. If the contractor has previously received payment for the items deleted and not replaced, the contractor will be required to refund the amount of these payments and reduce the contract price accordingly.

B. Amendments requiring additional FMF will not normally be approved later than five years from the date DSAA approved financing of the basic contract. A request for exception may be considered if sufficient justification is provided to DSAA by the purchaser.

7. Requesting FMF funding for purchases containing offset provisions as a condition for securing the purchase is not encouraged. Offset provisions are agreements by the seller to make investments or procurements in a country other than the United States, either concurrent with or subsequent to the purchase for which financing is being requested.

A. FMF grants may not be used to pay for offsets, to include direct offsets or the related costs of offset administration. A direct offset is the procurement of a non-U.S. made component required by the purchasing country, for incorporation or installation in a U.S.-produced end item being sold.

B. FMF credits may not be used to pay for offsets, to include direct offsets. If the contract is wholly financed with repayable FMF credit or with repayable FMF credit and foreign purchaser funds, the offset administration costs may be included in

282

a direct commercial contract. The purchasing country must be informed of the inclusion of the offset administration costs during contract negotiations.

8. Commissions or contingent fees will not be FMF funded. Additionally, such commissions or fees will be treated as an unallowable cost under the contract. Therefore, no element of commissions or contingent fees may be included in the contract funded by the United States Government. When commissions or contingent fees related to the sale will be paid with other than FMF funding, the contractor will so advise DSAA at the time the contract is presented for funding approval. The contractor shall maintain an available system of accounts sufficient to demonstrate that no element of commission of contingent fee is contained in the contract funded by the United States Government.

9. Purchase agreements should be made directly with the prime manufacturer of the defense article or service if possible, and the contractor is expected to add value to the product being sold.

A. If the items or services are available from production in the United States, purchases of materiel should be made to the maximum extent feasible from the prime manufacturer of assemblies or items, the assembler or a U.S.-based distributor licensed by the manufacturer who has had a long standing relationship with the manufacturer and who has been provided with general domestic and/or international sales regions.

B. A prime contractor must demonstrate to the DSAA (by means of a DoD preaward survey or other means) its capability--including, e.g., expertise, experience, plant, and financial soundness--to perform by itself a substantial portion of the work. Prior successful completion of

recent direct commercial contracts financed with FMF funds or DoD contracts for the same or essentially similar items shall normally satisfy this requirement.

C. Funding with FMF will not be considered for a procurement agent, broker, import-export firm or other intermediary unless justified by factors relating to specific country needs and the country's abilities to conduct commercial contracting. A request for exception will be considered if sufficient justification is provided by the purchasing government as to why the purchase is sought from a firm other than the manufacturer.

D. A list of suppliers and subcontractors for the proposed contract, showing names, addresses, and the materiel and services to be procured by the intermediary (i.e. prime contractor) must be provided as part of the purchasing government's justification. Such intermediaries are required to identify names and addresses of all projected suppliers and subcontractors applicable to this contract. In such a case it is assumed that the purchasing government will be aware of the extent of additional cost or markup by the intermediary and that such data can be provided upon request.

10. U.S. firms which are selling or have sold the same items to DoD are generally recognized as having adequate production capabilities and having previously performed on their contracts in a satisfactory manner. It is recognized that many small businesses or firms that have not previously sold to the DoD may be the best qualified to provide articles or services unique to country needs. To verify the contractors' statements and determine their capability to perform under the contract terms, a DoD preaward survey may be required as a condition of FMF approval. Such preaward surveys normally are not required for firms with previous DoD contracting experience.

284

11. Contractors and country representatives should plan for the time required by DoD to perform the processing necessary to determine the extent of FMF authorization. The processing time for contracts that are fully in compliance with these guidelines is approximately 60 days. **The purchasing country is responsible for providing the contractor with a copy of DSAA Guidelines together with the Contractor's Certification. If the contract is submitted without the required certification, the contract will be returned to the purchaser for inclusion of such data.** When the prospective purchase is from a contractor that does not regularly sell to the U.S. Government, the purchaser should set a commencement date for the contract that allows at least an additional 30 days for U.S. Government representatives to conduct a survey of the contractor. Such a review and preaward survey may be required in certain circumstances by DSAA as a condition for FMF of the contract.

12. FMF will not be approved for financing of direct commercial letters of credit which assure payment to the supplier upon presentation by the supplier of invoices and/or delivery documents. If the contract requires performance bonds or other forms of letters of guarantee from the supplier, the use of a bank or financial institution chartered or incorporated in and doing business in the United States is required for this purpose.

13. The use of FMF will be approved for the financing of transportation performed by U.S. carriers only.

A. For ocean transportation of FMF shipments, the contractor and the purchaser will use, or cause to be used, privately owned U.S. flag commercial vessels. For contractor-originated ocean shipments, the contractor will, within 20 days of loading, submit one legible copy of the rated on-board ocean bill of lading for each shipment to: Chief, Division of National Cargo,

285

Office of Market Development, Maritime Administration, U.S. Department of Transportation, 400-7th Street, S.W., Washington, DC 20590. The bill of lading will identify: contract number; name of vessel; flag of registry; date and port of loading; port of final discharge; description, weight, and value of cargo; and total ocean freight revenue. Any waivers (general, security, or non-availability) will be in accordance with the country's agreement with DSAA. The waivers are described in the agreements and may apply to either specific shipments or for a specific period of financing. Contractors will include these requirements in subcontracts or purchase orders applicable to this contract.

B. No payments will be made to freight forwarders with FMF unless, prior to July 1, 1994, DSAA had authorized the purchasing country to use FMF-funded DCCs to procure freight forwarding services. Rated, on-board bills of lading or rated airway bills may be approved for direct payments to U.S. ocean or air carriers upon request.

14. FMF will not be approved for payments for travel, per diem, accommodations, lodging, car rental, personal expenses, entertainment or other similar expenses of purchasing country personnel in connection with a direct commercial purchase. Therefore, while these types of costs may be cited in contracts submitted, they must be paid by the purchaser with national funds. If such costs are included, either directly or indirectly, they must be expressly identified.

15. Any purchase agreement that provides for a refund, penalty, liquidated damages, bonding provisions, or any other form of financial reimbursement to the purchasing country must be structured to ensure that such payment is made by the contractor or designated agent (including the contractor's commercial bank) directly and without undue delay, from the payor to the U.S. Government. Should the purchaser exercise a drawdown on a U.S. private letter of

286

credit, it must ensure that the funds are transferred directly from the payor to the U.S. Treasury.

A. Bonding and guarantee documents, such as Performance Bonds, Letters of Guarantee, Letters of Credit, and any other such instrument that is established by the contractor or his agent pursuant to the Purchase Agreement, must be received at the Defense Finance and Accounting Service (DFAS) Denver and made part of the Purchase Agreement file as a prerequisite to disbursement of FMF funds to the contractor. Bonding and guarantee documents lacking adequate provisions to ensure prompt payment to the U.S. Government will not be accepted but will be returned for revision, and the pertinent Purchase Agreement will be held in abeyance until this requirement is satisfied.

B. Reimbursement payments must be remitted to the addresses noted below. These payments, when received by the DFAS Denver, will be credited to the purchasing country's FMS trust fund account and become available for application by the country to any FMS or commercial case approved for FMF. Any financial reimbursement relating to the Purchase Agreement which is equal to or less than the FMF funds paid by the DSAA on the Purchase Agreement will become available for application by the country to any FMS or commercial case approved for FMF. In the event that the amount of reimbursement exceeds the amount of FMF funds paid by the DSAA on that Purchase Agreement, the excess amount of that reimbursement will be credited to the country's FMS trust fund account and become available to the country for application as "cash" to FMS cases.

C. Remittances should be processed as follows:

Payments by check must be accompanied by a letter which identifies the purchasing country and the DSAA case identifier. The check must be made payable to the "United States Treasury" and mailed to:

Defense Finance and Accounting Service (DFAS)
DE-FCC
Denver, CO 80279-5000

Payments by wire transfer should be transferred as follows:

United States Treasury
New York, New York
0210-3000-004
DFAS/SAAC
Agency Code 3801

Refund from: (Name of Company)
for purchase made by the Government of
__(Country)__ under DSAA case__(Identifier)

16. Contracts should include all essential contract elements. Complete copies of all provisions of contracts are required for DoD review for FMF funding. The purchaser must also submit to DSAA for review all subsequent modifications, amendments, or side letters/ supplementary agreements which affect the contractual relationship between the buyer and the seller on FMF contracts.

17. DSAA requires that contractors doing business with the purchaser execute certain notices and certifications as part of both the proposal and the contracting processes. The execution of these documents is a prerequisite for receipt of DSAA approval to use FMF funds to finance purchaser contracts. The CONTRACTOR'S CERTIFICATION AND AGREEMENT WITH DEFENSE SECURITY ASSISTANCE AGENCY is required to be

288

signed by the contractor and submitted by the purchaser to the DSAA when the contract is provided for funding review. The date of the current agreement form is **January 1995.**

18. All FMF-funded DCCs are subject to audit by the Defense Contract Audit Agency (DCAA). DCAA will perform audits, at the U.S. Government expense, to ensure contractor's compliance with the contractor's certification. DCAA audits may be performed at any time up to three years following receipt by the contractor of the final payment on the contract.

19. The Defense Contract Management Command (DCMC) can perform quality assurance services if desired by the contractual parties or if directed by DSAA.

A. The cost of DCMC quality assurance services may be included in the contract and paid to the DFAS by the contractor on behalf of the purchaser; however, the purchasing country is required to arrange for these services through an FMS agreement with the DCMC.

B. For some contracts or purchase orders, the DSAA may require that a DCMC quality assurance verification be performed before delivery of the materiel to assure that the quality of the materiel is in accordance with contract terms, or for DoD standard items, U.S. Military specifications. In the event that the DSAA determines that such quality assurance is required, the purchaser will be notified when the contract is reviewed that DoD quality assurance services from the Defense Logistics Agency (DLA), through the DCMC International Logistics Office (ILO) in New York, are required as a condition for FMF of the contract.

20. It is highly recommended that several U.S. manufacturers be contacted by the purchaser for solicitation of offers to meet their specific needs. All contracts awarded on a competitive basis will require the purchaser to identify, in writing, the various contractors

solicited and the prices submitted. If the lowest offeror was not selected, the purchaser must provide justification explaining the basis for the contract award. If this information is not provided, the contract will be returned to the purchaser for inclusion of such data.

21. Field pricing support is required prior to contract award for all sole-source procurements of $500,000 or more. DCMC, with DCAA assistance as required, will provide field pricing support, at the purchaser's expense, as a condition for FMF funding of the contract. The purchaser must provide a copy of the offer to DCMC for its use in providing this support.

A. The DCMC- ILO, with DCAA assistance as required, will perform price and cost analyses and technical evaluations to determine price reasonableness of offers submitted. The purchaser should allow at least 45 days for the U.S. Government representative to perform these analyses. The DCMC-ILO will provide a copy of the price and cost analysis reports to the purchaser.

B. The purchasing country must include a copy of the price and cost analysis as part of the justification submitted to DSAA in support of its request to use FMF to fund a contract.

C. The purchasing country will be required to pay for this service under an FMS Letter of Offer and Acceptance (LOA) negotiated with DLA.

D. On all amendments of $500,000 or more for contracts previously approved for FMF funding the purchaser will consult with DSAA to determine if a price and cost analysis review will be required.

290

E. The purchaser is required to incorporate the contract clauses in Enclosure 3 into its requests for proposal on FMF-funded DCCs.

22. On all contracts of $500,000 or more (sole source or competitive awards) the purchasing country is required to contract with DCMC for contract administration services using a DLA FMS case. At a minimum, DCMC will monitor the contractor's performance to ensure compliance with the DSAA Contractor's Certification throughout the life of the contract. The purchaser is required to incorporate the contract clauses at Enclosure 3 into its FMF-funded DCCs of $500,000 or more.

23. The contracts or purchase orders must clearly identify the amount of any contract financing payments and be in accordance with the following limitations:

A. The purchasing country is responsible for demonstrating the reasonableness and safety of contract financing arrangements.

B. Advance payments for FMF-funded DCCs may include a total amount of not more than 15 percent of the contract price, in advance of any performance under the contract. The purchasing country shall obtain adequate security for such payments in accordance with paragraph F below.

C. Contract financing arrangements may provide for payments to be made on the basis of accomplishment of specific milestones detailed in the contract, or other basis such as installments. Installments shall be payable no more frequently than quarterly.

D. Cumulative contract financing shall not exceed 85 percent of the contract price of undelivered items. See F below for security requirements.

E. Full contract payment shall not be made until after full performance of the contract.

F. All unliquidated advance and interim financing payments shall be secured by guarantee documents, such as Letters of Guarantee, Letters of Credit, or Performance Bonds from a U.S. bank or financial institution chartered in and doing business in the United States. Copies of guarantee documents must be submitted with the contracts or purchase orders when submitted for funding approval. The security shall be at least equal to the amount of the unliquidated contract financing. Guarantee documents lacking adequate provisions to ensure prompt payment to the U.S. Government will not be accepted but will be returned for revision, and the pertinent Purchase Agreement will not be approved until this requirement is satisfied.

G. Purchasing countries may not assess charges to United States contractors for processing contracts or invoices for payment. FMF will be withdrawn if such charges are determined to have been assessed or if the purchasing country representatives have solicited U.S. contractors to provide free materiel, services, advertising, or other similar forms of benefits as a condition of award of a contract or processing of invoices.

H. After validation of invoices, the purchasing country should submit them within 60 days of receipt from the contractor to DFAS Denver for payment.

24. If the contractor otherwise contracts with DoD, the contractor must comply with approved cost accounting standards. FMF may be disallowed for contracts which result in additional costs being transferred to the DoD. The DCAA has expressed concerns about the formation by U.S. prime contractors of separate corporate segments to conduct foreign sales. In

292

some cases, when significant intracompany contracting is involved, the resulting allocations of costs are inconsistent with cost accounting standards and result unjustifiably in the allocation of additional costs to DoD contracts. If DoD prime contractors establish separate companies or other corporate segments for the purpose of conducting foreign sales and request FMF for sales by such segments, DSAA will request DCAA review of the transaction. FMF will be approved only upon confirmation by the DCAA that the arrangement is consistent with cost accounting standards and that there would be no unjustifiable additional cost on DoD contracts with the prime contractor.

25. DSAA is not staffed in a manner which would enable it to conduct independent debarment or suspension proceedings. Therefore, with respect to approval of financing for U.S. contractors, DSAA relies heavily on the experiences of other U.S. Government agencies which are empowered to debar/suspend contractors for cause.

A. Contracts will not be approved for U.S. suppliers which are included in the U.S. General Services Administration List of Parties Excluded From Federal Procurement or Nonprocurement Programs, the U.S. Commerce List of Denial Orders Currently Affecting Export Privileges or similar determinations in which the U.S. Department of State has made certain contractors ineligible to export material under the International Traffic in Arms Regulations. Should contracts involving such suppliers be submitted to DSAA, they will be returned to the prospective purchaser without action with the appropriate indication as to the Agency which has initiated the action of debarment or suspension. A copy of the letter will be furnished to the contractor involved.

B. The action required before such contracts can be considered for FMF is for the U.S. contractor involved to take appropriate administrative or legal steps to remove the relevant organization or individual from the debarment/suspension list. Such action should be taken directly with the Agency which has debarment responsibility.

26. If the contract includes a requirement for insurance, the use of a U.S. insurance firm is required.

27. If the contract includes an arbitration clause, the location of the arbitration must be identified as in either the United States or a mutually agreed third country and not in the purchaser country.

28. Contracts and supporting documentation should be submitted by the purchasing country to the following address:

Defense Security Assistance Agency
ATTN: Operations Management Division (OPS-MGT)
Washington, DC 20301-2800

29. Inquiries concerning these polices and procedures or the contract review process should be directed to the above address or by phone to (703) 604-6635.

Enclosures
As stated

294

ESSENTIAL CONTRACT ELEMENTS

1. Elements that MUST be included in the contract.

   a. Country

   b. Complete identification of U.S. Contractor to include name, address, and telephone number

   c. Contract number

   d. Complete nomenclature of defense articles and description of services to be provided

   e. Complete description of quantities and prices

   f. Complete description of financial arrangements:

      - Unit prices
      - **Advance payment**
      - Payment schedule (to include method of liquidating **advance** payment based on deliveries)

   g. **Contract clauses for contract administration**

   h. Identification of shipment terms

   I. Identification of any guarantee documents or clauses that could result in a refund to the purchaser, such as but not limited to:

      - **Advance payment guarantee documents**
      - **Interim payment guarantee documents**
      - Liquidated damages

   j. - Acceptance (signature) by both parties

Enclosure 1

295

2. Elements that must be provided and can either be included in the contract, or submitted separately to DSAA by the Purchaser when the contract is submitted for FMF Funding approval.

a. Identification of the non-U.S. origin components and services (Note: Raw materials and items procured by a manufacturer from both U.S. and foreign sources, which are not ordinarily segregated by origin, and are incorporated on an interchangeable basis into the manufacturer's products, need not be identified.)

b. Identification of offsets or countertrade requirements or agreements.

c. **Contractor's Certification.**

d. **List of Offerors and prices submitted on competitive procurements.**

e. **Justification for selection of other than the lowest offeror on competitive contracts.**

f. **Copy of DSAA approval of exception to use a direct commercial contract (if applicable).**

g. **Justification for procurement of non-standard items (if applicable)**

h. **Guarantee documents**

296

REQUESTS FOR EXCEPTIONS FOR STANDARD DOD ITEMS AND JUSTIFICATION FOR MAJOR-UNIQUE SYSTEMS TO BE FUNDED WITH U.S. FOREIGN MILITARY FINANCING FUNDS MUST INCLUDE THE FOLLOWING:

A. Country:

B. Identification of Requirements:

(1) U.S. Defense Items or Services:

(2) Quantity:

(3) Estimated Purchase Agreement Value: $

(4) Projected date of submission of contract to DSAA for funding approval:

(5) Required delivery date

C. Basis for requesting exception to allow FMF funding of a Direct Commercial Contract, including, but not limited to the following:

(1) Statement as to why FMS is not considered appropriate

(2) Anticipated source of goods or services

Enclosure 2

291

Requests for Proposal and Contract Clauses

The following clauses are required to be incorporated into requests for proposal for sole source contracts of $500,000 or more that will be funded with FMF.

Field Pricing Support

1. As a condition of foreign military financing of the contract, the contractor must agree to the requirement for field pricing support. This support will be provided by Defense Contract Management Command (DCMC) and Defense Contract Audit Agency and will normally include technical and cost analysis of the contractor's proposal. _____(Enter Country Name)_____shall request field pricing support through the DCMC International Logistics Office in New York, NY. Field pricing support will include an audit review by the cogrizant contract audit activity before concluding negotiation of the contract or any modification. The contractor is required to submit cost or pricing data in connection with pricing of this contract or any modification to this contract which affects the price of the contract.

2. The U.S. Government (USG) representatives shall have the right to examine and audit all the contractor's books, records, documents, and other data, related to proposing, negotiating, pricing, or performing the contract, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data. The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used. The contractor shall make available at its office at all reasonable times the materials described above for examination,

audit, or reproduction, until 3 years after final payment under the contract. General access to the offeror's books and financial records shall be limited to USG representatives. The USG representatives shall verbally notify the purchaser immediately of data provided that is so deficient as to preclude review, or where the contractor has denied access to records or to cost or pricing data considered essential to the performance of a satisfactory review. This verbal notification shall be promptly confirmed in writing to the purchaser describing the deficiency or the denial of access to data or records. A contractor's failure to provide adequate cost and pricing data may disqualify the contract from consideration for FMF approval.

3. Field pricing support is intended to give the purchaser a detailed analysis of the proposal for use in contract negotiations to determine a fair and reasonable price. It normally includes an audit review by the cognizant audit activity and a technical analysis by DCMC.

a. Cost analysis will include, as appropriate:

1) Verification of cost or pricing data and evaluation of cost elements.

2) Evaluating the effect of the offeror's current practices on future costs to ensure that the effects of inefficient or uneconomical past practices are not projected into the future.

b. Comparison of costs proposed by the offeror for individual cost elements with:

1) Actual costs previously incurred by the same offeror;

2) Previous cost estimates from the offeror or from other offerors for the same or similar items

3) Other cost estimates received in response to the purchaser's request;

4) Independent cost estimates by technical personnel;

5) Forecasts or planned expenditures.

c. Verification that the offeror's cost submissions are in accordance with U.S. DoD contract cost principles and procedures and, when applicable, the requirements and procedures of the Cost Accounting Standards.

d. Review to determine that all cost or pricing data necessary to make the contractor's proposal accurate, complete, and current has been either submitted or identified in writing by the contractor.

e. Analysis of the results of any make-or- buy program reviews, in evaluating subcontractor costs.

4. Technical analysis will include, at a minimum, a review and assessment of: the quantities and kinds of material proposed; the need for the number and kinds of labor hours and the labor mix; any special tooling and facilities proposed; reasonableness of proposed scrap and spoilage factors; and any other data that may be pertinent to the cost or price analysis.

5. Any subcontracts meeting the $500,000 or more threshold will be subject to the same surveillance as the prime contractor.

300

Contract Administration

The following clause is required to be incorporated into all contracts of $500,000 or more:

As a condition of FMF funding of the contract, the contractor agrees that Defense Contract Management Command (DCMC) and Defense Contract Audit Agency (DCAA) contract administration services will be performed to ensure that the contractor is in compliance with the Defense Security Assistance Agency (DSAA) Contractor's Certification and Agreement. DCMC, with assistance of DCAA, will perform contract administration services in accordance with the contractor's certification. DCAA will perform audits on contracts to ensure contractor's compliance with the contractor's certification. DCMC/DCAA contract administration services will be provided over the life of the contract. Other contract administration services that are available to the purchaser are outlined in FAR 42.302.

301

Appendix J
POLAND'S LAW ON PROCUREMENT

302

THE LAW of June 10th, 1 9 9 4
as amended July 6, 1995

ON PUBLIC PROCUREMENT

CHAPTER 1. GENERAL PROVISIONS

Art. 1

This Law[1] determines the principles, forms and procedures for conducting public procurements, the appropriate organs of government in matters related to public procurement, and procedures for reviewing protests and appeals filed during the course of procurement proceedings.

Art. 2

Terms used in this Law have the following respective meanings:

1) "construction" - means any work associated with the construction, reconstruction, repair or demolition of a construction site, or its parts, as well as advertising fixtures, art works, and other fixtures affecting the appearance of the building site;

2)"delivery" - means all stages of the process of procuring raw materials, products, equipment, and other goods delivered to the procuring entity;

3)"services" - means all work that is neither the delivery of goods nor construction;

4)"public procurement", hereinafter referred to also as "procurement" - means the procuring of construction, the delivery of goods, and the performing of services, financed fully or partially with public funds;

5)"procuring entity" - means any entity conducting public procurements under this Law;

6)"domestic suppliers and contractors" means natural persons residing in Poland, and legal persons and entities established under Polish law without legal personality that have their site (siedziba) in Poland.

---

[1] The Law of June 10, 1994 on Public Procurement (Ustwa z dnia 10 czerwca 1994 r. o zamówieniach publicznych) was enacted by Parliament on June 10, 1994 and published in the Journal of Law Dz. U. No. 76, Item 344 with technical amendment published in the Journal of Law Dz. U. No. 130, Item 645. The Law of July 6,1995 on the Amendment of the Law on Public Procurement (Ustawa z dnia 6 lipca 1995 r. o zmianie ustawy o zamówieniach publicznch) was enacted by Parliament on July 6, 1995 and published in the Journal of Law Dz. U. No. , Item .

7) "public funds" - means the following sources of funds:

a) funds from the state budget or the budgets of self-government units that are allocated for ordinary activity and capital investment activity,

b) funds as defined in the Budgetary Law (Prawo budżetowe) as "pozabudżetowe" (extra budgetary funds),

c) funds guaranteed, secured or for which the cost of the credit is co-financed by the State Treasury, the local self-governments (gmina) or a union of self-governments (zwiazek komunalny),

d) funds granted as foreign aid under international agreements, unless the agreement requires different procedures for using the funds.[2]

8)"best offer" - means the offer, tender or quotation with the lowest price that is exactly the same quality of the subject matter sought in the procurement proceeding, or an offer, tender or quotation with the best balance of price, life-cycle costs, completion or delivery time, or other criteria specified in the relevant provisions describing the procurement.

Art. 3

1. This Law applies to procurements for delivering goods, performing services and construction, financed in whole or in part with public funds.

2. The procuring entity may not divide the procurement into parts or lower the value of a procurement in order to avoid the application of this Law or to avoid the application of the procedures for public procurements as set forth in this Law. [3]

Art. 4

1. This Law applies to public procurements issued by:

1) state units and support services created by the state budgetary units;

2) funds established by state earmarks (państwowe fundusze celowe);

---

[2] This definition was amended by the Law dated July 6, 1995. The definition formerly read: " 'public funds' means funds out of the state budget or the budgets of self-government units and allocated for ordinary activity and capital investment activity, funds from the state earmarked funds, funds guaranteed, insured, or for which the credit was co-financed by the State Treasury, a state organizational unit, or self-government unit, and funds obtained from foreign assistance acquired through international agreements, unless these agreements provide different procedures for using these funds."

[3] This paragraph of Article 3 was amended by the Law dated July 6, 1995. This paragraph formerly read: "The procuring entity may not divide a procurement into parts, or lower the value of a procurement in order to avoid applying the procedures for conducting procurement procedures set forth in this Law."

3) units of self-government;

4) state and municipal entities that receive any public funds and perform public utility activities;

5) co-operatives, foundations and associations to the extent that they dispose of public funds.

2. The Council of Ministers shall, by ordinance, define the specific principles for conducting public procurements related to the protection of national security, the protection of state secrets, the sate of natural disaster, or other important state interests.

3. The Council of Ministers may, by ordinance, designate other entities that dispose of public funds which will be governed by this Law.

Art. 5

If a number of units of government administration need the same subject matter of a procurement, the Council of Ministers may assign a particular administrative unit to perform the procurement proceeding and conduct one joint procurement on behalf of those units.

Art. 6

This Law does not apply to:

1. budget funds for scientific research which are at the disposal of the Chairman of the State Committee of Scientific Research,

2. principles and procedures for dotations from public funds, if these dotations are designated under another Law (ustawa).

3. contracts granted to:

a. general services administrations of procuring entities (gospodarstwom pomocniczym) and budgetary units (zakładom budżetowym) for services for regular and ordinary activities of the procuring entity.

b.enterprises subject to the Minister of Justice which operate at penitentiaries and detention centers.

4. public funds granted as a subsidy, as defined in the Budgetary Law, and destined for agricultural projects with the exception of funds granted for investment projects.[1]

CHAPTER 2. THE OFFICE OF PUBLIC PROCUREMENT

[4] Subparagraphs 3 and 4 were added to Article 6 by the Law dated July 6, 1995.

305

Art. 7

The Office of Public Procurement is hereby established, hereinafter referred to as "Office."

Art. 8

1. The Chairman of the Office is hereby established as the central organ of state administration on all matters of public procurement, according to the provisions of this Law.

2. The Chairman of the Office shall be appointed and dismissed by the Prime Minister.

3. The Chairman of the Office shall be under the Prime Minister.

Art. 9

The scope of activities of the Chairman of the Office includes:

1) approving, as provided in Art. 15, subparagraph 2, the selection of a procedure for conducting a public procurement other than the tendering procedure;

2) establishing and maintaining the list of arbiters to review the appeals filed in procurement proceedings, and publicizing the list of arbiters in the Bulletin of Public Procurement;

3) presenting an annual report to the Council of Ministers concerning the functioning of the public procurement system;

4) preparing drafts of laws and regulations concerning public procurement.

5) disseminating the general conditions (ogólne warinki umów) and forms of contracts for public procurements, the rules (regulamin) and standard procedures for conducting procurements and the knowledge related to conducting public procurements, in coordination with appropriate Ministries;

6) recording and maintaining the list of public procurements, and collecting information about procurement planning, signed contracts, and performing public procurements;

7) preparing training programs, and conducting and encouraging training concerning public procurements;

8) cooperating with foreign entities on matters associated with public procurements.

2. The Chairman of the Office may also:

1) motion the Council of Ministers in matters of joint public procurements, as described in Art. 5;

2) require the procuring entities to provide information about conducting public procurement proceedings and performing public procurements as well as disclosing the documentation of public procurements.

Art. 10

1. The Council of the Office is the advisory body to the Chairman of the Office.

2. The members of the Council of the Office are appointed and dismissed by the Prime Minister upon the motion of the Chairman of the Office.

Art. 11

1. Announcements of public procurements governed by this Law shall be published in the Bulletin of Public Procurement issued by the Chairman of the Office.

2. The Chairman of the Office may, by special order, establish regional or industry-specific editions of the Bulletin described in subparagraph 1 and will determine the range and the provisions for announcing procurements.

3. The announcement referenced in paragraph 1 is to be published in the Bulletin no later than within 10 days from its delivery to the Office.[5]

Art. 12

1. The organization of the Office shall be specified in a charter issued by the Prime Minister.

CHAPTER 3. PRINCIPLES OF CONDUCTING PUBLIC PROCUREMENTS

Art. 13

Public procurements shall be conducted according to the following procedures:

1) unlimited tendering
2) limited tendering
3) two-stage tendering
4) negotiations-with-retaining-competition
5) request-for-quotations
6) single-source procurement.

Art. 14

[5] Paragraph 3 was added to Article 11 by the Law dated July 6, 1995.

The preferred procedure for conducting public procurements is unlimited tendering.

Art. 15

1. In public procurements valued less than 20,000 ECU and in public procurements financed with less than 20,000 ECU in public funds, unlimited tendering procedures are not obligatory and the following requirements of this Law shall not apply: the requirements related to publication of announcements in the Bulletin of Public Procurement, written procedures, official records of proceedings, specification of essential provision of the procurement, time periods and deadlines, tender security (wadium), and protests and appeals.

2. If the amount of the procurement exceeds 200,000 ECU, the selection of a procurement procedure other than unlimited tendering requires approval by the Chairman of the Office.

3. The Council of Ministers may, by ordinance, determine before September 30 of every year, the obligatory threshold limits reference in paragraphs 1 and 2 for the coming year beginning January 1.

Art. 16

The procuring entity is obligated to treat all competitors for a procurement equally and to conduct the procurement proceeding in a manner that ensures fair competition.

Art. 17

1. The subject matter of the procurement should be described using technical characteristics and quality features applying Polish standards (Polskie Normy).

2. It is prohibited to describe the subject matter and conditions of a procurement in a way that could hinder fair competition.

3. The Council of Ministers may, by ordinance, determine for specific categories of deliveries, services and construction, the criteria for evaluating and selecting offers.

Art. 18

1. Domestic as well as foreign suppliers and contractors shall be able to participate in procurement proceedings on an equal basis according to the provisions of this Law.

2. The procuring entity may limit participation in a procurement proceeding solely to domestic suppliers or contractors and foreign suppliers or contractors that have a branch or representative office in Poland, if the value of the procurement does not exceed the amount referenced in Art. 15, paragraph 1.

3. If the subject matter of the procurement is comprised of services or construction on the territory of Poland, the procuring entity may request that the entire work covered by the procurement be performed with domestic entities, raw materials and products.

4. When applying national preferences in a procurement proceeding, the procuring entity shall inform the suppliers and contractors about the national preference when is starts the procurement procedure. The declaration regarding the national preference cannot be changed thereafter.

5. All obligations described in the international agreements signed by the Republic of Poland shall be considered in applying national preferences.

6. The Council of Ministers shall, by ordinance, specify:

1) the range and the procedures for applying national preferences in public procurement proceedings, including the preferences referenced in paragraphs 2 and 3,

2) the categories of deliveries, services, and construction that must be procured under national preference procedures,

3) the specific principles when the Chairman of the Office can approve the application of national preferences and when the Chairman can waive the application of national preferences.

Art. 19

1. The following entities are excluded from competing for public procurements:

1) suppliers or contractors that failed in the diligent performance of at least one public procurement contract within the last three years before the commencement of the public procurement proceeding,

2) suppliers or contractors who are in a bankruptcy proceeding or who have been declared bankrupt,

3) suppliers or contractors who are in arrears with paying taxes, social insurance fees and other fees, unless the Minister of Finances allows the supplier or contractor to participate in the procurement proceeding,

4) natural persons who have been validly sentenced (prawomocnie skazano) for a crime committed in connection with a procurement proceeding, or any other crime committed to gain financial profit,

5) legal persons, who currently employ an officer or officers that have been validly sentenced (prawomocnie skazano) for a crime committed in connection with a procurement proceeding, or other crime committed to gain financial profit.

30P

2. Commencement of a proceeding for crimes referenced in paragraph 1, subparagraphs 4 and 5, can be a basis for exclusion from participation in public procurement proceedings.

Art. 20

A person can not represent the procuring entity, perform other activities connected to a procurement proceeding, or be an expert (biegły) to a procurement proceeding if:

1) such person is in a marital relationship, is directly related to, is in direct or indirect kinship to the second degree, or is related by adoption, guardianship or tutelage (kuratela) with the offeror, with its legal counsel, or with its officers;

2) such person, during the last three years, worked for the offeror as employee or contractor or has been an officer of a legal person competing for the procurement;

3) such person is in such a legal or factual relationship with a supplier or contractor competing for the procurement as to give cause to justify doubts regarding his or her objectivity.

Art. 21

1. Unless otherwise specified in this Law, all statements and notifications made by the procuring entities and suppliers or contractors are effective only in the written form.

2. If, in the course of the procurement proceeding, the parties communicate in other than written form, the content of this communication shall be promptly confirmed in writing.

Art. 22

1. To protect the intellectual property rights and trade secrets of suppliers and contractors, the procuring entity may require from suppliers and contractors only documents essential to perform the procurement proceeding.

2. To participate in a public procurement proceeding other than a proceeding conducted by request-for-quotations, every supplier or contractor has to declare that:

1) it has the legal capacity to enter into legal transactions according to legal requirements,

2) it has satisfied the legal requirements essential to perform the defined work or activities, if these legal requirements are established by Law (ustawa),

3) it possesses the knowledge, experience, financial resources, technical competence, personnel and all necessary capacity to perform the procurement,

4) it is in a financial situation to ensure performance of the procurement,

5) it is not excluded from the procurement proceeding under the provisions of Art. 19.

3. In a public procurement proceeding with a value less than the value referenced in Art. 15, paragraph 1, the procuring entity may require the suppliers or contractors to confirm that they satisfy the conditions referenced in paragraph 2.

4. In a public procurement proceeding with a value more than the value referenced in Art. 15, paragraph 1, the procuring entity shall require the suppliers or contractors to confirm that they satisfy the conditions referenced in paragraph 2 and it shall require the declaration that they are not in dependence or dominant relation, as prescribed in the Law of March 22, 1991 - The Law on the Exchange of Commercial Paper and on Trust Funds (Dz. U. No. 58, pos. 239, 1994), with other participants of the proceeding or with the procuring entity or with people of the procuring entity taking part in the proceeding.

5. Requirements regarding conditions referenced in paragraph 2 shall be uniform for all suppliers and contractors.

Art. 23

1. The procuring entity may, before announcing organization of a tendering or before inviting participation in a public procurement proceeding, conduct prequalification of suppliers and contractors according to the conditions set forth in Art. 22, paragraph 2.

2. Not later than one month before publicizing the announcement of the tendering or before sending invitations to participate in a tendering, the information about prequalification shall be published in the Bulletin of Public Procurement or shall be sent to the suppliers or contractors if participation in the procurement proceeding is by invitation.

3. The information about prequalification shall include:

1) name and address of procuring entity,

2) quantity, amount and category of deliveries to be procured, and the category, range and location in construction procurements,

3) desired or required time period and deadline for performing the procurement,

4) definitions of conditions required from suppliers and contractors,

5) instructions for obtaining the documents for prequalification, referenced in paragraph 4, below,

6) place and deadline for submitting motions for prequalification.

4. The procuring entity shall dispatch immediately, but not later than 14 days before the deadline for submitting motions for prequalification, to all interested suppliers or contractors, the documents for prequalification that include the data defined in paragraph 3, above, plus:[6]

1) instructions for preparing motions for prequalification,

2) description of criteria and evaluation methods to satisfy the conditions required of suppliers and contractors,

3) information about documents which must be submitted by suppliers and contractors to confirm that they satisfied the required conditions,

4) names, positions and means for communicating with the employees of the procuring entity that are authorized to communicate directly with suppliers and contractors.

5. The procuring entity shall qualify suppliers and contractors for further participation in a proceeding only on the basis of the conditions defined in the prequalification documents.

6. Under a prequalification proceeding, only the suppliers and contractors that were prequalified are admitted to further participation in the public procurement.

7. The procuring entity shall notify immediately every supplier or contractor about the results of the prequalification. The list of suppliers or contractors admitted to further proceedings shall be public.

ART. 24

1. Criteria to evaluate satisfying the conditions required of suppliers and contractors can not be changed in the course of a particular proceeding. This rule also applies to cases when the procuring entity conducts prequalification procedures.

2. Suppliers or contractors are obligated to prove that they satisfied the required conditions within the time period and deadlines determined by the procuring entity.

3. In proceedings without prequalification, an offeror shall not be excluded from the proceeding if the offeror commits to present the requisite documents.

4. The procuring entity must exclude a supplier or contractor from the procurement proceeding if the procuring entity determines that any information material to the procurement process that was submitted by the supplier or contractor is false.

---

[6] Paragraph 4 of Article 23 was amended by the Law dated July 6, 1995. This paragraph formerly read: "The procuring entity shall dispatch immediately, but not later than 14 days before the deadline for submitting tenders, to all interested suppliers or contractors the documents for prequalification that include the data defined in paragraph 3, above, plus:"

Art. 25

1. During a public procurement proceeding, the procuring entity shall prepare an official record (protokól) of the procurement proceedings that shall contain the following:

1) a description of the subject matter of the procurement,

2) the name of the person or the name of the firm, and the addresses of the suppliers and contractors competing for the procurement contract,

3) the information about satisfying the conditions required of suppliers and contractors competing for the procurement contract,

4) the price and other essential terms of each offer, tender or proposal (oferta),

5) a summary of the evaluation and comparison of all submitted offers, tenders or proposals (oferta),

6) if all offers, tenders or proposals (oferta) are rejected, the justification for rejecting the offers, tenders or proposals (oferta),

7) if the parties failed to sign a contract after concluding the proceeding, other than a unlimited tendering proceeding, a statement indicating the reasons the agreement failed,

8) if tendering was limited to certain suppliers and contractors, the reasons for this limiting,

9) the reasons the procurement entity used a procurement procedure other than unlimited tendering,

10) the reasons for conducting prequalification of suppliers and contractors,

11) the justification for using national preferences,

12) the information about protests and appeals filed and how they were resolved,

13) the information concerning a suspension of the proceedings,

14) the information on hiring experts (biegły),

15) the identification of the selected offer and the justification for selection.

2. With the exception of Art. 27, subparagraph 1, the official record is public, but the parts of the official record defined in paragraph 1, subparagraphs 3 to 7 and subparagraph 14 may be disclosed only to suppliers or contractors who competed for the procurement contract and only after selecting the offer or after finishing the proceeding if an offer was not selected.

3. The Chairman of the Office may, by special order, establish:

1) the model of the official record of the public procurement proceeding,

2) additional requirements of the official record for the public procurement proceedings.

4. The Council of Ministers shall, by ordinance, define the scope and procedures for the procuring entities to submit information about procurement plans, signed contracts and performance of procurement contracts to the Office.

Art. 26

1. In the public procurement proceedings referenced in Art. 15, paragraph 1, the procuring entity is obligated to document the basic activities related to the proceeding, including the information defined in Art. 25, paragraph 1, subparagraph 1, 2, 4, 5, 9 and 15.

2. After the proceeding is completed, the documents of the basic activities referenced in paragraph 1, above, shall be open to suppliers and contractors who competed in the procurement.

Art. 27

The procurement entity shall not disclose:

1) information, if its disclosure would be contrary to important state interest, the important commercial interest of the parties, or to the principles of fair competition,

2) information connected with the process of examining, evaluating, or comparing submitted offers, tenders or proposals (oferta), except information in the official record.

CHAPTER 4. UNLIMITED TENDERING AND LIMITED TENDERING

Art. 28

1. Tendering is organized by the procuring entity to select the best offer for performing public procurements.

2. In unlimited tendering, tenders (oferta) may be submitted by all suppliers and contractors who want to participate, with the exception of Art. 23.

3. In limited tendering, tenders (oferta) may be submitted only by those suppliers and contractors invited by the procuring entity.

Art. 29

1. A procuring entity shall invite participation in an unlimited tendering by posting the announcement in a public place at its site and by publishing, through the Chairman of the Office, an announcement in the Bulletin of Public Procurement.

2. The Chairman of the Office shall refuse to publish an announcement in the Bulletin of Public Procurement if such announcement doesn't satisfy the requirements of this Law.

3. The procuring entity may announce the unlimited tendering in a news publication. However, this announcement shall not be dispatched to the media before publication in the Bulletin of Public Procurement.

Art. 30

1. The announcement of an unlimited tendering shall contain at minimum:

1) the name and the address of the procuring entity,

2) the quantity, amount and category of deliveries to be procured, or services to be supplied, or the category, range and location of construction,

3) the desired or required time period and deadline for performing the public procurement,

4) the information about conditions required of suppliers or contractors,

5) a statement of the applicability of national preferences,

6) the instructions for obtaining the documents specifying the essential provisions of the procurement and the price, if any, for these documents,

7) the place, the time period and the deadline for the submission of tenders (oferta),

8) the place and the deadline for opening tenders (oferta).

2. The Chairman of the Office may, by special order, determine:

1) the model of announcements for organizing the tendering,

2) additional information to be included in announcements.

Art. 31

1. Procuring entities shall be obligated to dispatch for publication in the Official Journal of the European Community, the announcement of a public procurement proceeding for:

1) a construction procurement with an estimated value (without VAT tax) no less in conversion than 5,000,000 ECU,

2) a procurement issued by a public utility with an estimated value (without VAT tax) no less in conversion than 400,000 ECU,

3) other procurements than defined in subparagraphs 1 and 2 with an estimated value (without VAT tax) no less in conversion than 200,000 ECU.

2. In public procurement proceedings described in paragraph 1, the procuring entity shall be obligated to dispatch for publication:

1) the announcement referenced in Art. 30,

2) the announcement of award referenced in Art. 50, paragraph 2.

3. The announcements referred to in paragraph 1 shall be transferred through the Chairman of the Office of Public Procurement.

4. In especially justified cases, the Chairman of the Office may waive the requirements referenced in paragraph 1 for the procuring entity.

Art. 32

The procuring entity may organize a limited tendering when:

1) the specialized character of the procurement limits the number of suppliers or contractors who can perform the particular procurement,

2) the costs of an unlimited tendering are substantially out of proportion as compared to the value of the procurement.

Art. 33

1. In the circumstances described in Art. 32, subparagraph 1, the procuring entity shall issue an invitation to submit interest in the tendering to all known suppliers and contractors.

2. In the circumstances in Art. 32, subparagraph 2, the procuring entity shall issue an invitation to submit interest in the tendering to a sufficient number, but not less than four, of suppliers or contractors to ensure the selection of the best offer, to ensure competition and to ensure efficiency of the public procurement proceeding.

3. An invitation to submit interest in participating in a tendering should contain at least information determined in Art. 30, paragraph 1, subparagraphs 1 through 5.

4. The time period allowed by the procuring entity for submitting interest in participating in a tendering cannot be shorter than 3 (three) weeks from the date of sending the invitation.

5. If the value of the procurement is higher than the amount referenced in Art. 15, paragraph 2, the invitation to submit interest in the tendering shall be announced in the Bulletin of Public Procurement not later than two weeks before the deadline established in paragraph 4.

6. After termination of the time period allowed for submission of interest in the tendering, the procuring entity shall invite a sufficient number, including all the suppliers and contractors who submitted interest in participating in the tendering proceeding, but not less than four, to ensure selection of the best offer, to ensure competition, and to ensure an efficient public procurement proceeding.

7. The Chairman of the Office shall define, by special order, the model of the invitation for submitting tenders.

Art. 34

1. The procuring entity shall send the formal documents specifying the essential provisions of the procurement to the suppliers or contractors not later than within one week after the request for sending the formal documents was submitted.

2. In a limited tendering proceeding, the formal documents containing the specifications shall accompany the invitation to participate in the tendering.

3. If prequalification proceedings were conducted, documents containing the specifications shall be sent to every selected supplier or contractor.

4. The price that the procuring entity may charge for the documents specifying the essential provisions of the procurement shall cover only the cost of printing and sending the documents.

Art. 35

1. The specifications of the essential provisions of the procurement should contain:

1) the instructions for preparing tenders (oferta);

2) the criteria and the evaluating methods to satisfy the conditions required of suppliers and contractors;

3) the information about the documents required from suppliers and contractors to demonstrate the required qualifications;

4) the description of the subject matter of the procurement (including, if necessary, plans, drawings, and designs), as well as a list of all additional services to be provided under the contract;

5) the desired or required deadline for performing the contract;

6) the description of all the criteria, other than price, which the procuring entity will use in selecting the successful tender (oferta), including the weight of this criteria;

7) all provisions essential for the procuring entity that will be embodied in the written contract;

8) if tenders (oferta) for only a portion of the procurement are permitted, a description of the respective portions for which tenders (oferta) may be submitted;

9) a description of how to calculate the price of the tender;

10) in international tendering, the information concerning the currencies which the procuring entity and the supplier or contractor shall use to settle accounts;

11) all requirements, especially the quotation of the amount, for the tender security (wadium) and for the security (zabezpieczenie) for the full performance of the contract;

12) a definite description of the place, the time period and the deadline for the submission of tenders (oferta);

13) a description of the procedures for providing clarifications of the specifications of the essential provisions of the procurement and a statement as to whether the procuring entity intends to convene a meeting of suppliers or contractors;

14) the deadline for which a supplier or contractor shall be bound by the submitted tender (oferta);

15) a definite description of the place and the time for opening tenders (oferta);

16) the procedure for opening and examining tenders (oferta);

17) the names and the positions of the employees of the procuring entity who are authorized to communicate directly with the suppliers and contractors and the procedures for conducting communication;

18) all future duties that the supplier or contractor commits to in the pubic procurement contract;

19) instructions about the protest and appeal rights of suppliers and contractors in the course of procurement proceedings;

20) the information concerning all formalities that should be satisfied before signing the contract once the tender (oferta) has been accepted;

21) the general conditions of the contract and model contract if the procuring entity requires an offeror to sign a contract that applies any of these provisions.

2. For construction procurements, the procuring entity must possess documentation describing the subject matter of the tendering and the cost estimates.

3. The Minister for Physical Planning and Construction shall, by ordinance, define the methods and basis for preparing cost estimates.

4. The Chairman of the Office may, by special order, determine the model of the documents for specifying the essential provisions of the procurement and additional information which shall be included in these documents for particular categories of procurements.

Art. 36

1. A supplier or contractor may request a clarification of the specification of the essential provisions of the procurement from the procuring entity. The procuring entity shall promptly respond to any such request.

2. At the same time, the procuring entity shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the essential provisions of the procurement.

3. In especially justified circumstances, the procuring entity may modify the contents of the documents specifying the essential provisions of the procurement by issuing an addendum at any time prior to the deadline for submission of tenders (oferta). The addendum shall be communicated promptly to all suppliers or contractors and shall be binding on those suppliers or contractors.

4. If the procuring entity convenes a meeting of suppliers or contractors to clarify any doubts concerning the specification of the essential provisions of the procurement, it shall prepare an official record of the clarification requests submitted at the meeting and its responses to those requests, without identifying the sources of the requests. The official record shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the specifications.

Art. 37

1. All offers, tenders and proposals (oferta) shall be prepared in the Polish language.

2. In especially justified circumstances, the Chairman of the Office may agree to the preparation of the tender in a language commonly used in international trade.

Art. 38

1. A tender (oferta) submitted after the deadline has passed shall be returned without opening.

2. The deadline set by the procuring entity for submission of tenders (oferta) shall not be shorter than:

1) in unlimited tendering:

- 6 weeks after announcing the tendering;

2) in limited tendering:

- 4 weeks after the date of sending the invitation for tenders (oferta).

3. In justified cases and on motion of the procuring entity, the Chairman of the Office may agree to establish shorter deadlines than those indicated in paragraph. 2.

Art. 39

1. The procuring entity shall extend the deadline in order to allow the suppliers and contractors to consider the clarifications or modifications of the specification of essential provisions of the procurement in their prepared tenders (oferta).

2. If a supplier or contractor is not able to submit a tender (oferta) in the assigned time due to circumstances beyond its control, a procuring entity may extend the deadline for submitting tenders (oferta) upon motion of the supplier or contractor.

3. The extension of the deadline for submission of tenders (oferta) is permitted only before the original deadline has passed.

4. The procuring entity shall give prompt notice of any extension of the deadline to each supplier or contractor to which the procuring entity provided the specification of the essential provisions of the procurement.[7]

Art. 40

1. The entity submitting a tender (oferta) shall remain bound by the tender (oferta) during the time specified in the specification of the essential provisions of the procurement, no longer, however, than 90 days. This period of time shall commence at the deadline for the submission of tenders (oferta).

---

[7] Paragraph 4 of Article 39 was amended by the Law dated July 6, 1995. This paragraph formerly read: "Notice of any extension of the deadline shall be given promptly to each suppplier or contractor to which the procuring entity provided the specification of the essential provisions of the procurement."

2. Prior to the expiry of the period that the submitted tenders (oferta) are binding, the procuring entity may request suppliers or contractors to extended the period for an additional specified period of time.

3. Refusing to accept the request of the procuring entity shall not forfeit the tender security (wadium).

4. Suppliers or contractors that agree to an extension of the period that their submitted tenders (oferta) are binding shall be required to extend the period of effectiveness of tender security (wadium) it provided, or if this is not possible, to provide a new tender security (wadium) to cover the extended period that the tender (oferta) is binding.

5. A modification or withdraw of a tender (oferta) by a supplier or contractor prior to the deadline for submission of tenders (oferta) shall be effective.

Art. 41

1. A supplier or contractor submitting tenders (oferta) is obligated to provide a tender security (wadium) within the range of 1 - 5% of the value of the subject matter of procurement in accordance with the value determined for the procurement and the principles specified in the specification of the essential provisions of the procurement.

2. The tender security (wadium) may be provided in cash, state securities, guarantees made by credit institutions, and with permission of the procuring entity, in stocks accepted for public dealings, in deposit certificates payable to the bearer, or in bills of exchange (weksel).

3. In cases where the cost of organizing the tendering are not significant, the Chairman of the Office, upon the motion of the procuring entity, may agree to renounce the duty to submit a tender security (wadium) by suppliers or contractors entering the tendering.

Art. 42

1. The procuring entity shall return tender security (wadium) upon:

1) the passing of the deadline set forth in Art. 40, paragraph 1,

2) the execution of the contract and the submission of the required security for the full performance of the contract,

3) the termination of the tendering proceedings without selecting an offeror,

4) the revocation of the tender (oferta) prior to the deadline for the submission of tenders (oferta).

2. The offeror whose offer was selected shall forfeit its tender security (wadium) to the procuring entity only if:

1) the offeror refuses to sign the agreement under the conditions defined in its tender,

2) the offeror refuses to provide the required security for full performance of the contract.

Art. 43

1. The tenders (oferta) shall be opened at the place and the time specified in the announcement of the tendering.

2. The offerors may be present at the opening of the tenders (oferta).

3. The name and address of each offeror whose tender (oferta) is opened, as well as the price of each tender (oferta) shall be announced immediately to those persons present at the opening of the tenders (oferta) and recorded immediately in the official record of the tendering proceeding.

4. The information referred to in paragraph 3 shall be communicated upon request to the offerors who have not been present at the opening of tenders (oferta).

Art. 44

1. During the course of evaluating the submitted tenders (oferta), the procuring entity may require a supplier or a contractor to clarify its tender (oferta).

2. No changes in the content of the tender (oferta), especially the change of price and no negotiations between the procuring entity and the offeror concerning the submitted tender (oferta) shall be permitted.

3. The procuring entity shall correct obvious errors on the face of a tender (oferta) and immediately inform the offeror about the correction.

Art. 45

A tender (oferta) shall be rejected if:

1) the tender (oferta) does not satisfy the principles set forth in this Law and the requirements set forth in the specification of essential provisions of the procurement,

2) the offeror does not agree to the correction of obvious errors in the content of its tender (oferta).

Art. 46

1. The tender shall be canceled in the cases, when:

1) less than two valid offers (oferta) are submitted,

2) all offers are rejected,

3) the price of the most advantageous offer is higher than the amount allocated by the procuring entity for the given procurement,

4) the execution of the procurement is no longer in the public interest because of a serious change of circumstances which could not have been reasonably foreseen.

2. In the notification of cancellation of the tender, the procuring entity shall state the reasons for such cancellation without having to justify them in detail.

3. The procuring entity shall send, promptly, the notification mentioned in paragraph 2 to all offerors.[1/8]

Art. 47

The offerors shall have no claims against the procuring entity for its rejection of tenders (oferta).

Art. 48

Only the principles and criteria set forth in this Law and in the specification of the essential provisions of the procurement shall apply in the selection of a tender (oferta).

Art. 49

Having considered the national preferences, if such preferences apply, the best offer shall be selected.

Art. 50

1. The procuring entity shall give prompt notice of the selection identifying the name and the seat (siedziba) of the successful offeror and the price of its tender (oferta).[1/9]

2. The announcement with the information referenced in paragraph 1 shall be posted promptly in a public place at the site (siedziba) of the procuring entity.

---

[8] Article 46 was amended by the Law dated July 6, 1995. This Article formerly read: "1. In the event that there are less than two valid tenders (oferta) submitted or all offers are rejected, the tendering is declared canceled, and all participants shall be informed immediately of this fact. 2. Notice of declared cancelation of the tendering shall provide the reasons for the declaration of cancelation, but the procuring entity shall not be obligated to provide detailed justification."

[9] Paragraph 1 of Article 50 was amended by the Law dated July 6, 1995. This paragraph formerly read: "The other offerors shall be promptly notified of the selection identifying the name and the seat of the successful offeror and the price of its tender."

3. If the announcement of tendering was published in the Bulletin of Public Procurements, the announcement referenced in paragraph 2 shall be announced in this Bulletin.

4. The Chairman of the Office, by special order, shall define:

a) the form for the announcement of the selection of the offer,

b) additional information that must be contained in this announcement.[10]

Art. 51

1. If the procuring entity selects a tender (oferta) pursuant to the provisions of this normative act, it is obligated to sign a contract within a time period not less than seven days from the day of the announcement referenced in Art. 50, paragraph 2.

2. Notice of acceptance of a tender (oferta) defining the deadline for executing the contract, shall be delivered promptly to the selected offeror.

Art. 52

If the offeror whose tender (oferta) has been selected avoids signing a contract, or fails to provide requisite security for full performance of the procurement contract, the selection of tenders (oferta) shall be conducted again among the already submitted tenders (oferta), unless all other tenders (oferta) were rejected or the time period referenced in Art. 40, paragraph 1 has passed.

CHAPTER 5. TWO-STAGE TENDERING

Art. 53

In a two-stage tendering, the suppliers or contractors submit initial offers in the first stage without specifying the price. The procuring entity may request suppliers or contractors to define the parameters of the subject matter of the procurement. The second stage is a limited tendering for selected offerors and may be preceded by negotiations between the procuring entity and offerors.

Art. 54

Two-stage tendering shall be used when one of the following circumstances occurs:

1) it is not possible to determine in advance the specific technical characteristics and quality features of the deliveries, services or construction being ordered,

[10] Paragraph 4 was added to Article 50 by the Law dated July 6, 1995.

2) negotiations with suppliers or contractors are necessary because of the special nature of the deliveries, services or construction,

3) the subject matter of the procurement is research, experiment, preparation of a scientific opinion, or performance of other specialized services.

Art. 55

The provisions regarding unlimited tendering shall apply to two-stage tendering, unless the provisions of this Chapter state otherwise.

Art. 56

1. The announcement about the organization of a two-stage tendering shall contain at the minimum:

1) the name and the address of the procuring entity,

2) a description of the subject matter of the procurement, including technical and other parameters, and in the case of construction procurements, the location and the type of construction,

3) the description of the criteria that the procuring entity will apply in selecting the offer and the importance of this criteria,

4) the time period, the deadline and the place to submit the initial offers.

2. In the specification of the essential provisions of procurement, the procuring entity may request suppliers or contractors to define the method and the time of performance, the technical parameters, the quality and other characteristic features of deliveries, services or construction.

3. The Chairman of the Office may, by special order, determine additional information that should be included in an announcement of a two-stage tendering.

Art. 57

1. The deadline for submitting initial offers cannot be shorter than six weeks after publication of the announcement about a two-stage tendering.[11]

2. In justified cases and on motion of the procuring entity, the Chairman of the Office may agree to a shorter deadline than the one indicated in paragraph 1.[12]

Art. 58

[11] This Paragraph was designated paragraph 1 by the Law dated July 6, 1995.
[12] Paragraph 2 was added to Article 57 by the Law dated July 6, 1995.

325

The procuring entity may negotiate with each supplier or contractor the content of a submitted offer, keeping confidential the content of conducted negotiations.

Art. 59

After submission of initial offers, the procuring entity may modify the technical and quality requirements set forth in the specification of the essential provisions of the procurement, as well as modify the criteria for evaluating the offers.[13]

Art. 60

In the invitation to submit final offers, the procuring entity shall inform suppliers or contractors about any modifications made in the specification of the essential provisions of the procurement.

Art. 61

For the second stage of tendering, the procuring entity selects suppliers or contractors whose tenders (oferta) satisfy the requirements of the initial specification, inviting them to submit their final offers, with price. The place, the time period and the deadline for submission of final offers shall be specified in the invitation.

Art. 62

Suppliers and contractors shall provide tender security (wadium) when entering the second stage of the tendering.[14]

CHAPTER 6. OTHER PUBLIC PROCUREMENT PROCEEDINGS

Art. 63

Negotiations-with-retaining-competition is a public procurement procedure in which the procuring entity negotiates the provisions of a procurement contract with a sufficient number of suppliers or contractors to ensure competition, but not less than three.

Art. 64

---

[13] Article 59 was amended by the Law dated July 6, 1995. This Article formerly read: "After submission of initial offers, the procuring entity may modify the technical and quality requirements set forth in the specification of the essential provisions of the procurement, as well as modify the criteria for evaluating the submitted offers."

[14] Article 62 was amended by the Law dated July 6, 1995. This Article formerly read: " A supplier or contractor that is not going to submit a final offer may withdraw from the tendering without forfeiting its tender security (wadium)."

1. Negotiations-with-retaining-competition may be used when one of the following circumstances occurs:

1) the conditions set forth in Art. 54 are satisfied,

2) when there is an urgent need for the procurement and the urgency was not the fault of the procuring entity and could not have been foreseen,

3) when the required number of valid tenders are not submitted in a proceeding or all tenders are rejected and there are grounds to assume that subsequent tendering will not lead to the signing of a contract.

Art. 65

1. In negotiations-with-retaining-competition, negotiations may be preceded by sending invitations to submit initial offers to a sufficient number of suppliers or contractors.

2. The invitation to submit initial offers shall contain at least the data defined in Art. 56, paragraph 1.

Art. 66

1. All requirements, clarifications and information, as well as documents associated with the negotiations, shall be provided to suppliers or contractors equally.

2. The conducted negotiations shall be confidential. Neither party may, without the consent of the other party, disclose technical and trade information concerning the negotiations.

3. After all negotiations are completed, the procuring entity requests all participants to submit their final offer, including price, and selects the best offer.

4. The provisions of Art. 47-51 apply to negotiations-with-retaining-competition, as relevant.

Art. 67

Request-for-quotations is a public procurement procedure in which the procuring entity addresses a request for quotations for readily available goods or services to such a number, but not less than four, of suppliers or contractors to ensure selection of the best offer and to ensure competition and an efficient proceeding.

Art. 68

Request-for-quotations may be used when a procurement is for deliveries of readily available goods or for services with established quality standards.

Art. 69

1. Each of the suppliers or contractors may propose only one price and can not change it. No negotiation of price shall be conducted.

2. The procuring entity signs a public procurement contract with the supplier or contractor that submitted the lowest price.

Art. 70

Single-source procurement is a public procurement procedure in which the procuring entity signs a procurement contract after negotiating with one supplier or contractor only.

Art. 71

The procuring entity may issue an order for a procurement by a single-source procedure only when one of the following circumstances occurs:

1) it undertakes some additional orders, not exceeding 15% of the value of the previous procurement, and it is necessary to retain the same norms, parameters and standards,

2) it signs a contract for research, experiment, or preparation of a scientific opinion,

3) the specific type of deliveries, services or construction are available only from a particular supplier or contractor,

4) it conducts a public procurement for creative project works or for creative activity in the area of arts and culture,

5) only one supplier or contractor can be used because a legally permitted national preference is applied,

6) particular economic or social (społeczne) circumstances that could not have been foreseen by the procuring entity necessitates the immediate performance of the procurement.

7) the value of the procurement does not exceed the equivalent of 1000 ECU or the share of public funds in the financing of the procurement does not exceed the equivalent of 1000 ECU.[15]

2. The Council of Ministers shall define by ordinance the scope of project works and the procedures for conducting competition for works, as described in paragraph 1, subparagraph 4.

CHAPTER 7. PUBLIC PROCUREMENT CONTRACTS

[15] Subparagraph 7 was added to Article 71, paragraph 1 by the Law dated July 6, 1995.

Art. 72

The provisions of the Civil Code and Civil Procedure Code shall be applied to public procurement contracts, when this Law does not state otherwise.

Art. 73

Public procurement contracts are enforceable at the moment of signing by both parties.

Art. 74

Public procurement contracts shall be in written form under pain of invalidity, but not when special provisions of law require another special form.[16]

2. The provisions of paragraph 1 of this Article shall not apply to the single-source procurements under the circumstances defined in Article 71, paragraph 1, subparagraph 7.[17]

Art. 75

1. The procurement entity may request from a supplier or contractor a security for full performance of the contract.

2. The security referenced in paragraph 1 may be provided in cash, state securities, guarantees made by state institutions, bank guarantees, the liens of public papers (papiery wartosciowe), that State Treasury emits or guarantees, and with permission of the procuring entity, in stocks accepted for dealings, in deposit certificates payable to the bearer, or in bills of exchange (weksel) and guarantees made by physical persons or legal persons. The security cannot be higher than a double value of fines reserved upon the contract or than a value more than 80% of the value of the procurement.

3. The Minister for Physical Planning and Construction shall, by ordinance, establish the threshold value of construction for which the security for full performance of the contract is necessary and shall determine the form of the security.

Art. 76

1. It shall be prohibited to change any element of a signed contract and to introduce new elements into a signed contract, when the modification would change the content of the offer that was the basis for selecting the offeror and would increase the cost for the procuring entity, unless the necessity of introducing a change based on this circumstance could not have been foreseen at the moment of signing the contract.

2. A change done in violation of paragraph 1 is invalid.

---

[16] This Paragraph was designated paragraph 1 by the Law dated July 6, 1995.
[17] Paragraph 2 was added to Article 71 by the Law dated July 6, 1995.

3. The Chairman of the Office may motion (wystąpić) to a court to state (stwierdzenie należności) the invalidity of a modification, referenced in paragraph 1.

Art. 77

If an essential change of circumstances arises that was impossible to foresee at the time of signing the contract and makes the performance of the contract contrary to the public interest, the procuring entity may terminate the contact within one month from the date of learning about the circumstances. When a contract is terminated in these circumstances, the supplier or contractor is entitled to require only payment for the partial performance of the contract.

Art. 78

1. If a controversy connected with the performance of a public procurement contract arises, the supplier or contractor is obligated to exhaust the grievance procedure by addressing its claims to the procuring entity.

2. The procuring entity is obligated to consider claims of a supplier or contractor and respond in writing within 21 days from the date the claim was filed.

3. If the procuring entity rejects the claim or doesn't reply within the prescribed time period referenced in paragraph 2, the supplier or contractor may turn to the courts.

CHAPTER 8. PROTESTS AND APPEALS

Art. 79

1. Suppliers and contractors, whose legal interests have been infringed by a violation of the principles of public procurement described in this Law by the procuring entity, are entitled to review of its complaints according to the procedures described in this Chapter.

2. The following shall not be subject of review proceedings:

1) the selection of a procedure for a public procurement proceeding,

2) the application of a national preference,

3) the rejection of all tenders (oferta).

Art. 80

Against the activities undertaken during the course of a public procurement proceeding, the supplier or contractor may submit a written protest with reasons to the procuring entity.

Art. 81

1. In the event that a protest is filed, the procuring is prohibited from signing the public procurement contract until the protest is finally resolved.

2. In the circumstances referenced in Art. 64, paragraph 1, subparagraph 2, the Chairman of the Office may permit the signing of the contract before final resolution of protest.

Art. 82

1. A protest may be filed within seven days from the day when the supplier or contractor has learned or could have learned of the circumstances giving ground for its filing.

2. Filing of the protest is admissible only before the signing of the public procurement contract.

3. The procuring entity shall reject a protest filed after that date.

Art. 83

1. The procuring entity shall promptly inform the suppliers and contractors participating in the particular proceeding about the filing of a protest.

2. The suppliers and contractors participating in the public procurement proceeding who join the protest proceeding within three days from the time of receiving the notice referenced in paragraph 1 also shall be deemed participants of the protest proceeding.

3. A supplier or contractor who did not join the protest proceeding can not thereafter file a protest citing the same circumstances.

Art. 84

1. The procuring entity shall review the protest within seven days from the date of filing.

2. In the decision justifying resolution of the protest, the procuring entity shall list the reasons for the decision, and shall provide instructions about how to file an appeal and the time period for filing.

3. In cases where the protest is upheld, the procuring entity shall redo the protested activity.

4. Failing to review the protest within the assigned time period shall be deemed a dismissal of the protest.

Art. 85

1. After filing the protest, the procuring entity shall suspend the procurement proceeding until the time the protest is reviewed but no longer than seven days, unless:

1) the protest is obviously unjustified,

2) the procuring entity or other supplier or contractor might sustain disproportionately greater damage in relation to that which threatens the person filing the protest,

3) the suspension of the proceeding is against an important public interest.

2. A decision suspending the procurement proceeding can not be appealed.

Art. 86

1. Upon resolution or rejection of the protest, or in case of failure to resolve the protest in due time, the interested supplier or contractor may file an appeal.[18]

2. An appeal may be filed with the Chairman of the Office, with simultaneous notice to the procuring entity, within three days from the day of delivering the decision resolving the protest or within seven days from the deadline for reviewing the protest.[19]

Art. 87

The laws of the conciliatory courts established in the Civil Procedure Code shall be applied to appeal proceedings if this Law does not state otherwise.

Art. 88

The appeals shall be reviewed by a panel of three arbiters selected from the list of arbiters maintained by the Chairman of the Office. One of the arbiters shall be selected by the supplier or contractor who has filed the appeal, one shall be selected by the procuring entity, and one by the Chairman of the Office.

Art. 89

1. Simultaneously with filing the appeal, the supplier or contractor shall select an arbiter.

2. After the appeal has been filed, the Chairman of the Office shall promptly request the procuring entity to select its arbiter within three days of the date of receiving his request.

---

[18] Paragraph 1 of Article 86 was amended by the Law dated July 6, 1995. This paragraph formerly read: "upon resolution of the protest, or in case of failure to resolve the protest in due time, the interested supplier or contractor may file an appeal."

[19] Paragraph 2 of Article 86 was amended by the Law dated July 6, 1995. This paragraph formerly read: "An appeal may be filed with the Chairman of the Office within three days from the day of delivering the decision resolving the protest or within seven days from the deadline for reviewing the protest."

3. If the participants of the appeal proceeding fail to select an arbiter within the prescribed time, the arbiter shall be selected by the Chairman.

4. Among the selected arbiters, the Chairman shall appoint the chairman of the panel of arbiters.

5. A decision to exclude an arbiter from an appeal proceeding shall be resolved by the Chairman of the Office.[20]

Art. 90

1. The panel of arbiters shall review the appeal within 14 days from the day the appeal was filed.

2. When reviewing appeals, the panel of arbiters shall uphold or reject the appeal and shall assess the cost of the appeal proceeding.

3. When upholding the appeal, the panel of arbiters can:

1) order the procuring entity to do or redo an action, or declare an action invalid except the action of signing the public procurement contract,

2) cancel the public procurement proceeding.

Art. 91

The participants of the proceeding shall cover the costs of the proceeding according to the outcome of the proceeding.

Art. 92

1. The Chairman of the Office shall, by special order, determine:

1) the procedure of appeal proceedings,

2) the conditions for entry on and dismissal from the list of arbiters,

3) the fee for arbiters.[21]

2. The Chairman of the Office shall enter on the list of arbiters persons selected among candidates submitted by:

1) Chairman of the Office,

2) ministers, managers of central offices and voivods,

[20] Paragraph 5 was added to Article 89 by the Law dated July 6, 1995.
[21] Subparagraph 3 was added to Article 92, paragraph 1 by the Law dated July 6, 1995.

3) state-wide territorial self-government organizations and regional account chambers,

4) professional associations, economical self-governments and other economical self-governmental organizations.

CHAPTER 9. TEMPORARY AND FINAL PROVISIONS, AND CHANGES IN EXISTING PROVISIONS

Art. 93

In the law of October 7, 1992, on regional account chambers (Dz.U. No. 85, item 428) the following changes are made:

1) Art. 1 par 1 shall read:

"1. Regional account chambers, hereinafter referred to as "chambers" are hereby called for the purpose of controlling the finances and public procurements (in a range determined by special order of the Chairman of the Office of Public Procurement) of the self-governments, unions of self-governments, other communal legal persons and local self-governmental legislatures",

2) in Art. 13:

a) in par. 4 after the words: "... for the first half of a year" the following words shall be added: "and about conducted public procurements",

b) in par. 5 after the words: "... assigned to the self-governments", the following words shall be added: "and information about performing public procurements",

3) Art. 21 par. 2 shall read:

"2. Regarding the negative opinions issued in matters described in Art. 13 subparagraphs 4 and 5, the chamber shall inform the proper voivod as well as the Minister of Finance and the Chairman of the Office of Public Procurement".

Art. 94

In the law of January 5, 1991 - Budget Law (Dz.U. 1993, No. 72, Item 344) the following changes are made:

1) in art. 42:

a) par. 1 pt. 5 is deleted,

b) par. 3 is deleted,

2) Art. 57 pt. 14 shall read:

"14) to contravene the rules, forms and procedures for conducting public procurements determined by the Law of June 10, 1994 on Public Procurement. (Dz.U. No. 76. Item 344 and No. 130, Item 645)

Art. 95

The previous provisions shall apply to public procurement proceedings that commence before the day of entry into force of this Law.[1]

Art. 96

From January 1 to December 31, 1995, the ruling body of the territorial self-government entities may state that the public procurements funded from own funds are conducted according to the provisions of this Law. This statement can not be revoked.

Art. 97

1. This normative act becomes effective on January 1, 1995, except that:

1) the provisions of Art. 7-12, and Art. 92 become effective upon the date of promulgation,

2) the provision of Art. 4, paragraph 1, subparagraph 3 in the part referring to public procurements funded by own funds and the provisions of Art. 31 become effective on January 1.

---

[22] This paragraph was revised by the Law dated July 6, 1995. This paragraph formerly read: " Regarding public procurements commenced before this Law entered into force, the previous legal provisions and principles shall be applied."

The July 6, 1995 amendment to the Law of June 10, 1994 on Public Procurement was published on . Article 2 of this amendment provides that : " All matters not commenced and not completed by the day of entry into force of this Law (the amendment) shall be governed by the provisions of the Law of June 10, 1994 on Public Procurement in its present wording." Article 3 of the amendment provides that: "This Law (the amendment) enters into force after 14 days from its announcement."

Appendix K
BRAZIL'S GOVERNMENT PROCUREMENT LAW

Brazil

Appendix 1C

Law No. 8666 OF June 21, 1993

Regulates article 37, XXI of the Federal Constitution, institutes rules for biddings and agreements with the Public Administration, and makes other provisions.

THE PRESIDENT OF THE REPUBLIC

I hereby make known that Congress decrees and I sanction the following law:

CHAPTER I. GENERAL PROVISIONS

SECTION I. PRINCIPLES

Article 1.—This law establishes general rules on biddings and administrative agreements for works, services (including advertising), purchases, disposals and leases within the sphere of authority of the federal government, states, the Federal District and municipalities.

Sole Paragraph—In addition to the direct administrative bodies, all special funds, autonomous government entities, public foundations, state-owned companies, mixed-capital companies and other entities directly or indirectly controlled by the federal government, states, the Federal District and municipalities are subject to the ruling of this law.

Article 2.—The works, services—including advertising—purchases, sales, disposals, concessions, permissions and leases involving the Public Administration and third parties shall necessarily be preceded by bidding, with the exception of the events provided for herein.

Sole Paragraph—For the purposes of this law an agreement shall mean any and all contracts between the Public Administration and private entities in which there is a binding arrangement stipulating reciprocal obligations, regardless of the name given thereto.

Article 3.—The bidding is designed to guarantee observance of the constitutional principle of isonomy and to select the bid that is most advantageous for the Administration, and shall be processed and judged strictly in accordance with the basic principles of legality, impersonality, morality, equality, publicity, administrative probity, abidance by the announcement to bid, objective judgment, and other related items.

Paragraph 1.—Public agents are prohibited:

I.—to permit, provide for, include or forebear, in announcements to bid, any clauses or conditions that commit, restrict or thwart the competitive character thereof and establish preferences or distinctions in light of the native land,

BEST AVAILABLE COPY

headquarters or domicile of the bidders, or any other circumstance that is impertinent or irrelevant to the specific subject matter of the agreement;

II.—to establish differentiated treatment of a commercial, legal, labor, social security or any other nature between Brazilian and foreign companies, including as regards currency, type and place of payments, even when involving financings from international agencies, with due regard for the provisions of the following paragraph and what is established in Law No. 8248, article 3 of October 23, 1991.

Paragraph 2.—In order to break a tie between bids under equal conditions, the preference criteria below will be successively ensured to goods and services:

I.—produced or rendered by Brazilian domestic-capital companies;

II.—produced in Brazil; and

III.—produced or rendered by Brazilian companies.

Paragraph 3.—The bidding shall not be confidential and, accordingly, the acts of its procedures shall be made public and accessible to the public at large with the exception of the bid contents, up to the moment such bids are opened.

Article 4.—All of the parties that participate in the bidding promoted by the bodies or entities mentioned in article 1 have the subjective public right to full compliance with the pertinent procedure established in this law, and any citizen may accompany the development thereof provided he/she does not interfere in such manner as to disturb or impede development of the works.

Sole Paragraph—The bidding procedure set forth herein characterizes a formal administrative act, regardless of the sphere of the Public Administration in which it is performed.

Article 5.—All the values, prices and costs utilized in the biddings shall be denominated in Brazilian currency, with the exception of the provisions of article 42 hereof, and each unit of the Administration when paying obligations related to the supply of goods, leases, works and services shall observe the strict chronological order of their due dates for the different sources of funds, except when there are relevant reasons of public interest and upon prior justification of the competent authority, duly published.

Paragraph 1.—The amounts of the credits mentioned in this article shall be adjusted by the criteria set forth in the announcement to bid with a view to preserving the value thereof.

Paragraph 2.—The adjustment dealt with in the previous paragraph shall be charged to the same budget as the credit to which such adjustment refers.

SECTION II. DEFINITIONS

Article 6.—For the purposes of this law the following items shall have the meanings below:

I.—Works—all construction, remodeling, manufacturing, restoration or expansion carried out by direct or indirect execution;

II.—Service—all activity destined to obtain a specific goal of interest to the Administration, namely: demolition, repair, installation, assembly, operation, upkeep, restoration, adaptation, maintenance, transportation, lease of goods, publicity, insurance or technical/professional works;

III.—Purchase—all remunerated acquisitions of goods in one or separate lots;

IV.—Disposal—all transfer of ownership of goods to third parties;

V.—Works, services and purchases on a large scale—those whose estimated

value exceeds twenty-five (25) times the limit established in article 23, item I (c) this law;

VI.—Performance Bond—a bond that guarantees full compliance with tl obligations assumed by companies in biddings and agreements;

VII.—Direct Execution—what is carried out by the bodies and entities of tl Administration through their own means;

VIII.—Indirect Execution—what the body or entity contracts with third partic and may be of the following types:

(a) global pre-fixed price works—when execution of the work or service contracted for a certain and total price;

(b) works per unit price—when execution of the work or service is contract for the certain price of specific units;

(c) (VETOED)

(d) task—when manpower is contracted for small jobs for a certain price, wi or without the supply of materials;

(e) turnkey works—when an undertaking is contracted in its entirety, inclu ing all steps of the works, services and necessary installations under tl entire responsibility of the contractor until delivery thereof to the princip in conditions to start up operations, meeting the technical and leg requirements for use thereof in structural and operational safety conc tions and with characteristics in line with the purposes for which it w contracted;

IX.—Basic Plan—the group of necessary and sufficient elements with a level precision suitable to define the works or services, or the combination of works services that are the subject matter of the bidding, elaborated based on indicatio of preliminary technical studies that ensure the technical feasibility and adequa treatment of the environmental impact of the enterprise and that permit evaluatic of the cost of the works and definition of the methods and term of execution. Tl plan should contain the following elements:

(a) development of the solution chosen so as to supply an overall view of tl works and to clearly identify all of the elements that compose it;

(b) global and localized technical solutions in sufficient detail, in order minimize the necessity of either reformulation or variations during tl elaboration phases of the working plan and implementation of the wor and assembly;

(c) identification of the types of services to be executed and the materials ar equipment to be included in the works, as well as the specifications there that ensure the best results for the undertaking without thwarting tl competitive nature for execution thereof;

(d) information that allows for the study and devising of constructic methods, temporary installations and organizational conditions for tl works without thwarting the competitive nature for execution thereo

(e) subsidies to devise the plan for the bidding and management of the work comprising scheduling, supply strategy, inspection rules and other da required for each case;

(f) a detailed budget of the global cost of the works based on quantitative da regarding services and supplies appropriately evaluated;

X.—Working Plan—the set of elements necessary and sufficient for tl

BEST AVAILABLE COPY

complete execution of the works, pursuant to the pertinent rules of the Brazilian Association of Technical Standards—ABNT;

XI.—Public Administration—direct and indirect administration of the Federal Government, the states, the Federal District and the municipalities, including entities with a private identity under the control of the public authorities and the foundations organized or maintained thereby;

XII.—Administration—body, entity or administrative unit through which the Public Administration operates and acts on a concrete basis;

XIII.—Official Press—official media of the Public Administration;

XIV.—Principal—the body or entity that signs the contractual instrument;

XV.—Contractor—the individual or legal entity that signs the agreement with the Public Administration;

XVI.—Committee—permanent or special committee created by the Administration with the purpose of receiving, examining and adjudicating all documents and procedures related to biddings and to registration of bidders.

SECTION III. WORKS AND SERVICES

Article 7.—The biddings for execution of works and for rendering of services shall comply with the provisions of this article and, specifically, with the following sequence:

I.—basic plan;

II.—working plan;

III.—execution of works and services.

Paragraph 1.—Execution of each step shall be mandatorily preceded by the conclusion of the works related to the previous steps and by the competent authority's approval thereof, with the exception of the working plan, which may be concurrently developed with execution of the works and services, provided that it has also been authorized by the Administration.

Paragraph 2.—The works and services may only be under bidding when:

I.—there is a basic plan that has been approved by the competent authority and is available for examination of the parties interested in participating in the bidding process;

II.—there is a detailed budget in spread sheets with the composition of all unit costs thereof;

III.—there is a forecast of budget funds that ensure payment of obligations resulting from works or services to be executed during the fiscal year in course, pursuant to the respective time schedule;

IV.—the outcome has been included in the objectives established in the multiyear plan under article 165 of the Federal Constitution, should it be the case.

Paragraph 3.—It is prohibited to include in the object of the bidding the obtainment of financial resources for execution thereof, whatever its origin may be, except in cases of undertakings executed and exploited under the system of concession, pursuant to specific legislation.

Paragraph 4.—It is furthermore prohibited to include in the object of the bidding the supply of materials and services without a forecast of quantities or the quantitative data of which does not correspond to the actual forecast of the basic or working plan.

Paragraph 5.—Biddings cannot include in their objects goods and services

without a market similar, or with exclusive trademarks, characteristics specifications, except for those cases in which it is technically justifiable furthermore, when the supply of such materials and services is carried out und system of contracted administration, duly established and detailed on announcement to bid.

Paragraph 6.—Infringement on the provisions of this article shall c annulment of the acts or agreements executed and liability of the party that given rise thereto.

Paragraph 7.—For the purposes of judging price bids, monetary adjustmer the payment obligations as from each payment deadline and actual payn thereof shall not be computed within the work or service price; accordingly, such monetary adjustment shall follow the criteria that are to be established ir announcement to bid.

Paragraph 8.—Any citizen may request the Public Administration to pro the quantitative data on the works and unit prices of any executed works

Paragraph 9.—The provisions of this article also apply, when suitable, to c in which bidding has been waived or is inapplicable.

Article 8.—Execution of the works and services shall always be scheduled i entirety, with forecasts of current and final costs and with due regard for execution time frames therefor.

Paragraph 1.—The works, services and supplies shall be divided into as n portions as shown technically and economically feasible, at the discretion of suitability to the Administration, and the bidding shall proceed with a vie taking the utmost advantage of the available resources on the market an fostering competition without loss of the economy of scale.

Paragraph 2.—The unjustified delay in executing a portion of the work services is prohibited if total execution thereof has been forecast in the budget, the exception of insufficient funds or evidenced technical reason justified detailed order issued by the authorities, as mentioned in article 26 of this

Paragraph 3.—In the event of phase-in execution, including in the permitted herein, each step or set of steps of the works, services or supply correspond to a distinct bidding, according to the bidding mode otherwise app to total execution of the object of the bidding.

Paragraph 4.—In any case, the corresponding expenditure shall be autho vis-à-vis the final cost of the projected works or services.

Article 9.—The following shall not participate, directly or indirectly, ir bidding or execution of works or services and in the supply of goods nece therefor:

I.—the author of the basic or working plan, whether an individual or legal e

II.—the company, individually or in a consortium, that is responsibl elaboration of the basic or working plan, or for which the author of the plan a director, manager, shareholder or owner of more than five percent (5%) voting or controlling capital, or as a technician in charge or subcontracto

III.—civil servant or director of the contracting body or entity or the responsible for the bidding.

Paragraph 1.—The author of the plan or the company mentioned in ite hereof is permitted to participate in the bidding for works or services, or i

BEST AVAILABLE COPY

execution thereof as consultant or technician, with monitoring, supervision or management duties, exclusively at the service of the interested Administration.

Paragraph 2.—The provisions of this article do not impede the bidding or contracting of works or services that include elaboration of the working plan as a charge of the contractor, or for a price previously established by the Administration.

Paragraph 3.—For the purposes of this article, indirect participation shall mean the existence of any bond of a technical, commercial, economic, financial or labor nature between the author of the plan—whether an individual or legal entity—and the bidder or party responsible for the services supplies and works, including the supply of goods and services necessary therefor.

Paragraph 4.—The provisions of the preceding paragraph apply to the members of the bidding committee.

Article 10.—The works and services may be executed in the following systems:

I.—direct execution;

II.—indirect execution consisting of the following types:

(a) global fixed-price works;

(b) unit-price works;

(c) (VETOED)

(d) task;

(e) turnkey works.

Sole Paragraph—(VETOED)

Article 11.—The works and services designed for the same purposes shall have plans standardized as per types, categories or classes, except when the standard plan does not meet the distinct conditions of a location or the specific requirements of an undertaking.

Article 12.—The basic plans and working plans for works and services shall mainly take into consideration the following requirements:

I.—safety;

II.—practicality and suitability to the public interest;

III.—cost-effectiveness in execution, upkeep and operation;

IV.—possibility of using manpower, materials, technology and raw materials existing in the location for execution, upkeep and operation;

V.—ease of execution, upkeep and operation, without adversely affecting durability of the works or service;

VI.—adoption of adequate technical rules;

VII.—environmental impact.

SECTION IV. SPECIALIZED PROFESSIONAL TECHNICAL SERVICES

Article 13.—For the purposes of this law, specialized professional technical services are considered to be works related to:

I.—technical studies, plans and basic or working plans;

II.—opinions, expert reports and appraisals in general;

III.—technical assistance or consultancy and financial audits;

IV.—monitoring, supervision or management of works or services;

V.—filing of or defense in judicial or administrative proceedings;

VI.—training and specialization of personnel;

VII.—restoration of works of art and heritage assets.

Paragraph 1.—With the exception of cases in which bidding is inapplicable, agreements for specialized professional technical services shall preferably executed through contest bidding for which the award or remuneratior previously stipulated.

Paragraph 2.—The provisions of article 111 of this law also apply to the ex appropriate to the technical services set forth herein.

Paragraph 3.—The company rendering the specialized professional techn services that submits a list of the members of its technical team as part of bidding process or as an element to justify that the bidding be waived or rend inapplicable, shall be obligated to guarantee that the mentioned members personally and directly carry out the services under the agreement.

SECTION V. PURCHASES

Article 14.—No purchase shall be made without the appropriate definition o object and stipulation of the budget funds for payment thereof, under the pen of the act's being considered null and the party that gave rise thereto being l responsible therefor.

Article 15.—Whenever possible, purchases shall:

I.—meet the standardization principle that imposes compatibility of techn and performance specifications, with due regard, should it be the case, for maintenance, technical assistance and warranty conditions offered;

II.—be processed by a price registration system;

III.—follow acquisition and payment conditions similar to those of the pri sector;

IV.—be subdivided into as many portions as necessary in order to benefit f the market opportunities, with a cost-effective outlook;

V.—remain within the limits of the prices practiced within the sphere of Public Administration bodies and entities.

Paragraph 1.—Registration of prices shall be preceded by a comprehen market survey.

Paragraph 2.—Registered prices shall be published in the official press c quarterly basis for the Administration's guidance.

Paragraph 3.—The price registration system shall be regulated by dec provided the distinctive regional characteristics are met, and with due regard the following conditions:

I.—selection made by competitive bidding;

II.—prior stipulation of the control system and updating of registered pri

III.—registration validity that does not exceed one year.

Paragraph 4.—The existence of registered prices shall not obligate the Admi tration to execute agreements that may arise therefrom; accordingly, s Administration may employ other means—with due regard for the legisla related to bidding—and the beneficiary of the registration will be ens preference on equal conditions.

Paragraph 5.—Whenever possible, the price control system shall be compu ized.

Paragraph 6.—Any citizen is a legitimate party to oppose prices contained in

general price table in light of incompatibility thereof with the prevailing market prices.

Paragraph 7.—Purchases shall also observe:

I.—complete specification of the goods to be acquired without stipulating any special mark or brand thereof;

II.—definition of the units and the quantities to be acquired in light of expected consumption and utilization, the estimate of which shall be obtained, whenever possible, by means of adequate quantitative techniques for estimates;

III.—preservation and storage conditions that do not permit the material to deteriorate.

Paragraph 8.—Receipt of the material whose value exceeds the limit established in article 23 hereof for invitations to bid shall be referred to a committee of at least three (3) members.

Article 16.—Once the transaction has been closed, the list of all purchases made by the direct or indirect Administration shall be published in order to provide for a clear-cut identification of the goods purchased, the unit price thereof, the quantity acquired, the name of the seller and the total value of the transaction.

SECTION VI. DISPOSALS

Article 17.—Disposal of Public Administration assets, at all times provenly in the public interest, shall be preceded by an appraisal and shall comply with the following rules:

I.—real properties shall depend on legislative authorization for bodies of the direct administration as well as autonomous government entities and foundations, and for all of them, including parastate entities, any such disposals shall require a prior appraisal and competitive bidding, the latter being waived in the following cases:

(a) payment in kind;
(b) donation, permitted exclusively for another Public Administration entity or body within any governmental sphere;
(c) exchange for another real property that meets the requirements stated in article 24, item X of this law;
(d) investiture;

II.—real properties shall require prior appraisal and bidding, the latter being waived in the following cases:

(a) donation, permitted exclusively for the purposes and use of social interest, upon an appraisal of the social and economic advisability and opportunity thereof if compared to another form of disposal;
(b) exchange, permitted exclusively between bodies or entities of the Public Administration;
(c) sale of shares that may be traded on the stock exchange, with due regard for specific legislation;
(d) sale of securities pursuant to pertinent legislation;
(e) sale of goods manufactured or traded by the Public Administration bodies or entities in light of the purposes thereof;
(f) sale of materials and equipment to other Public Administration bodies or entities, the actual use of which has been dispensed with by the sellers.

Par[redacted]h 1.-[redacted]e th[redacted]ons [redacted]usti[redacted]onat[redacted]f pr[redacted]es ba[redacted]n

item I (b) of this article have ceased, these properties shall revert to the assets of legal entity that donated them, disposal thereof by the beneficiary being her prohibited.

Paragraph 2.—The Administration may grant an *in rem* right for the use of property without bidding when such property will be used by another Pul Administration body or entity.

Paragraph 3.—For the purposes of this law, investiture shall mean the dispo to owners of bordering properties of an area remaining or resulting from pul works and which cannot be used separately, for a price never lower than that of appraisal, and provided it does not exceed fifty percent (50%) of the amo mentioned in article 23, item II (a) hereof.

Paragraph 4.—A remunerated conveyance may be offered for bids, and instrument thereof shall mandatorily mention the charges, its term of effectiver and a reversion clause, under penalty of such act's being considered null and v

Article 18.—In competitive biddings for the sale of real property, the eligibi phase shall be limited to evidence as to payment of an amount correspondin five percent (5%) of the appraisal value.

Sole Paragraph—An auction for the sale of real properties appraised, individ ly or in lots, at an amount not exceeding the limit set forth in article 23, item II of this law, may be permitted by the Administration.

Article 19.—Real property pertaining to the Public Administration and acqui through judicial proceedings or payment in kind may be disposed of by an ac the competent authority, with due regard for the following rules:

I.—appraisal of the real properties to be disposed of;
II.—evidence of the need or usefulness of the disposal;
III—adoption of a bidding procedure.

CHAPTER II. BIDDING

SECTION I. TYPES, LIMITS AND WAIVER

Article 20.—Biddings shall be carried out at the place in which the interes government agency is located, except if otherwise in the public interest, d justified.

Sole Paragraph—The provisions of this article shall not impede the eligibility interested parties resident or headquartered elsewhere.

Article 21.—Notices containing the summaries of the bidding prospectus competitive biddings and requests for quotation, although put up at the interes government agency's place, shall be published in advance, during three consecutive days, mandatorily and simultaneously:

I.—in the Official Gazette of the Federal Executive, when the bidding is carr out by an agency of the federal Public Administration or of the Federal Dist and, furthermore, in the event of works, purchases and services partially or tot financed with federal funds or secured by federal institutions;

II.—in the Official Gazette of the state in which the works or services will performed, in the event of a bidding placed by state or municipal Administrat agencies;

III.—in at least one widely circulated newspaper in the state or, if there is one [redacted] mu[redacted]ality [redacted]hich [redacted]orks [redacted]rvic[redacted]l be [redacted]rme[redacted]both[redacted]

the Administration may resort to other means of disclosure to broaden the competition area, according to the importance of the competitive bidding.

Paragraph 1.—The published notice shall indicate the place where interested parties may read and obtain the full text of the bidding prospectus, as well as all information on the bidding.

Paragraph 2.—The minimum term for submission of bids or performance of events shall be:

I.—Thirty (30) days for competitive bidding;

II.—Forty-five (45) days for contest bidding;

III.—Fifteen (15) days for requests for quotation or auctions;

IV.—Forty-five (45) days for biddings of the "best technology" or "technology and price" type, or when the agreement to be signed includes turnkey works;

V.—Five (5) business days for invitations to bid.

Paragraph 3.—The terms established in the preceding paragraph shall be counted from the first publication of the summarized bidding prospectus or forwarding of the invitation to bid, or further from actual availability of the bidding prospectus or the invitation to bid and respective annexes, prevailing whichever occurs last.

Paragraph 4.—Any changes in the bidding prospectus shall be disclosed in the same way as the original text, and the term initially established shall rerun, except when such changes provenly do not affect in any way the formulation of bids.

Article 22.—The types of bidding are the following:

I.—competitive bidding;

II.—request for quotation;

III.—invitation to bid;

IV.—contest bidding; and

V.—auction.

Paragraph 1.—Competitive bidding is the type of bidding in which any interested party that evidences in the initial eligibility phase that it has the minimum eligibility required under the bidding prospectus for execution of its object is allowed to participate.

Paragraph 2.—Request for quotation is a type of bidding carried out among interested parties duly registered or that meet all the conditions required for registration up to the third day prior to the deadline for placement of the bids, with due regard for the necessary qualification.

Paragraph 3.—Invitation to bid is a type of bidding carried out among interested parties operating in the field pertinent to the object thereof, whether or not registered with the administrative unit, and chosen and invited thereby in a number of at least three (3) invitees. The administrative unit shall put up a copy of the invitation document in an appropriate place, and shall extend this invitation to the other companies registered therewith in the corresponding specialty, which shall express their interest at least twenty-four (24) hours prior to the scheduled submission of bids.

Paragraph 4.—Contest bidding is a type of bidding placed among any interested parties for the eventual choice of technical, scientific or artistic works, by awarding prizes or remuneration to the winners, according to criteria specified in a bidding prospectus published in the official press at least forty-five (45) days in advance.

Paragraph 5.—Auction is a type of bidding carried out among any interested

parties for the sale of movable assets that are of no use for the Administration o products legally seized or attached, to whoever offers the highest bid, which m be equal to or higher than the appraisal value thereof.

Paragraph 6.—In the event of paragraph 3 of this article, should there be m than three (3) prospective bidders, repeated invitations to bid to the same par chosen in the immediately preceding bidding for an identical or similar object hereby prohibited.

Paragraph 7.—When due to market limitations or clear lack of interest of invitees it is impossible to address the minimum bidders required in paragraph this article, such circumstances shall be duly justified in the proceedings, un penalty of having to repeat the invitation to bid.

Paragraph 8.—Creation of other types of bidding or a combination thereo hereby prohibited.

Article 23.—The types of bidding mentioned in items I through III of preceding article shall be determined according to the following limits, taking i consideration the estimated value of the contracting:

I.—for engineering works and services:

(a) invitation to bid—up to one hundred million cruzeiros (100,000,000.00);

(b) request for quotation—up to one billion cruzeiros (Cr$ 1,000,000,000.

(c) competitive bidding—above one billion cruzeiros (Cr$ 1,000,000,000.

II.—for purchases and services not mentioned in the item above:

(a) invitation to bid—up to twenty-five million cruzeiros (Cr$ 25,000,000.

(b) request for quotation—up to four hundred million cruzeiros (400,000,000.00);

(c) competitive bidding—above four hundred million cruzeiros (400,000,000.00).

Paragraph 1.—For municipalities, as well as for the bodies and enti subordinate thereto, the following limits in relation to the amounts indicated in main section of this article and in article 24, items I and II hereof shall ap

I.—twenty-five percent (25%) of the amounts indicated, when the populatio the municipality does not exceed twenty thousand (20,000) inhabitants;

II.—fifty percent (50%) of the amounts indicated, when the population of municipality ranges from twenty thousand and one (20,001) to one hun thousand (100,000) inhabitants;

III.—seventy-five percent (75%) of the amounts indicated, when the popula of the municipality ranges from one hundred thousand and one (100,001) to hundred thousand (500,000) inhabitants;

IV.—one hundred percent (100%) of the amounts indicated, when the pop tion of the municipality exceeds five hundred thousand (500,000) inhabita

Paragraph 2.—For the purposes of the preceding paragraph, the numbe inhabitants in each municipality according to the data provided by the Brazi Institute of Geography and Statistics—IBGE shall be adopted as paramete

Paragraph 3.—Competitive bidding is the appropriate type of bidding, reg less of the value of the object thereof, in the purchase or disposal of real prop in granting of usufruct, as well as in international biddings, the request quotation's being admitted in the latter case, provided the body or entity ha

international record of registered suppliers and the limits under this article are duly complied with.

Paragraph 4.—Whenever invitation to bid is applicable, the Administration may adopt a request for quotation and, in any event, a competitive bidding.

Paragraph 5.—Such types of bidding as "invitation to bid" or "request for quotation", as the case may be, cannot be used for portions of a same work or service, or further for works or services of the same nature that may be carried out concurrently or successively, whenever the aggregate value thereof typifies a case of "request for quotation" or "competitive bidding", respectively, pursuant to this article, except for portions of a specific nature that may be carried out by persons or companies specialized in areas different from that of the work or of the service contractor.

Article 24.—The bidding may be waived:

I.—for engineering works and services with a value of up to five percent (5%) of the limit set forth in item I (a) of the preceding article, provided such works and services do not refer to portions of the same work or service or, further, of works and services of the same nature that may be carried out concurrently or successively;

II.—for other services and purchases involving amounts up to five percent (5%) of the limit set forth in item II (a) of the preceding article, and for disposals in the cases hereunder, provided these services and purchases do not refer to portions of a same service, purchase or disposal involving a larger amount that may be carried all at once;

III.—in the event of war or turmoil;

IV.—in the events of emergency or calamity which typify an urgent assistance to a situation that may cause losses or jeopardize the safety of persons, works, services, equipment and other public or private assets, and solely for the goods necessary to meet the emergency or calamity situation and for the portions of works and services that may be completed within one hundred and eighty (180) consecutive and uninterrupted days counted from the occurrence of the emergency or calamity, extension of the respective contracts being hereby forbidden;

V.—when there were no interested parties in a first bidding, and such process cannot provenly be repeated without prejudice to the Administration; in this case all preestablished conditions shall be maintained;

VI.—when the Federal Government has to intervene in the economy to control prices or normalize supply;

VII.—when the bids state prices undoubtedly higher than those adopted on the Brazilian market or are incompatible with those established by the competent official bodies; in these cases, with due regard for article 48, sole paragraph hereof, and should this situation persist, direct adjudication of the goods or services for an amount not higher than that mentioned in the price or service record shall be permitted;

VIII.—when the transaction involves exclusively domestic government-owned companies, except if there are private companies or mixed-capital companies capable of rendering or supplying the same goods or services, in which event these shall be subject to bidding;

[redacted]

established in a decree of the President of the Republic, after the National Del Council is heard;

X.—for the purchase or lease of real property intended for public services choice of which is conditioned on installation needs and location, provided price is compatible with market value, according to a previous appraisal;

XI.—when contracting for remaining works, services or supplies as a result contractual termination, provided the classification order in the previous bid is followed and the same conditions offered by the winning bidder are acce including as regards the price, duly adjusted;

XII.—in occasional purchases of perishable food, made in supply cente similar places directly on the basis of the price on the day;

XIII.—when contracting a Brazilian nonprofit institution, responsible purs to its regulations or statutes for research, teaching or institutional, scientifi technological development, provided the intended contractor holds a renov ethical and professional reputation;

XIV.—when acquiring goods or services through international organizat provided Brazil is a member thereof and pursuant to a specific agreen whenever the offered conditions are clearly advantageous to the Public Admini tion;

XV.—when acquiring or restoring works of art and heritage objects w authenticity has been certified, provided these are compatible with or inhere the purposes of the government body or entity.

Article 25.—The bidding will be inapplicable when competition is unfeas especially:

I.—for the acquisition of materials, equipment, or items that can onl supplied by exclusive manufacturers, companies or commercial representati Preference for a certain brand is prohibited, and exclusivity shall be evide through a certificate supplied by the commercial registry of the place in which bidding, works or services would be carried, by the union, federation or emplo association, or by equivalent entities;

II.—for contracting of unique technical services listed in article 13 hereof, professionals or companies reputedly specialized; inapplicability of bidding advertising and publicity services is hereby prohibited;

III.—for contracting of professionals of any artistic area, either directl through an exclusive agent, provided such artist is recognized by the special critics or by the public opinion.

Paragraph 1.—Professionals or companies reputedly specialized shall mean professionals or companies whose reputation in their field of specialty, resul from previous performance, studies, experiences, publications, organizati equipment, technical team, or from other requirements related to their activi allows one to infer that their work is essential and undoubtedly the n appropriate to full compliance with the object of the contract.

Paragraph 2.—Should overbilling be evidenced in the event of this article an any of the cases of waiver, the supplier or service renderer and the respons public agent shall be jointly liable for any damages caused to the Treasury, wit prejudice to other applicable sanctions.

Article 26.—[redacted]

delay provided for in the final provisions in article 8, paragraph 2 hereof, shall be communicated within three (3) days to the higher authority for ratification and publication in the official press within five (5) days, as a condition for effectiveness of these acts.

Sole Paragraph—The process of waiver, inapplicability or delay set forth in this article shall be supported, whenever applicable, by the following elements:

I.—definition of the emergency or calamity situation that justifies the waiver, as the case may be;

II.—reason for choosing the supplier or contractor;

III.—justification of the price.

SECTION II. ELIGIBILITY

Article 27.—For bidding eligibility purposes, the interested parties shall only be required to submit the documents relating to:

I.—legal eligibility;

II.—technical qualification;

III.—economic and financial qualification;

IV.—evidence of good standing with the tax authorities.

Article 28.—The documentation related to legal eligibility, according to the case, shall consist of:

I.—identity card;

II.—registration at a commercial registry, in the case of sole proprietorship;

III.—duly registered acts of incorporation, bylaws or articles of association in effect (for commercial companies), accompanied by documents related to election of managers (for joint-stock companies);

IV.—filing of the acts of incorporation, in the case of civil companies, accompanied by evidence of an executive board in office;

V.—decree of authorization, in the case of foreign company or corporation operating in Brazil, and registration or authorization to operate issued by the competent body, when the activity so requires.

Article 29.—The documentation relating to good standing with the tax authorities, according to the case, shall consist of:

I.—evidence of enrollment in the Individual Taxpayers' Register (CPF) or in the General Taxpayers' Register (CGC);

II.—evidence of enrollment in the state or municipal register, if any, relating to the domicile or headquarters of the bidder, pertinent to his/its field of activity and in line with the contractual object;

III.—evidence of good standing with the federal, state and municipal treasury authorities with authority over the domicile or headquarters of the bidder, or an equivalent document, pursuant to the law;

IV.—evidence of good standing with the social security authorities, proving that the company is complying with the social security contributions established by law.

Article 30.—The documentation relating to technical qualification shall be limited to:

I.—registration or enrollment with the competent professional entity;

II.—evidence of capability to perform activities that are pertinent, and compatible as regards characteristics, quantities and terms with the object of the bidding, indication of the facilities and equipment and of adequate technical

personnel available to carry out the object of the bidding, as well as qualification of each one of the members of the technical team that wi responsible for the works;

III.—evidence, provided by the prospective bidder, that it received documents and, whenever required, that it is cognizant of all information an local conditions for compliance with the obligations which are the object o bidding;

IV.—evidence that requirements provided for in special law have been whenever appropriate.

Paragraph 1.—In the case of biddings for works and services, the capal referred to in item II of this article shall be evidenced by certificates provide public entities or private companies, duly certified by the competent profess entity; any such requirements shall be limited to:

(a) as regards technical and professional capability: evidence provided b bidder that it has in its permanent staff, on the date of the biddi college-degree professional holding a certificate of technical responsil for the execution of works or services with similar characteristics; characteristics being exclusively limited to the portions of the object c bidding that are of the utmost relevance and involve substantial amo requirements regarding minimum quantities or maximum terms prohibited;

(b) (VETOED)

Paragraph 2.—The portions that are technically of the utmost relevan involve substantial amounts mentioned in the preceding paragraph shal previously and objectively defined in the announcement or invitation instrun

Paragraph 3.—Evidence of capability by certificates or statements for simil more complex works or services as regards their technological and operat complexity shall always be admitted.

Paragraph 4.—In biddings for supply of goods, evidence of capability, a case may be, shall be made by statements provided by public entities or pr companies.

Paragraph 5.—Requirements of evidence as to activity or capability vali specific times and periods or at specific locations, or any others not provide herein that hinder participation in biddings are hereby prohibited.

Paragraph 6.—The minimum requirements relating to installation of machines, equipment and specialized technical staff considered essentia compliance with the object of this bidding shall be met upon presentation detailed list and a formal statement that these are available, under penalty o law; requirements relating to property or previous location are hereby prohib

Paragraph 7.—(VETOED)

Paragraph 8.—In the case of works, services and purchases that in substantial amounts and high technical complexity, the Administration require that the bidders provide their execution method, the examination of w for acceptance purposes shall always be carried out prior to the price ana exclusively in keeping with objective criteria.

Paragraph 9.—Biddings of high technical complexity shall mean those involve high specialization as a factor of the utmost relevance to guar

\ecution of the object to be contracted, or that may jeopardize the continuity of ssential public services.

Article 31.—The documentation relating to economic and financial qualifica-on shall be limited to:

I.—balance sheet and financial statements for the last fiscal year, already onsolidated and submitted pursuant to the law, evidencing the good financial anding of the company; these cannot be replaced by trial or interim balance ieets, and may be updated by official indexes when drawn up more than three (3) ionths before the date of submission of the bid;

II.—bankruptcy or concordata (court-approved composition with creditors) earance certificates issued by the distributor of the place in which the headquar-rs of the legal entity are located, or clearance certificate as to asset execution sued at the individual's domicile;

III.—guarantee, of the same kind and according to the same criteria set forth in rticle 56, main section and paragraph 1 hereof, limited to one percent (1%) of the stimated value of the contracted object.

Paragraph 1.—The requirement regarding indicators shall be limited to those videncing the bidder's financial capability for the purpose of assuming the ecessary commitments in the event the contract is awarded thereto.

Paragraph 2.—For purchases for future delivery and execution of works and ervices, the Administration may establish in the announcement instrument of a idding a requirement of minimum capital or minimum net worth, or further equest the posting of guarantees as provided for in article 56, paragraph 1 hereof, s an objective datum for evidencing a bidder economic and financial qualification nd for the purpose of providing a security in the event of default on the contract to e subsequently signed.

Paragraph 3.—The minimum capital or net worth value referred to in the receding paragraph cannot exceed ten percent (10%) of the estimated value of the ontracting, and evidence to this effect shall be provided for the date of submission f the bid, pursuant to the law; adjustment by official indexes up to such date is ereby permitted.

Paragraph 4.—A list of the obligations assumed by the bidder that entail a eduction in its operating capacity or increased cash liabilities (the latter calculated n the basis of the updated net worth and its turnover ratio) may be required.

Paragraph 5.—Evidence of the company's good financial standing shall be bjectively calculated as per the accounting indexes provided for in the bidding rospectus and duly justified in the administrative proceeding that gave rise to the idding process.

Paragraph 6.—(VETOED)

Article 32.—The necessary eligibility documents may be submitted in original orm, in copies made under any process if duly certified by a notary office or by an mployee of the bidding agency, or published in the official press.

Paragraph 1.—The documentation dealt with in articles 28 through 31 hereof nay be partially or fully waived in the cases of invitation to bid, contest bidding, upply of goods for prompt delivery and auction.

Paragraph 2.—The certificate of registration with the government agency eferred to in article 36, paragraph 1, replaces the documents spelled out in articles 8 and 29, with the exclusion of those dealt with in article 29, items III and IV; the

party shall be obliged to declare, under the applicable penalties, the occurrenc any fact that impedes eligibility thereof, and to submit the remaining docum established in articles 30 and 31 of this law.

Paragraph 3.—The documentation referred to in this article may be replacec a registration certificate issued by a government body or entity, provided thi established in the bidding prospectus and registration has been made pursuan the provisions hereof.

Paragraph 4.—In international biddings, foreign companies that do not ope in Brazil shall meet as fully as possible the requirements established in preceding paragraphs by submitting equivalent documents, certified at respective consulates and translated by certified public translators. These com nies shall have a legal representative in Brazil with express powers to rec service of process and answer therefor in an administrative or judicial sph

Paragraph 5.—For the eligibility dealt with in this article, no prior fees charges will be required, except those related to supply of the bidding prospe and annexes, whenever requested, which fees or charges shall be limited to actual cost of graphical reproduction of the supplied documentation.

Paragraph 6.—The provisions of paragraph 4 of this article, paragraph 1 article 33, and paragraph 2 of article 55, do not apply to international biddings acquisition of goods and services whose payments are to be funded by internatic organizations to which Brazil is a member, or by foreign cooperation agencies, to contracts with foreign companies for the purchase of equipment manufactu and delivered abroad (except if in this case a prior authorization by the Chief of Executive Branch has been granted) or to acquisition of goods and services car out by administrative units with principal place of business abroad.

Article 33.—When participation of companies forming a consortium is per ted, the following rules and regulations shall be observed:

I.—evidence of a public or private commitment for the formation of consortium, signed by the consortium members;

II.—indication of the company liable for the consortium, and that shall meet leader conditions mandatorily established in the bidding prospectus;

III.—submission of the documents required in articles 28 through 31 hereo each consortium member, the adding of the quantitative data of each consorti member being permitted for technical qualification purposes. For economic financial qualification purposes, the adding of the values of each consorti member ratably to its respective participation is permitted, and the Administrat may increase the amounts required from the consortium by up to thirty perc (30%) above those required from individual bidders; this requirement does apply to consortia entirely composed of microcompanies or minicompanies defined by law;

IV.—companies that are members of a consortium cannot participate in same bidding, either through more than one consortium or individually;

V.—the consortium members shall be jointly liable for the acts performed by consortium, both in the bidding stage and in the execution of the contract

Paragraph 1.—In consortia made up by Brazilian and foreign companies, Brazilian company shall be mandatorily the lead company, with due regard for provisions of item II of this article.

Paragraph 2.—Before entering into the contract, the winning bidder is oblig

form and register the consortium, pursuant to the commitment terms referred to in item I of this article.

SECTION III. REGISTRATION WITH GOVERNMENT AGENCIES

Article 34.—For the purposes of this law, Public Administration bodies and entities that carry out biddings on a frequent basis shall keep, according to applicable regulations, a record of registered companies for eligibility purposes, which registrations shall be valid for at most one year.

Paragraph 1.—Registration with government agencies shall be widely disclosed and permanently opened to any interested parties, and the unit responsible therefor shall be obliged, at least once a year, to publish in the official press and in a daily newspaper a public notice to update the existing registrations and to include new interested parties therein.

Paragraph 2.—The administrative units may use the registrations made with other Public Administration bodies or entities.

Article 35.—When applying for registration with government entities or for updating thereof, at any time, the interested party shall supply the elements necessary to meet the requirements of article 27 hereof.

Article 36.—The registered parties shall be classified by category, depending on their specialization, and subdivided into groups according to their technical and economic qualification, evaluated through the contents of the documents listed in articles 30 and 31 hereof.

Paragraph 1.—Registered companies shall be granted a certificate, renewable whenever the registration is updated.

Paragraph 2.—A bidder's performance when complying with the obligations assumed thereby shall be annotated on the respective registration record.

Article 37.—The registered party that fails to meet the requirements of article 27 of this law or those established for classification thereof may at any time have its registration altered, suspended or canceled.

SECTION IV. PROCEDURE AND ADJUDICATION

Article 38.—The bidding procedure shall begin with the opening of an administrative proceeding, duly filed, registered and numbered, containing the respective authorization, a summarized indication of its object and of the funds available therefor, to which the following documents shall be attached in due course:

I.—bidding prospectus or invitation to bid and respective annexes, as the case may be;

II.—evidence as to publication of the summarized bidding prospectus, pursuant to article 21 hereof, or as to delivery of the invitation to bid;

III.—appointment of the Bidding Committee, the administrative or official auctioneer, or the party responsible for the invitation to bid;

IV.—original of the bids and of the documents that support them;

V.—minutes, reports and resolutions of the Bidding Committee;

VI.—technical or legal opinions issued on the bidding, waiver or inapplicability thereof;

VII.—acts of adjudication of the object of the bidding and ratification the

VIII.—appeals that may be filed by the bidders and respective answers decisions;

IX.—order of annulment or revocation of the bidding, as the case may be, substantiated;

X.—agreement or equivalent instrument, as the case may be;

XI.—other evidence of publications;

XII.—other documents relating to the bidding.

Sole Paragraph—The draft bidding prospectuses, as well as the draft ag ments, settlements, conventions or adjustments, shall be previously examined approved by the legal counsel of the unit responsible for the bidding.

Article 39.—Whenever the estimated value of a bidding or a set of simultan or successive biddings exceeds one hundred (100) times the limit establishe article 23, item I (c) of this law, the bidding process shall mandatorily begin wi public hearing conducted by the responsible authority at least fifteen (15) busi days prior to the date set for publication of the bidding prospectus and disclose least ten (10) business days prior to instatement thereof through the same m provided for publication of the bidding; all interested parties shall have acces such hearing and, after being acquainted with all pertinent information, they s be allowed to pronounce themselves thereon.

Sole Paragraph—For the purposes of this article, as well as for those of ar 23, paragraph 5, and article 24, item I hereof, simultaneous or successive bidd shall mean those with a similar object. Simultaneous biddings are those foreca be carried out at intervals shorter than thirty (30) days. Successive biddings s mean those in which the subsequent bidding prospectus bears a date shorter t one hundred and twenty (120) days after the end of the obligations set forth in preceding bidding.

Article 40.—The preamble of the bidding prospectus shall contain the numbe order in an annual series, the name of the interested government agency and sector thereof, the type, execution system and kind of bidding, and shall men that the bidding will be governed by this law; it shall also establish the location, and time for receipt of documents and bids and for the beginning of the proces opening the envelopes, mandatorily indicating the following:

I.—the object of the bidding, described in a summarized and clear fash

II.—term and conditions for execution of the contract or drawing ou instruments, as set forth in article 64 hereof, for execution of the agreement delivery of the object of the bidding;

III.—penalties in the case of default;

IV.—the place in which the basic plan will be available for examination acquisition;

V.—if there is a working plan available on the date the bidding prospectu published, and the place where it will be available for examination and acquisit

VI.—conditions for participation in the bidding, in accordance with article through 31 hereof, and presentation form of the bids;

VII.—criteria for adjudication, set out in clear-cut terms and objec parameters;

VIII.—the places, time and codes of access to remote communications m

through which features, data and clarifications on the bidding and on the conditions stipulated for compliance therewith will be made available;

IX.—equivalent payment conditions for domestic and foreign companies, in the case of international bidding;

X.—acceptability criteria applying to unit and global prices, as the case may be;

XI.—adjustment criteria, which shall reflect the actual variation in the production costs (alternatively, the variation in special or sectorial indices) from the date of placement of a bid or budget related thereto through the date of settlement of each installment;

XII.—(VETOED)

XIII.—maximum installation and allocation disbursements for performance of works or services, which must be budgeted separately from the other installments, phases or assignments;

XIV.—payment conditions, with such data as follows:

(a) payment term as regards the deadline for each reference period, at a maximum thirty (30) days;

(b) maximum disbursement schedule per period, in keeping with the availability of funds;

(c) criteria applying to monetary restatement of outstanding payments, from the date to be set out under (a) above through actual payment thereof;

(d) fines and penalties as a result of any delay, and discounts on advance payments;

(e) insurance, as the case may be;

XV.—instructions and rules for the appeals set forth herein;

XVI.—conditions for receipt of the works or services under the bidding;

XVII.—other specific or particular data on the bidding.

Paragraph 1.—The original bidding prospectus shall be dated, initialled in all pages and signed by its issuing authority. This counterpart shall remain available throughout the bidding process, and full-length or summarized copies thereof may be made for disclosure and distribution to interested parties.

Paragraph 2.—The following documents shall be attached to and become an integral part of the bidding prospectus:

I.—the basic and/or working plan, with all its sections, drawings, specifications and other annexes thereto;

II.—a budget estimate set out in schedules covering quantities and unit costs;

III.—the draft agreement to be signed between the Administration and the winning bidder;

IV.—all supplementary specification and execution rules related to the bidding.

Paragraph 3.—For the purposes of this law, compliance with contractual obligations shall mean the performance of services or works, delivery of goods or portions thereof, and compliance with any other contractual event on which the corresponding release of a billing document is conditioned.

Article 41.—The Administration cannot overrule the provisions and conditions set forth in the bidding prospectus, to which the Administration shall be strictly bound.

Paragraph 1.—Any citizen is entitled to challenge a bidding prospectus on the grou[redacted] non[redacted]liance [redacted]h this [redacted] and [redacted]uch [redacted]st sh[redacted] filed [redacted]ter

envelopes. The Administration shall examine and answer to any such challe within three (3) business days, without prejudice to the alternative set forth article 113, paragraph 1 hereof.

Paragraph 2.—The right to challenge the terms of a bidding prospectus bef the Administration shall not be accorded to any bidder that, having accepted s terms without any objections whatsoever, points out purported failures irregularities after the opening of the eligibility envelopes, in which case any no to this effect cannot be deemed an appeal.

Paragraph 3.—Challenges timely posed by a bidder shall not prevent hi from participating in the bidding process until a final decision is rendered there

Paragraph 4.—A bidder ineligibility entails termination of its right to take p in the subsequent bidding phases.

Article 42.—For international bidding processes, the bidding prospectus s conform to the existing currency and foreign trade policies and regulations, as as meet the requirements posed by the appropriate bodies.

Paragraph 1.—Whenever foreign bidders are allowed to bid prices in for currency, so will Brazilian bidders.

Paragraph 2.—Payments to Brazilian bidders under the preceding paragr will be made in Brazilian currency at the exchange rate in effect on the dat actual payment.

Paragraph 3.—The payment securities afforded a Brazilian bidder shall tantamount to those offered to foreign bidders.

Paragraph 4.—For awarding purposes, the bids placed by foreign bidders s be added by the amounts corresponding to the taxes exclusively payable Brazilian bidders on the final sale transaction.

Paragraph 5.—For performance of works or services, or acquisition of go with funds from advance facilities or donation granted by an official for cooperation entity or multilateral financing organization to which Brazil is a pa the rules and procedures established by any such entities as well as the conditi arising from international agreements, protocols, conventions or treaties appro by the Brazilian Congress may be accounted for in the bidding process, with regard for the provisions hereof.

Paragraph 6.—All bidders shall quote prices for delivery at the same destinat point.

Article 43.—Biddings shall be adjudicated and awarded in accordance with following procedures:

I.—opening of the envelopes with the documentation on eligibility of bidd and analysis thereof;

II.—return of the sealed envelopes and corresponding bids to ineligible bidd providing no appeal has been filed or after denial thereof;

III.—opening of the envelopes containing the bids placed by eligible comp tors, provided that the term for appeals has lapsed or any such right has b expressly waived, or after all appeals have been judged;

IV.—checking of each bid vis-à-vis the requirements set forth in the bidc prospectus and, as the case may be, with the prices effective in the market or set by a competent official agency, or with the prices available in the price registrat [redacted]stem [redacted]f w[redacted]hall [redacted]ly r[redacted]ed i[redacted]min[redacted]f th[redacted]rd p[redacted]

V.—awarding and classification of bids according to the evaluation criteria spelled out in the corresponding bidding prospectus;

VI.—resolution passed by the appropriate authorities as to ratification and awarding of the subject matter under the bid process.

Paragraph 1.—The envelopes bearing the eligibility-related documentation and bids shall at all times be opened in a previously scheduled public session, and the corresponding minutes shall be drawn up in detail and signed by the attendant bidders and the Bidding Committee.

Paragraph 2.—All documents and bids shall be initialled by the attendant bidders and the Bidding Committee.

Paragraph 3.—In any bidding phase, the Bidding Committee or higher authority will be entitled to carry out a due diligence intended to clarify or supplement the submission of supporting documents to the process. A further addition of documents or data that had been originally scheduled for the bid is hereby prohibited.

Paragraph 4.—The provisions hereof apply to the competitive bidding and, as the case may be, to the contest bidding, auction, request for quotation and invitation to bid. The latter need not be published in the official press.

Paragraph 5.—After the eligibility phase (items I and II) and upon opening of the bids (item III), bidders can no longer be disqualified for eligibility-related reasons, unless otherwise determined in light of facts subsequent thereto or made known only after the corresponding award.

Paragraph 6.—After the eligibility phase, bids cannot be withdrawn unless for bona-fide reasons arising from subsequent facts duly acknowledged by the Bidding Committee.

Article 44.—On analyzing the bids, the Bidding Committee shall take into consideration the objective criteria spelled out in the corresponding bidding prospectus or invitation to bid, which shall not thwart the rules and principles established herein.

Paragraph 1.—No other feature, criterion or factor of a secret, confidential, subjective or classified nature that in any way directly or indirectly jeopardizes the principle of equity between bidders may be used.

Paragraph 2.—Advantages other than those set forth in the bidding prospectus or invitation to bid, including subsidized or nonrecoverable financings, as well as prices or advantages based on third-party bids, will not be taken into consideration.

Paragraph 3.—Bids containing global or unit prices at a token, near-zero or zero prices inconsistent with input prices and market salaries plus the respective charges will not be accepted, even if the bidding prospectus has not set minimum prices.

Paragraph 4.—The provisions of the above paragraph also apply to bids including foreign manpower or import of inputs of any kind; should this occur, the markets in the corresponding countries of origin shall be adopted as a reference.

Article 45.—Bids shall be analyzed on an objective basis, and the Bidding Committee or party responsible for the invitation to bid shall carry out such analysis in keeping with the types of bidding, the criteria previously set forth in the corresponding prospectus, and the factors exclusively provided for therein, in such a way as to enable bidders and monitoring bodies to check whether such procedures have been followed during the analysis.

Paragraph 1.—For the purposes of this article, biddings for works, services and

purchases shall be awarded according to the following criteria, except in the cas contest biddings and auctions:

I.—lowest price—whenever the criterion for award of the bid most adva geous to the Administration determines that the winning bidder will be the placing a bid in keeping with the specifications set out in the bidding prospectu invitation to bid, and also bids the lowest price;

II.—best technology;

III.—technology and price.

Paragraph 2.—In the case of a tie between two or more bids, and a compliance with article 3, paragraph 2 hereof, the final award shall be grantec drawing of lots in a public session for which all bidders will be called; any o process will be void.

Paragraph 3.—In the case of a "lowest price" bidding qualified bidders wil classified in crescent order of the bid prices acceptable hereunder; in the case tie, the criterion set forth in the preceding paragraph shall exclusively pre

Paragraph 4.—For obtaining computer science items and services, the Pu Administration will observe the provisions of Law No. 8248, article 3 of Oct 23, 1991, and will also take into account the factors spelled out in paragra thereof whenever the "technology and price" bidding process is adopted.

Paragraph 5.—Bidding processes other than those set forth in this article hereby prohibited.

Article 46.—The "best technology" or "technology and price" bidding proce shall be adopted exclusively for services of a predominantly intellectual nat especially as regards planning, calculations, monitoring, supervision, managen and consulting engineering in general, and particularly as regards the prepara of preliminary technical studies, and basic and working plans.

Paragraph 1.—For "best technology" bidding processes, the following proce shall be clearly expressed in the corresponding prospectus, which shall set out maximum price that the Administration agrees to pay:

I.—only the envelopes containing the technical bids of previously quali bidders will be opened. These bids will then be analyzed and classifie accordance with proper criteria vis-à-vis the subject matter under the bid pro providing any such criteria shall have been clearly and objectively defined in corresponding prospectus, with due regard for the bidder capability and exper the technical quality of the bid (including methodology, organization, technol and material resources to be employed in the works), and the level of speciali the technical staff to be assigned for performance of the works;

II.—after classification of the technical bids, the price bids from the bidders have attained the minimum grade set forth in the prospectus will be opened, then the bid conditions will be discussed with the highest bidder on the basis o detailed pricing submitted and the corresponding unit prices, by taking reference the minimum price bid from among the bidders that obtained abovementioned minimum grade;

III.—in the case of a deadlock in the aforesaid negotiation, an iden procedure will be successively adopted with the other bidders, with due regar the order of classification thereof, until an agreement for the contracting is reac

IV.—the price bids will be returned unopened to those bidders that have

been qualified on a preliminary basis or that have not attained the minimum grade required for the technical bid.

Paragraph 2.—For "technology and price" bidding processes, the following procedures—clearly expressed in the bidding documents—shall be adopted additionally to item I of the preceding paragraph:

I.—the price bids will be analyzed and qualified, in accordance with objective criteria previously set forth in the corresponding bidding documents;

II.—bidders will be classified according to the weighted average of the grades ascribed to the technical and price bids, on the basis of the criteria previously set forth in the corresponding bidding documents.

Paragraph 3.—On an exceptional basis, the types of bidding set forth in this article may be adopted—upon express authorization and substantiated justification therefor by the senior Administration authority responsible for the bidding process and mentioned in the prospectus—for supply of goods and performance of substantial works or services primarily contingent on clearly sophisticated know-how of limited domain, as attested by technical authorities of renowned expertise, for the cases in which the object of any such bidding allows for alternative solutions and variations in execution, with substantial repercussions on the quality, productivity, performance and durability thereof on an objectively mensurable basis, providing such alternative solutions or variations may be adopted at the bidders' discretion, in accordance with criteria clearly set out in the bidding documents.

Article 47.—In the bidding for performance of works and services contracted at a global pre-fixed price, the Administration must provide jointly with the bidding prospectus all features and data required for the bidders to prepare their price bids with full and unrestricted knowledge on the subject matter underlying the bidding.

Article 48.—The following bids will be disqualified:

I.—bids that do not meet the requirements provided for in the corresponding bidding prospectus; and

II.—bids with excessive or clearly unenforceable prices.

Sole Paragraph—If all bids are disqualified, the Administration will be entitled to provide bidders with eight (8) business days for placing other bids devoid of the disqualification causes referred to in this article.

Article 49.—The authority with powers to approve the bidding process will only be entitled to annul it in the public interest as a result of any provenly adverse fact that would suffice and justify any such decision. Accordingly, this annulment shall be effected owing to illegality, ex officio or at third-party requests, duly substantiated in a written opinion in this respect.

Paragraph 1.—Annulment of the bidding on the grounds of illegality does not give rise to any indemnity, except for the provisions of article 59, sole paragraph hereof.

Paragraph 2.—Annulment of the bidding shall entail termination of the corresponding agreement, with due regard for the provisions of article 59, sole paragraph hereof.

Paragraph 3.—In the case of annulment of bidding, appeals and full defense are hereby safeguarded.

Paragraph 4.—This article and paragraphs thereof apply to any bidding waiver [redacted] inap[redacted]bilit[redacted]

Article 50.—Any agreement signed by the Administration without regard to t order in which bids have been classified, or with third parties outside the biddi process, shall be deemed null and void hereunder.

Article 51.—Pre-eligibility, listing in the appropriate registration, and a change or cancellation thereof, and the bids will all be duly processed and award by a permanent or special committee composed of a minimum three (3) membe wo (2) of whom must be qualified civil servants from the staff of the permane Administration bodies in charge of the bidding.

Paragraph 1.—In the case of invitations to bid, the Bidding Committee may eplaced by a servant formally appointed by the competent authority on xtraordinary basis, for small municipalities and in view of the unavailability qualified staff.

Paragraph 2.—In order to analyze applications for listing in the appropri egistration, or any changes or cancellation thereof, the Committee will composed of legally qualified professionals in the case of works, services urchase of equipment.

Paragraph 3.—The Bidding Committee members will be held jointly liable f ll acts performed by the Committee, unless individual dissident votes are d substantiated and recorded in the minutes prepared for the meeting wherein a such decision has been taken.

Paragraph 4.—The term of office of the permanent Committee members sh not exceed one (1) year; reinstatement of all members of a certain committee f he following term of office is hereby prohibited.

Paragraph 5.—Contest biddings will be awarded by a special commit composed of individuals with renowned reputation and specialty in the mat under analysis, who need not be civil servants.

Article 52.—The contest bidding referred to in article 22, paragraph 4 of this l shall be preceded by a proper regulation, which must be made available interested parties at the place indicated in the bidding prospectus.

Paragraph 1.—The regulation shall provide for:

I.—the qualification required from prospective competitors;

II.—the guidelines and presentation of the work;

III.—the conditions for the contest bidding, and the prizes to be awarde

Paragraph 2.—Awardees shall authorize the Administration to carry out t winning plan whenever it deems appropriate.

Article 53.—Auctions may be carried out by an official auctioneer or ci servant appointed by the Administration for such purpose, with due regard applicable laws.

Paragraph 1.—All assets to be auctioned shall be previously appraised by t Administration for the purpose of establishing the minimum bid price.

Paragraph 2.—Assets acquired in the auction shall be paid at sight, or at t minimum percentage set forth in the bidding prospectus, which cannot be lov than five percent (5%); after signing of the corresponding minutes at the aucti place and upon immediate delivery of the assets acquired in the auction, t awardee shall undertake to settle the outstanding debt within the period set forth the bidding prospectus, under pain of losing the down payment to the Administ

Paragraph 3.—The auction prospectus shall be widely disclosed, mainly in the municipality wherein it is to take place.

CHAPTER III. AGREEMENTS

SECTION I. PRELIMINARY PROVISIONS

Article 54.—The administrative agreements dealt with herein are regulated by their clauses and public law precepts, and additionally by general contractual principles and private law.

Paragraph 1.—The agreements must clearly and accurately set out the conditions for performance thereof, duly established in clauses that shall define the rights, obligations and liabilities inherent to the parties thereto, with due regard for the terms of both the bidding and the bid to which they are bound.

Paragraph 2.—The agreements related to cases in which biddings have been waived or are inapplicable shall be in keeping with the terms of the act that has approved them, as well as with the corresponding bid.

Article 55.—All agreements must bear clauses establishing the following:

I.—the object and features thereof;

II.—the execution system, or form of supply;

III.—the price and payment conditions; criteria, reference date and periods for price adjustment; criteria for monetary restatement between the date scheduled for compliance with obligations and their actual payment;

IV.—the start-up terms for the execution, conclusion, delivery, testing and final acceptance phases, as the case may be;

V.—the credit underlying the expenditures, with an indication as to the functional classification and economic category;

VI.—the bonds, if any, offered to secure full performance of the object underlying the agreement;

VII.—the rights and responsibilities inherent to the parties, the applicable penalties and the amounts of fines;

VIII.—events of termination;

IX.—acknowledgment of the Administration rights, in the event of administrative termination as set forth in article 77 hereof;

X.—import conditions; the date and rates for exchange conversion, as the case may be;

XI.—their binding relationship with the bidding prospectus, or with the act that waived or rendered such bidding inapplicable, with the invitation to bid, and with the winning bid;

XII.—the laws applying to performance of the agreement, and especially to cases not set forth therein;

XIII.—the contractor's obligation to maintain throughout the effectiveness of the agreement all eligibility and qualification conditions required under the bidding, in keeping with the obligations assumed thereby.

Paragraph 1.—(VETOED)

Paragraph 2.—Agreements signed by the Public Administration with individuals and legal entities, including those domiciled abroad, must bear a clause electing the courts with jurisdiction over the Administration headquarters as competent to

settle any contractual dispute, except for the provisions of article 32, paragraph this law.

Paragraph 3.—Upon settlement of expenses, the accounting services shall a the bodies charged with collecting and monitoring federal, state or municipal t of the features and amounts actually paid, according to Law No. 4320, article March 17, 1964.

Article 56.—A performance bond may be required for contracting of w services and purchases, at the competent authorities' discretion and on a cas case basis, provided that such performance bond has been set forth in corresponding bidding prospectus.

Paragraph 1.—Performance bonds may be submitted in the form of:

I.—pledge given in cash, government bonds or personal bonds;

II.—(VETOED)

III.—bank guarantee.

Paragraph 2.—The performance bonds dealt with in items I and III o preceding paragraph, if required, shall not exceed five percent (5%) of the am under the agreement.

Paragraph 3.—(VETOED)

Paragraph 4.—The bond given by the contractor shall be released or refu after full performance of the agreement, as monetarily adjusted if in cash

Paragraph 5.—In the case of agreements providing for delivery of goods b Administration and for which the contractor will act as depositary, the respe bond shall be increased by the amount of any such goods.

Article 57—The term of effectiveness for agreements regulated by this law not exceed the effectiveness of the respective budgets, except in the following c

I.—projects whose products have been accounted for in the Multiyear targets, which term may be extended to the Administration interest providing i been duly forecast in the announcement to bid;

II.—the rendering of the services to be performed on an ongoing basis, w term may be extended for a like period;

III.—(VETOED)

IV.—the lease of equipment and use of computer programs, which term ma extended for a maximum forty-eight (48) months after commencement o contractual term of effectiveness.

Paragraph 1.—The terms for start-up of execution, conclusion and deli phases are extendable in the cases below (duly evidenced and substantia providing all further contractual clauses remain effective and with due regar the economic/financial equilibrium of the agreement:

I.—changes made by the Administration in the plan or specifications;

II.—occurrence of an exceptional or unforseeable fact beyond the parties' w any such fact substantially changes the conditions for performance of corresponding agreement;

III.—interruption or slowdown in the execution of the contract as a result order of the Administration or in the interest thereof;

IV.—increase in the volumes initially contracted, within the limits set fort applicable law;

V.—stayed perfo

ous facts, duly acknowledged by the Administration in a document issued at the time of occurrence thereof;

VI.—omission or delay involving the Administration assignments, including as regards the payments set forth in the agreement and directly causing an impediment or delay in the performance thereof, without prejudice to the legal penalties applying to the responsible parties.

Paragraph 2.—All extensions to the term of effectiveness shall be substantiated in writing and duly authorized by the authorities in charge of the agreement.

Paragraph 3.—Agreements for an indeterminate term are hereby prohibited.

Article 58.—The legal provisions applying to administrative agreements under this law bestow the following rights on the Administration:

I.—unilateral changes therein, in order to better meet the public interest, with due regard for the rights inherent to the contractor;

II.—unilateral termination, in the cases spelled out in article 79, item I hereof;

III.—monitoring of the performance thereof;

IV.—application of penalties owing to total or partial nonperformance of the adjustment;

V.—in the case of essential services, temporary use of personal assets, real property, personnel and services linked to the subject matter of the agreement, should there be any need to carry out administrative proceedings for the purpose of verifying contractual violations on the part of the contractor, as well as in the case of termination of the administrative agreement.

Paragraph 1.—The economic/financial and monetary clauses in administrative agreements cannot be changed without the prior consent of the contractor.

Paragraph 2.—Should the event in item I of this article occur, the economic/financial clauses of the agreement shall be reviewed in order to maintain the same level of rights and obligations between the parties.

Article 59.—The notice of termination of the administrative agreement operates on a retroactive basis, and the legal effects otherwise arising therefrom—as well as the legal effects already produced–shall be rendered null and void.

Sole Paragraph—Termination of an agreement does not release the Administration from the obligation to indemnify the contractor for the services rendered thereby up to the date of any such termination, as well as for other proven losses not caused by the contractor, which losses shall be imputable on the party that has given cause thereto.

SECTION II. FORMALIZATION OF AGREEMENTS

Article 60.—The agreements and addenda thereto shall be filed at the competent government agencies, with a chronological record according to the dates of signing thereof and systematic records of their abstracts, except for those relating to *in rem* rights over real property, which shall be formalized by an instrument filed at the appropriate notary office. A copy of all such documents shall be attached to the case docket.

Sole Paragraph—Oral agreements with the Administration will be deemed void and without any effect whatsoever, except for those related to small-scale purchases against payment, viz. those not exceeding five percent (5%) of the ceiling set forth in article 23, item II hereof, if made on an advance purchase basis.

Article 61.—All agreements must mention the name of the parties and their

representatives; the purpose thereof; the act that authorized their signature number assigned to the bidding, waiver or inapplicability thereof; and the pa adhesion to the rules provided for herein and in the contractual clauses.

Paragraph 1.—As required for effectiveness purposes, on the same dat agreement is signed the Administration shall cause a summary agreemer addenda thereto to be published in the official press within twenty (20) whatever the amount involved, even if without charges.

Paragraph 2.—(VETOED)

Paragraph 3.—(VETOED)

Article 62.—An ensuing agreement is mandatory for competitive biddings requests for quotation, as well as for waivers and inapplicability of biddings o to the underlying prices' falling into the limits established for the aforementi types of bidding; accordingly, any such agreement is optional for all other bid in which the Administration may replace it with such other documents as a agreement, debt commitment, purchase order or service order.

Paragraph 1.—A draft agreement shall always be attached to the invitati announcement to bid.

Paragraph 2.—The provisions of article 56 hereof shall apply, whe applicable, to the "letter agreement", "debt commitment", "purchase or "service order" or like instruments.

Paragraph 3.—Articles 55 and 58 through 61 of this law, as well as other ge rules, shall apply to the applicable extent, to:

I.—insurance and advance facility agreements, lease agreements in whic Public Administration acts as lessee, and other contracts the tenor of whi primarily governed by private law;

II.—agreements in which the Administration acts as a public utility u

Paragraph 4.—The agreement may be waived (and the alternative set fo this article may be adopted at the Administration discretion irrespective c amount involved) in the case of purchases for full, immediate delivery of acquired without entailing future obligations, including technical assistan

Article 63.—Any bidder is afforded access to the tenor of the agreemen corresponding bidding, and interested parties will be entitled to a certified thereof against payment of the respective fees.

Article 64.—The Administration shall routinely notify the interested pa sign the agreement, acknowledge or obtain the equivalent document, withi terms and under the conditions established therefor, under penalty of termin of the right to enter into contracting hereunder, notwithstanding the sanctio forth in article 81 hereof.

Paragraph 1.—While in effect, the notification term may be extended once like period at the contractor's request, provided that there is good cause the duly accepted by the Administration.

Paragraph 2.—Should the notified party fail to sign the agreement, or agreement-equivalent document is not accepted or obtained by the interested within the terms and on the conditions established therefor, the Administ will be entitled to opt for calling the remaining bidders (according to the or their classification) to do so in a like period and under the same conditions as offered the winning bidder, including as to the prices duly restated in accor

with the announcement to bid, or otherwise revoke the bidding irrespective of the penalty set forth in article 81 of this law.

Paragraph 3.—If no bidder is called to sign the appropriate agreement within sixty (60) days after the date of delivery of the bids, any such bidders will be discharged from the commitments assumed thereby.

SECTION III. AMENDMENTS TO THE AGREEMENTS

Article 65.—The agreements governed by this law may be amended with good cause in the following cases:

I.—unilaterally by the Administration:

(a) when the plan or the specifications are modified in order to better meet the objectives thereof from a technical point of view;

(b) when it is necessary to modify the contractual amount as a result of an increase or reduction in the quantities established in the agreements, within the limits permitted hereunder;

II.—by agreement of the parties:

(a) when replacement of the performance bond is advisable;

(b) when the strategy for execution of the works or services, as well as the manner of supply, must be changed in view of the technical verification that the original contractual terms are inapplicable;

(c) when the form of payment must be changed due to ensuing circumstances, provided the initial amount is kept updated—early maturity in connection with the established financial schedule being prohibited, without the corresponding consideration for supply of goods or execution of works or services;

(d) (VETOED)

Paragraph 1.—The contractor is obliged to accept, on the same contractual conditions, any addition or elimination in the works, services or purchases, up to twenty-five percent (25%) of the updated initial amount of the agreement and, in the particular case of renovation of a building or equipment, up to fifty percent (50%) for additions thereto.

Paragraph 2.—No addition or elimination may exceed the limits set forth in the preceding paragraph.

Paragraph 3.—If the unit prices for works or services are not provided for in the agreement, these prices shall be set by mutual agreement of the parties, with due regard for the limits established in Paragraph 1 of this article.

Paragraph 4.—In the case of elimination of works, goods or services, if the contractor has already acquired the materials and placed them at the working site, these materials must be paid by the Administration at acquisition prices that are properly evidenced and monetarily restated, and any other damages possibly resulting from such elimination may be subject to indemnification, provided they are adequately evidenced.

Paragraph 5.—Any taxes or legal charges established, altered or extinguished, as well as any legal provisions issued subsequently to the date on which the bid is submitted, and which have a clear effect on the contracted prices, shall entail an increase or reduction therein, as the case may be.

Paragraph 6.—In the event of a unilateral amendment to the agreement which

increases the contractor's charges, the Administration shall reestablish the ini economic/financial equilibrium by means of an addendum.

Paragraph 7.—(VETOED)

Paragraph 8.—The contractual amount variation in view of the price adj ment provided for in the agreement itself, the updatings, offsettings or finan penalties deriving from the payment conditions set forth therein, as well as the of supplementary budget up to the limit of the updated amount of any s agreement, does not typify an alteration thereof and may be recorded as a sim correction, the execution of an addendum being waived.

SECTION IV. EXECUTION OF THE AGREEMENTS

Article 66.—The agreement shall be executed on an arm's length by the par in accordance with the agreed clauses and the rules of this law, each party be liable for the consequences of noncompliance therewith, either wholly or in p

Article 67.—Execution of the agreement shall be accompanied and inspected a representative of the Administration especially designated for such purpose, third parties may be contracted to assist and provide him/her with informat pertinent to this attribution.

Paragraph 1.—The Administration representative shall annotate in a pro book all occurrences relating to execution of the agreement, determining whate is necessary to remedy any faults or defects verified.

Paragraph 2.—Any decisions and procedures outside the scope of authorit the representative shall be referred to the superiors thereof in due time for adopt of the appropriate measures.

Article 68.—The contractor shall keep a representative acceptable to Administration at the working site or at the place where the service is to rendered to represent it in the execution of the agreement.

Article 69—The contractor must repair, correct, remove, rebuild or replace the expense thereof, either wholly or in part, the object of the agreement that sh imperfection, defect or incorrection resulting from execution or from the mater used.

Article 70.—The contractor shall be liable for any damages directly caused ei to the Administration or to third parties as a result of its fault or willful miscon when executing the object of the agreement, and this liability shall not be exclu or reduced in view of the inspection or follow-up by the interested body.

Article 71.—The contractor shall be liable for the labor, social security, tax commercial charges arising from execution of the agreement.

Paragraph 1.—Default by the contractor on the charges established in article shall not transfer the respective payment obligation to the Public Admi tration, nor shall it adversely affect the object of the agreement or rest regularization and utilization of the works and buildings, including as regards Real Estate Registry.

Paragraph 2.—The Administration can also require life and property liab insurance, and this requirement must be included in the bidding prospectu invitation to bid.

Article 72.—Upon execution of the agreement and without prejudice contractual and legal obligations, the contractor may subcontract portions of

works, services or supplies up to the limit permitted, in each case, by the Administration.

Article 73.—After the agreement is executed, its object shall be received:

I.—in the case of works and services:

(a) temporarily, by the person responsible for their follow-up and inspection, upon a detailed instrument signed by the parties within fifteen (15) days of the written communication of the contractor to this effect;

(b) definitively, by an employee or commission designated by the competent authority, upon a detailed instrument signed by the parties, after expiration of the trial period, or inspection evidencing that the object conforms to the terms of the agreement, with due regard for the provisions of article 69 hereof;

II.—in the case of purchases or lease of equipment:

(a) temporarily, in order to subsequently verify whether the material conforms with the specification;

(b) definitively, after verification of the quality and quantity of the material, and consequent acceptance thereof.

Paragraph 1.—In the cases of acquisition of equipment on a large scale, receipt thereof shall be made upon a detailed instrument and, in the other cases, upon receipt.

Paragraph 2.—Temporary or definitive receipt of the above does not exclude either civil liability for the soundness and safety of the works or service, or ethical/professional liability for orderly performance of the agreement, within the limits set forth by law or by the agreement.

Paragraph 3.—The trial period referred to in item I (b) of this article cannot exceed ninety (90) days, except in exceptional cases that are duly justified and provided for in the bidding prospectus.

Paragraph 4.—If the detailed instrument or verification referred to in this article are not respectively drawn up or performed within the scheduled time frames, they will be considered executed provided they are communicated to the Administration fifteen (15) days prior to expiration thereof.

Article 74.—Temporary receipt may be waived in the following cases:

I.—perishable articles and prepared meals;

II.—professional services;

III.—works and services in an amount up to that spelled out in article 23, item II (a) hereof, provided they do not comprise apparatus, equipment and facilities subject to operation and productivity verification.

Sole Paragraph—In the cases established in this article, delivery shall be made against receipt.

Article 75.—Unless otherwise provided for in the bidding prospectus, invitation to bid or normative ruling, the trials, tests and other verifications required by official technical rules for proper execution of the object of the agreement shall be borne by the contractor.

Article 76.—The Administration shall reject, either wholly or in part, any work, [redacted]

SECTION V. NONCOMPLIANCE AND TERMINATION O THE AGREEMENTS

Article 77.—Total or partial noncompliance with the agreement shall caus termination thereof, subject to the consequences established in the agreemen those set forth by law or applicable regulations.

Article 78.—The agreement shall terminate due to the following reason

I.—noncompliance with contractual clauses, specifications, plans or ter

II.—irregular compliance with contractual clauses, specifications, plans terms;

III.—delay in complying with the agreement, leading the Administratic evidence that the work, service or supply cannot be concluded within the sche time frames;

IV.—unjustified delay to start up the works, services or supply;

V.—stoppage of the works, services or supply without good cause and wi prior notification to the Administration;

VI.—total or partial subcontracting of its object, contractor's association third parties, total or partial assignment or transfer, as well as consolidation, off or merger not permitted under the bidding prospectus and the agreen

VII.—noncompliance with the regular determinations of the authority indi to follow up and inspect implementation of the agreement, as well as wit determinations of the superiors thereof;

VIII.—repeated failures when executing the object of the agreement, annotated as per article 67, paragraph 1 hereof;

IX.—bankruptcy or civil insolvency;

X.—dissolution of the company or death of the contractor;

XI.—corporate change or modification of the object or structure of the com which adversely affects execution of the agreement;

XII.—reasons of public interest, material relevance and wide knowl justified and determined by the upmost authority of the administrative sphe which the contracting party is subordinate, and rendered in the administ proceedings to which the agreement refers;

XIII.—elimination by the Administration of works, services or purchases, g rise to an alteration in the initial amount of the agreement beyond the permitted under article 65, paragraph 1 hereof;

XIV.—suspension of execution thereof by written order of the Administra for a period exceeding one hundred and twenty (120) days, except in case of p calamity, severe turmoil or war, or further due to repeated suspensions totalin same period, independently of the mandatory payment of indemnities fo successive and contractually unforeseen and foreseen stoppages and resumi the works or services, the contractor's being assured, in these cases, of the rig interrupt compliance with the obligations assumed until such time as the situ is regularized;

XV.—any delay exceeding ninety (90) days in the payments owed b Administration as a result of works, services or supplies, or portions thereof have already been received or carried out, except in the case of public cala severe turmoil or war, the contractor's being assured of the right to inte [redacted]

XVI.—failure by the Administration to release the area, place or object for implementation of the works, services or supply within the contractual terms, as well as the natural resources specified in the plan;

XVII.—events of force majeure or acts of God, adequately evidenced, which impede the agreement from being executed.

Sole Paragraph—The cases of contractual termination shall be formally justified in the case records, and the parties shall be given the opportunity to oppose each other and to fully defend themselves.

Article 79.—Termination of the agreement may be:

I.—determined by a unilateral act in writing by the Administration, in the cases listed in items I through XII and XVII of the preceding article;

II.—settled out of court by the parties, and then made into an instrument in the bidding process, provided that this is approved by the Administration;

III.—settled in court pursuant to the law;

IV.—(VETOED)

Paragraph 1.—The administrative or out-of-court termination shall be previously authorized in writing and duly justified by the competent authority.

Paragraph 2.—If the agreement is terminated based on items XII through XVII of the preceding article, without any fault on the part of the contractor, the latter shall be reimbursed for any losses adequately evidenced, and furthermore shall be entitled to:

I.—return of bond;

II.—payments owed as a result of execution of the agreement up to the date of termination;

III.—payment of the stoppage cost.

Paragraph 3.—(VETOED)

Paragraph 4.—(VETOED)

Paragraph 5.—In the event of impairment, stoppage or stay of the agreement, the execution schedule shall be automatically extended for an equal period.

Article 80.—The termination dealt with in item I of the preceding article shall give rise to the following consequences, without prejudice to the sanctions set forth by this law:

I.—prompt assumption of the object of the agreement, in its current condition and location, through a proper act of the Administration;

II.—occupation and utilization of the place, facilities, equipment, material and staff contracted to implement the agreement, and necessary for the continuity thereof, pursuant to article 58, item V hereof;

III.—execution of the contractual bond to reimburse the Administration for damages and to cover the fines and indemnities owed thereto;

IV.—retention of the credits resulting from the agreement up to the limit of the losses caused to the Administration.

Paragraph 1.—The measures provided for in items I and II of this article shall be applied at the discretion of the Administration, which can carry on the works or services either directly or indirectly.

Paragraph 2.—In the case of concordata of the contractor, the Administration may keep the agreement and assume control over certain essential services.

Paragraph 3.—In the event of item II of this article, the act shall be previously

and expressly authorized by the competent Ministry of State, or by the Sta Municipal Secretary, as the case may be.

Paragraph 4.—The termination dealt with in item IV of the preceding a allows the Administration, at its discretion, to adopt the measure establish item I hereof.

CHAPTER IV. ADMINISTRATIVE AND JUDICIAL SANCTIONS

SECTION I. GENERAL PROVISIONS

Article 81.—The awardee's unreasonable refusal to sign the agreement, ac or withdraw the equivalent instrument within the term established by Administration, shall be considered as full noncompliance with the oblig assumed, subjecting such awardee to the applicable legal penalties.

Sole Paragraph—The provisions of this article shall not apply to the bi invited in accordance with the terms of article 64, paragraph 2 hereof, which f accept the contracting on the same conditions proposed by the first awa including as regards term and price.

Article 82.—The administrative agents that perform acts in disaccord wit precepts of this law or seek to thwart the objectives of the bidding are subject t sanctions provided for in this law and in the applicable regulations, wit prejudice to the civil and criminal liabilities caused by their act.

Article 83.—The actual or threatened crimes defined herein shall subjec committers thereof, when civil servants, to criminal sanctions as well as to lo their title, job, employment, position or elected term of office.

Article 84.—For the purposes of this law, a civil servant is the person that l a public title, position or job, even if temporarily or without remuneratic

Paragraph 1.—A civil servant, pursuant to this law, also applies to indivi holding a title, job or position in parastate entities, namely foundations, owned companies and mixed-capital entities, as well as other companies und direct or indirect control of the public authorities.

Paragraph 2.—The fine imposed shall be increased by a third when the c set forth herein are committed by persons that hold a temporary title or positi trust in a direct Administration body, autonomous government entity, state-o company, mixed-capital entity, government foundation, or at other comp directly or indirectly controlled by the public authorities.

Article 85.—The criminal offenses provided for herein refer to the bidding agreements executed by the Federal Government, states, the Federal Di municipalities, and respective autonomous government entities, state-o companies, mixed-capital entities, government foundations, and any other co nies under their direct or indirect control.

SECTION II. ADMINISTRATIVE SANCTIONS

Article 86.—Any unjustified delay in implementing the object of the agree shall subject the contractor to the payment of a default fine as established i announcement to bid or the agreement.

Paragraph 1.—The fine referred to in this article does not preven

Administration from unilaterally terminating the agreement and applying the other sanctions set forth herein.

Paragraph 2.—The fine, applied after a regular administrative proceeding, shall be discounted from the bond posted by the respective contractor.

Paragraph 3.—If the fine exceeds the amount of the bond posted, the contractor will not only lose title to the bond, but will also be held liable for the difference thereof, which shall be deducted from any payments owed by the Administration or, further, be collected in court, if applicable.

Article 87.—For the full or partial noncompliance with the agreement the Administration may impose the following sanctions on the contractor, who will be assured of the right of prior defense:

I.—warning;

II.—fine, as provided for in the announcement to bid or agreement;

III.—temporary suspension from participating in the bidding and prohibition to contract with the Administration, for a period of at most two (2) years;

IV.—statement of lack of good standing to bid or contract with the Public Administration while the reasons that determined the contractor's punishment persist or until such time as the contractor is considered eligible for bidding purposes by the same authority that imposed the sanction, which will occur whenever the contractor reimburses the Administration for the resulting losses and after lapse of the sanction imposed according to the previous item.

Paragraph 1.—If the assessed fine exceeds the amount of the bond posted, the contractor will not only lose title to the bond, but will also be held liable for the difference thereof, which shall either be deducted from any payments owed by the Administration, or judicially collected.

Paragraph 2.—The sanctions set forth in items I, III and IV of this article may be applied together with that contained in item II, the interested party's being assured of the right of defense in the respective proceeding, within five (5) business days.

Paragraph 3.—The sanction established in item IV of this article is under the exclusive authority of the Ministry of State or of the State or Municipal Secretary, as the case may be, the interested party's being assured of the right of defense in the respective proceeding, within ten (10) days of the beginning of the examination, whereby the interested party may request requalification after two (2) years of application of the sanction.

Article 88.—The sanctions provided for in items III and IV of the preceding article may also be imposed on such companies or professionals that, in light of the agreements governed by this law:

I.—have been definitively convicted of a malicious tax fraud;

II.—have carried out illicit acts with a view to thwarting the objectives of the bidding;

III.—demonstrate that they do not have enough good standing to execute an agreement with the Administration, by virtue of illicit acts committed thereby.

SECTION III. CRIMES AND PENALTIES

Article 89.—To waive or to render a bidding not applicable, other than in the events set forth by law, or fail to observe the formalities pertinent to such waiver or [redacted]plica[redacted]:

Penalty—detention of three (3) to five (5) years, and a fine.

Sole Paragraph—The same penalty shall apply to any person who by havi evidently helped to commit such illicit act has benefited from the unlawful waiv or inapplicability to execute an agreement with the public authorities.

Article 90.—To thwart or defraud, through an arrangement, ruse or the like, t competitive aspect of the bidding procedure, with the intention of obtaining f itself/himself or others the advantages from the award of the object of the biddi

Penalty—detention of two (2) to four (4) years, and a fine.

Article 91.—To favor private interests, directly or indirectly, before t Administration, giving rise to the establishment of a bidding or to the execution an agreement that is further annulled by the Judiciary Branch:

Penalty—detention of six (6) months to two (2) years, and a fine.

Article 92.—To admit, make possible or cause any modifications or advantag including contractual extension, in favor of the awardee during implementation the agreements executed with the public authorities, outside what is permitt under the law, in the announcement to bid or in the respective agreements, furthermore to pay an invoice without observing the chronological order of submission:

Penalty—detention of two (2) to four (4) years, and a fine.

Sole Paragraph—This penalty also applies to a contractor that, having prover cooperated with this illicit act, obtains an improper advantage or unjustly benef from the contractual changes or extensions.

Article 93.—To hinder, disturb or defraud the performance of any act of t bidding process:

Penalty—detention of six (6) months to two (2) years, and a fine.

Article 94.—To infringe on the confidential nature of the bid offer placed in t bidding process, or to provide third parties with the opportunity to infrin hereon:

Penalty—detention of two (2) to three (3) years, and a fine.

Article 95.—To exclude or try to exclude a bidder, by means of violence, seric threat, fraud or offering of advantages of any kind:

Penalty—detention of two (2) to four (4) years, and a fine, as well as a pena corresponding to the violence involved.

Sole Paragraph—This penalty shall apply to any bidder that fails to place a t or withdraws from the bidding in light of the advantage offered.

Article 96.—To defraud, to the detriment of the Public Treasury, the biddi placed for acquisition or sale of products or goods, or the agreement resulti herefrom, by:

I.—arbitrarily raising the prices;

II.—selling, as genuine or perfect, counterfeited or deteriorated goods;

III.—delivering goods in place of others;

IV.—altering the substance, quality or quantity of the goods supplied;

V.—unjustly raising prices underlying the bid offer or the execution of t agreement in any way:

Penalty—detention of three (3) to six (6) years, and a fine.

Article 97.—To admit to the bidding or execute an agreement with a company professional considered without good standing:

[redacted]enal[redacted]eten[redacted]of si[redacted] mo[redacted]o tw[redacted] yea[redacted]nd a[redacted]

Sole Paragraph—This fine shall also be imposed on any person that has been considered without good standing, and takes part in the bidding or executes an agreement with the Administration.

Article 98.—To unreasonably hinder, impede or hamper the enrollment of any interested party in the appropriate records, or to unduly promote the alteration, suspension or cancellation of such enrollment:

Penalty—detention of six (6) months to two (2) years, and a fine.

Article 99.—The fine established in articles 89 through 98 hereof consists of the payment of an amount established in the court decision, calculated on percentage indices whose base shall correspond to the value of the advantage actually gained or potentially earned by the agent.

Paragraph 1.—The indices referred to in this article shall be at least two percent (2%) or at most five percent (5%) of the amount of the agreement resulting from the bidding or executed with bidding waiver or inapplicability.

Paragraph 2.—The fine proceeds shall, as the case may be, inure to the Federal, the Federal District, State or Municipal Treasury.

SECTION IV. PROCESS AND JUDICIAL PROCEEDING

Article 100.—The crimes defined under this law are subject to an unconditioned public criminal action, and shall be handled by the Department of Justice.

Article 101.—Any person may induce, for the purposes of this law, the Department of Justice to take action by supplying it with written information on the fact and the parties responsible therefor, as well as on the circumstances under which the crimes occurred.

Sole Paragraph—Any oral communication must be followed by an instrument signed by the claimant and two witnesses.

Article 102.—When, in the case records or documents of which they are cognizant, the judges, members of the Courts or Accounts Councils, or heads of the in-house control system bodies of any of the Branches, verify that the crimes defined herein have been committed, they will refer to the Department of Justice the copies and documents necessary for the denouncement.

Article 103.—A private criminal action subsidiary to a civil class action shall be admitted, if the latter is not filed within the legal term, pursuant to articles 29 and 30 of the Code of Criminal Procedure, as applicable.

Article 104.—Subsequently to receipt of the denouncement and service of process on the defendant, the latter will have ten (10) days from the date of interrogation to file a defense in writing. The defendant may attach documents, list witnesses—no more than five (5)—, and indicate any other evidence it intends to produce.

Article 105.—After the witnesses for the prosecution and the defense are heard, and the supporting procedures granted or ordered by the judge are carried out, each party will have five (5) days to present the closing arguments.

Article 106.—Upon expiry of this period, the case will be submitted to the judge within twenty-four (24) hours, who will then have ten (10) days to hand down a decision thereon.

Article 107.—The decision may be appealed within five (5) days thereafter.

Article 108.—In the processing and judgment of the criminal offenses defined

herein, as well as in the appeals and executions relating thereto, the Co Criminal Procedure and the law of Criminal Execution shall subsidiarily a

CHAPTER V. ADMINISTRATIVE APPEALS

Article 109.—With regard to the Administration acts resulting from applic of this law the following items may be filed:

I.—appeal, within five (5) business days of notification of the act or drawi of the minutes, in the cases of:

(a) bidder's qualification or not;
(b) judgment of the bids;
(c) annulment or revocation of the bidding;
(d) denial of the application for enrollment in records, alteration or can tion thereof;
(e) termination of the agreement, as referred to in article 78, item I h
(f) imposition of warning, temporary suspension or fine;

II.—formal complaint, within five (5) business days of the notification o decision concerning the object of the bidding or of the agreement, against whi appeal cannot be filed at a higher instance;

III.—petition for reconsideration of the decision handed over by the Minist State, or by the State or Municipal Secretary, as the case may be, in the eve article 87, paragraph 4 hereof, within ten (10) business days of notification c act.

Paragraph 1.—Notification of the acts mentioned in item I (a), (b), (c), and this article, with the exclusion of those referring to warning and default fine, a item III, shall be effected by publication thereof in the official press, except fo cases provided for in items (a) and (b), should the representatives of the bidde present in the act in which the decision was adopted, in which case the notific may be directly handed over to the interested parties and drawn up in min

Paragraph 2.—The appeal mentioned in item I (a) and (b) of this article have suspensive effects, whereby the competent authority may, based on s grounds and on reasons of public interest, attribute to the appeal filed the eff suspending the other appeals.

Paragraph 3.—After having been filed, the appeal shall be notified to the bidders, who may challenge it within five (5) business days.

Paragraph 4.—The appeal shall be addressed to the higher instance b instance that processed the act under appeal, which will have five (5) business to reconsider its decision or, in the same period, submit it to said higher inst duly supported; in this case, the decision shall be handed down within fiv business days of receipt of the appeal, under penalty of incurring in liabi

Paragraph 5. No appeal term, formal complaint or request for reconsider can start or run without the case records' being made available to the inter party.

CHAPTER VI FINAL AND TEMPORARY PROVISIONS

Article 110.—When counting the terms established herein, the starting day be excluded and the expiry day included; the days shall be consecutive, exce explicitly provided for otherwise.

Sole Paragraph—The terms referred to in this article shall only start and expire on working days of the competent body or entity.

Article 111.—The Administration may only contract, pay, award or receive plans or specialized technical services, provided the person in charge thereof assigns the property rights related to such plans and services and the Administration is able to use them in accordance with the bidding contest regulations or with the arrangement for preparation thereof.

Sole Paragraph—Whenever the plan refers to intellectual works of a technological nature that are not subject to privileges, assignment of the rights thereto shall include the supply of all data, documents and information pertinent to the technology involving conception, development, installation in physical media of any kind and application of the works.

Article 112.—When the object of the agreement is of interest to more than one public entity, the contracting body shall be held accountable, as regards the interested entity, for the orderly execution, inspection and payment thereof.

Sole Paragraph—The interested entity may, at its discretion, follow up on the implementation of the object of the agreement.

Article 113.—Control of the expenses incurred with the agreements and other instruments governed by this law shall be exercised by the competent Accounts Tribunal, pursuant to prevailing legislation, and the interested bodies of the Administration shall verify the legality and regularity of such expenses and implementation in light of the Constitution and without prejudice to the in-house control system set forth therein.

Paragraph 1.—Any bidder, contractor, individual or legal entity may file a formal complaint to the Accounts Tribunal or bodies of the in-house control system against any irregularities verified in the application of this law, for the purposes of this article.

Paragraph 2.—Before the bid envelopes are opened, the Accounts Tribunal and bodies of the in-house control system may ask to examine a copy of the bidding prospectus that has already been published, whereupon the bodies or entities of the interested Administration shall agree to adopt any remedial measures applied thereto as a result of such examination.

Article 114.—The system instituted hereunder does not prevent the bidders from being pre-qualified in the competitive biddings, which shall occur whenever the object of the bidding calls for a more detailed analysis of the technical qualification of the interested parties.

Paragraph 1.—This pre-qualification procedure shall be adopted upon a proposal of the competent authority, with the approval of the immediately higher ranking authority.

Paragraph 2.—In the pre-qualification procedure the requirements set forth by this law with regard to competitive bidding, invitation of the interested parties, procedure and review of documents, shall be observed.

Article 115.—The Administration bodies may issue guidelines concerning the operational procedures to be observed in the execution of biddings, within the sphere of competence thereof, and with due regard for the provisions hereof.

Sole Paragraph—The guidelines referred to in this article, after duly approved by the competent authority, shall be published in the official press.

Article 116.—The provisions of this law shall apply, as the case may be, to

conventions, agreements, arrangements and other similar instruments entered by the Administration bodies and entities.

Paragraph 1.—Execution of any convention, agreement or arrangement b Public Administration bodies or entities shall depend on the prior approval adequate working plan to be proposed by the interested organization, which include at least the following information:

I.—identification of the object to be executed;

II.—targets to be met;

III.—stages or phases of execution;

IV.—plan for application of financial resources;

V.—disbursement schedule;

VI.—estimated start-up and completion of the object, as well as conclusi the scheduled stages or phases;

VII.—if the arrangement encompasses engineering works or services, evid that the participant's own resources to supplement execution of the object been duly guaranteed, except if the total cost of the undertaking is to be borr the onlending entity or body.

Paragraph 2.—After the convention is signed, the onlending entity or body inform this fact to the House of Representatives or to the respective City Co

Paragraph 3.—The convention installments shall be released in strict a dance with the approved application plan, with the exception of the cases desc hereinbelow in which these installments will be withheld until any ex irregularities are remedied:

I.—when the good and orderly application of the installment previ received has not been duly evidenced pursuant to applicable law, including thr local inspection procedures carried out from time to time by the fund onlen body or entity, or by the body in charge of the in-house control system of the P Administration;

II.—should there be any misuse of funds, unjustified delay in the sched phases or stages, practices in violation of the basic principles by which the P Administration must abide in contractings and all further acts taken in performance of a convention, or default by the contractor with other basic cl in the corresponding convention;

III.—in the event the contractor fails to take the remedial action require such privies as the onlender or members of the respective in-house control sys

Paragraph 4.—The positive balance of a convention shall be deposite savings accounts at an accredited financial institution (if any such balan estimated for future use at a period equal to or higher than one month) or inv in money market or open market transactions backed by public debt bonds (i such balance is committed to use at a period less than one month).

Paragraph 5.—The yield arising from the transactions set forth in the prece paragraph shall be computed as a credit to the convention, and exclus channeled to the purview thereof; this yield shall also be accounted for in a sp statement to be added to rendering of accounts at the time of the settlen

Paragraph 6.—At the time of the conclusion, termination, rescissio discontinuance of a convention, agreement or settlement, any positive balan including the yield from financial investments—shall be returned to the onle entity or body within thirty (30) days after the event, under pain of imm

instatement of a special checking of the responsible party's accounts by the competent authorities at the creditor entity or body.

Article 117.—The works, services, purchases and sales carried out by the Legislative and Judiciary Branches, as well as by the Accounts Tribunal, are regulated by the provisions of this law—to the extent applicable—at the three administrative instances.

Article 118.—The states, the Federal District, municipalities and indirect Public Administration entities shall conform their bidding and contracting regulations to the provisions hereof.

Article 119.—Mixed-capital entities, state-owned companies, public foundations and other entities directly or indirectly controlled by the Federal Government or by the other entities referred to in the preceding article shall issue their own regulations, duly published and subject to the provisions of this law.

Sole Paragraph—The Public Administration regulations referred to in this article shall be published in the official press after duly approved by the authority at an instance higher than that to which the respective bodies, companies and entities are bound.

Article 120.—The amounts hereunder shall be automatically restated on the same time basis and rates as the variation in the Brazilian Consumer Price Index (*Índice Nacional de Preços ao Consumidor—INPC*) on the basis of the December 1991 reference index.

Sole Paragraph—The Federal Executive Branch shall cause the new amounts officially effective at the time of each event mentioned in the main section of this article to be published in the Official Gazette of the Federal Executive; for such purposes, fractions lower than Cr$ 1.000,00 (one thousand cruzeiros) will not be taken into account.

Article 121.—The provisions of this law do not apply to biddings opened and contracts signed prior to the effectiveness hereof.

Sole Paragraph—Agreements related to real estate pertaining to the Federal Government remain subject to Decree-Law No. 9760 of September 5, 1946, as amended; agreements related to domestic or foreign credit transactions signed by the Federal Government, and the securities given by the National Treasury, remain subject to the pertinent laws, as well as to the provisions of this law to the extent applicable.

Article 122.—Airlines concessions will be granted with due regard for specific bidding procedures to be established under the Brazilian Air Code.

Article 123.—Agencies sitting abroad shall have their administrative contractings and biddings conform to the local characteristics and the basic principles of this law, pursuant to specific regulation.

Article 124.—This law takes effect on the date of its publication.

Article 125.—All provisions to the contrary are hereby repealed, especially Decree-laws Nos. 2300 of November 21, 1986; 2348 of July 24, 1987; 2360 of

125September 16, 1987; Laws Nos. 8220 of September 4, 1991; and 5 article 83 of December 24, 1966.

Brasília, June 21, 1993; 172nd year of Independence and 105th of the Repu

Itamar Franco

Fernando Henrique Cardoso

Romildo Canhim

Brazil

Appendix P

Law No. 8883 OF June 8, 1994

Changes the provisions of Law No. 8666 of June 21, 1993, which regulates article 37, XXI of the Federal Constitution; sets out rules for bidding procedures; and makes other provisions.

The PRESIDENT OF THE REPUBLIC.

I hereby make it known that Congress decrees and I sanction the following law:

Article 1.—The provisions of Law No. 8666 of June 21, 1993 referred to below shall take effect with the following new wording:

"Article 3. (...)

Paragraph 1. (...)

II. (vetoed)

(...)

Paragraph 4. (vetoed).

Article 5. (...)

Paragraph 2. The adjustment referred to in the preceding paragraph, payable jointly with the principal amount, shall be charged to the same budget provisions as those corresponding to the credits to which such adjustment refers.

Article 6. (...)

VIII. Indirect Execution—the execution commissioned to third persons by the governmental body or entity under any of the systems below:

(...)

c) (vetoed).

(...)

XIII. Official Press—the official media of the Public Administration, ie. the Official Gazette of the Federal Executive, and the media provided for in the laws of the respective states, municipalities and the Federal District.

(...)

Article 8. (...)

Sole Paragraph. Any unjustified delay in the performance of works or services or any portion thereof is hereby prohibited if their full performance has been duly provisioned in the proper budget, except in such cases as lack of funds or duly proven technical problems, provided that such cases are justified in a substantiated order issued by the authority referred to in article 26 of this law.

Article 9. (...)

Paragraph 3. (vetoed)

(...)

Article 10. Works and services may be performed in the following modes:
II. indirect performance, under the following systems:
(...)
c) (vetoed)
(...)
Sole Paragraph. (vetoed)
I. accompanied by technical justifications as to the Administration advantage vis-à-vis the other systems;
II. the amounts do not exceed the caps applying to requests for quotation as per article 23 of this law;
III. if previously approved by the competent authorities.
(...)
Article 12. The following requirements shall apply to the basic and working plans for works and services:
(...)
VI. adoption of proper technical, health and security rules;
(...)
Article 13. (...)
III. technical assistance or consultancy, and financial or tax audits;
(...)
VIII. (vetoed)
Paragraph 1. (vetoed)
(...)
Article 16. A list of all purchases made by the direct or indirect bodies of the Administration shall be disclosed every month in the official press or affixed on boards open to public view. Such lists shall identify the item purchased, its unit price and volume, the name of the seller, and the total amount of the purchase; purchases for which bidding procedures are inapplicable or have been waived may be merged into one single item per category.
Sole Paragraph. This article does not apply to the bidding waivers under article 24, IX hereof.
Article 17. (...)
I. (...)
e) sale to another agency or entity of the Public Administration at any level;
f) disposal, conveyance of usufruct, rental or lease of real properties built and designed or actually used in housing programs sponsored by the Public Administration agencies or entities specifically created for such purpose in the community interest.
(...)
Paragraph 2. (vetoed)
Paragraph 4. Remunerated conveyances shall be offered for bids, and the instrument thereof shall set out the charges, the term of effectiveness, and a reversion clause, under penalty of such conveyance's being considered null and void; biddings may be waived for such conveyances if provenly held in the public interest.
Paragraph 5. For the purposes of the preceding paragraph, if the donee needs to offer the real property as a security for fund-raising purposes, then the

reversion clause and other obligations shall be secured by a second mortgage favor of the donor.
Paragraph 6. The Administration may avail itself of an auction proceeding f the sale of real properties whose appraisal value is severally or jointly low than the cap set forth in article 23, II (b) hereof.
(...)
Article 19. (...)
III. adoption of a competitive bidding or auction.
(...)
Article 21. Notwithstanding their affixation at the agency involved, notic containing the summaries of the prospectus regarding requests for quotatio contest biddings and auctions shall be published in advance, at least once, i
I. the Official Gazette of the Federal Executive, when the bidding is carried o by an agency of the Federal Public Administration and, furthermore, in case works fully or partially supported with federal funds or otherwise secured federal institutions;
II. in the Official Gazette of the State or Federal District, for biddings carri out by an agency or entity of the State or Municipal Administration, or of t Federal District Administration, respectively;
III. in one widely circulated newspaper in the state and, if any, in a wide circulated newspaper in the municipality or region in which the works services will be performed, or in which the relevant assets will be disposed or leased; the Administration may resort to other vehicles to broaden tl competition area, according to the importance of the bidding.
(...)
Paragraph 2. (...)
I. 45 days for:
a) bidding contests;
b) competitive biddings, when the ensuing contract provides for turnk works, or if the bidding relies on the best technology or technology and pri criteria:
II. 30 days for:
a) competitive biddings other than those in item (b) above;
b) requests for quotation, whenever the bidding relies on best technology technology and price criteria;
III. 15 days for requests for quotation, in cases other than those in item (l above, or for auctions;
IV. five business days for invitations to bid.
Paragraph 3. The terms established in the preceding paragraph shall b counted as from the last publication of the summarized bidding prospectus forwarding of the invitation to bid, or further from actual availability of tl bidding prospectus or the invitation to bid and respective annexes, prevailir whichever occurs last.
(...)
Article 22. (...)
Paragraph 5. Auction is a type of bidding carried out among any intereste persons for the sale of movable assets that are of no use to the Administratic or of products legally seized or attached, or for the disposal of

set forth in article 19, to whomever places the highest bid, which must be equal to or higher than the assessment value thereof.

Paragraph 6. For the purposes of paragraph 3 of this article, each new invitation for an identical or similar object shall be addressed to more than one interested bidder should there be more than three (3) prospective bidders within the relevant area, as long as there are registered prospective bidders not invited during the last biddings.

(...)

Paragraph 9. For the purpose of paragraph 2 hereof, the Administration may require from unregistered bidders only the documents (articles 27 through 31) evidencing their qualification consistently with the object of the bidding vis-à-vis the bidding prospectus.

Article 23. (...)

Paragraph 1. The works, services and purchases ordered by the Administration shall be divided into as many portions as technically and economically feasible, and the bidding process therefor shall be conducted with a view to taking the utmost advantage of the resources available on the market, as well as to enhancing competitiveness, provided that it does not affect the economy of scale.

Paragraph 2. During the performance of works and services or the purchase of assets in portions as per the preceding paragraph, each such phase or group of phases for these works, services or purchases shall be offered through a separate bidding, with due regard for the type of bidding applying to the object thereof.

Paragraph 3. Competitive bidding is the appropriate type of bidding, regardless of the value of the object thereof, for the purchase or disposal of real property (with due regard for the provisions of article 19 hereof), as well as for the granting of usufruct and international biddings; in the latter case, the request for quotation (whenever the body or entity has an international record of suppliers) or the invitation to bid (whenever there is no supplier of such goods or services in Brazil) will be admitted, with due regard for the limits spelled out in this article.

(...)

Paragraph 5. Such types of bidding as invitation to bid or request for quotation, as the case may be, cannot be used for portions of a same work or service, or further for works or services of the same nature and at the same place, and which may be carried out jointly and concurrently, whenever the aggregate value thereof typifies a case of request for quotation or competitive bidding, respectively, pursuant to this article, except for portions of a specific nature that may be carried out by persons or companies specialized in areas other than those of the work or service contractor.

Paragraph 6. The purchases and services in general by industrial organizations of the direct Federal Administration, with due regard for their special features, shall comply with the limits established in item I of this article, provided that such purchases and services are intended for the acquisition of materials exclusively employed in the maintenance, repair or manufacturing of warfare items pertaining to the Federal Government.

[redacted]ticle [redacted](...) [redacted]

I. for engineering works and services with a value up to five percent (5%) of limit set forth in item I (a) of the preceding article, provided such works services do not refer to portion of the same work or service or, further works and services of the same nature and at the same place that may carried out jointly and concurrently;

(...)

VIII. for the acquisition by a domestic government-owned company of go or services performed by a body or entity from the Public Administration which has been created for this specific purpose before the effectiveness of law, provided that the agreed price is at market levels;

(...)

X. for the purchase or lease of real property intended for compliance with major objectives of the Administration, the choice of which is conditione installation needs and location, provided that the price is compatible market value, according to a previous appraisal;

(...)

XII. for the purchase of fresh food, bread and other perishable items during time required for the corresponding bidding procedures; such purchase s be made directly, on the basis of the price effective on the day;

XIII. for the contracting of a Brazilian institution engaged (under applic regulations or statutes) in research, teaching or institutional developmen an institution engaged in rehabilitation programs for prisoners, provided the contractor is a nonprofit institution with a renowned ethical professional reputation;

XIV. for the acquisition of goods or services pursuant to a specific internat al agreement approved by Congress, whenever the conditions thus offered clearly advantageous to the Public Administration;

(...)

XVI. for the printing of official gazettes, standard forms for use of Administration, and official technical publications, as well as for the per mance of computer science services to domestic government-owned entitie Public Administration bodies or agencies specifically created for such purp

XVII. for the acquisition of domestic or foreign components or parts f their original supplier, as required for the maintenance of equipment du the warranty period, whenever this exclusivity status is indispensable warranty purposes;

XVIII. for the acquisition or contracting of services for the supply of item vessels, boats, airplanes or troops and their means of transportation, duri short-term stay thereof in ports, airports or places other than their headq ters for deployment or training activities, whenever the terms provided under the law would adversely affect the normality and purposes of the operations, and provided that the amount thereof does not exceed the lim article 23, II (a) of this law;

XIX. for the purchase of materials intended to the Armed Forces, except personal and office wares, whenever required to safeguard the stand applying to the the logistic support of Armed Forces vehicles, after a favor opinion to that effect is issued by a committee created by decree for [redacted]se [redacted]

XX. when renowned nonprofit associations for the assistance of handicapped persons are contracted by Public Administration bodies or agencies for the performance of services or supply of manpower, provided that the agreed price is at market levels.

Article 25. (...)

I. (vetoed)

(...)

Article 26. The waivers set forth in article 17, paragraphs 2 and 4, and in article 24, items III through XX, the inapplicability situations referred to in article 25 (provided that such events are duly justified), and the delay provided for in the last sentence of the sole paragraph of article 8 hereof shall be reported on within three (3) days to the higher authority for ratification and publication in the official press within five (5) days, as a condition for the effectiveness of such acts.

Article 29. (...)

IV. evidence of good standing with the Social Security Institute and the Unemployment Guarantee Fund—FGTS, thereby showing compliance with all social contributions required by law.

Article 30. (...)

Paragraph 1. In the case of biddings for works and services, the capability referred to in item II of the main section hereof shall be evidenced by certificates provided by public entities or private companies, duly certified by their respective professional entities; any such requirements shall be limited to:

I. as regards technical and professional capability: evidence provided by the bidder that it has in its permanent staff, on the date scheduled for delivery of bids, a college degree or other professional degree acceptable to the competent class entity, holding a certificate of technical responsibility for the execution of works or services with similar characteristics, such characteristics being exclusively limited to the portions of the object of the bidding that are of the utmost relevance and involve substantial amounts; requirements regarding minimum quantities or deadlines are prohibited;

II. (vetoed)

a) (vetoed)

b) (vetoed)

Paragraph 2. The portions that are of the utmost relevance from a technical viewpoint or involve substantial amounts as mentioned in the preceding paragraph shall be defined in the announcement or invitation instrument.

(...)

Paragraph 7. (vetoed)

I. (vetoed)

II. (vetoed)

Paragraph 8. (vetoed)

Paragraph 9. (vetoed)

Paragraph 10. The professionals appointed by the bidder for the purpose of evidencing the technical and operational capability dealt with in paragraph 1, I of this article shall take part in the works or services under the bidding; any

such professionals may be replaced by others with like or greater experien subject to Administration consent.

Paragraph 11. (vetoed)

Paragraph 12. (vetoed)

Article 31. (...)

Paragraph 1. The requirement regarding indicators shall be limited to th evidencing the bidder's financial capability vis-à-vis the commitments to assumed thereby if it is awarded the ensuing contract; minimum past sales, well as profitability or income ratios, cannot be required for the purpo hereof.

(...)

Paragraph 5. Evidence as to the sound financial standing of a company shall made in a clear-cut, objective manner, by way of calculation of cert accounting indices set forth in the bidding prospectus and duly justified in administrative bidding process that has given rise thereto; indices a calculations other than those usually adopted for proper assessment o company's financial standing vis-à-vis the obligations related to the bidd process are hereby prohibited.

Paragraph 6. (vetoed).

Article 32. The documents required for qualification purposes may submitted in the original version, or through a certified copy issued b competent registry or official from the Administration, or otherwise publisl in the official press.

(...)

Article 38. (...)

Sole Paragraph. The draft bidding prospectuses, as well as the draft contra agreements, conventions or accords, shall be previously reviewed and proved by the legal counsel of the Administration.

Article 39. (...)

Sole Paragraph. For the purposes hereof, concurrent biddings shall mean th with similar objects and to be held within periods not exceeding thirty (days; successive biddings shall mean those with similar objects in which subsequent bidding prospectus is dated no later than one hundred and twe (120) days after the end of the contract ensuing from the preceding bidd process.

Article 40. (...)

X. acceptability criteria for the unit and global prices, as the case may minimum prices, statistical criteria or variation bands vis-à-vis refere prices are hereby prohibited;

XI. adjustment criteria, which shall reflect the actual variation in product costs; specific or sectorial indices will be admitted in this case, as from the d scheduled for the placement of bids or of the budget provision referring the through the date of settlement of each installment;

XII. (vetoed)

(...)

XIV. (...)

a) payment term not exceeding thirty (30) days as from the deadline settlement of each installment;

(...)
c) criteria applying to monetary restatement of outstanding payments, computed as from the deadline for settlement of each installment through the date of actual payment;
(...)
Paragraph 2. (...)
II. a budget estimate set out on spreadsheets covering quantities and unit prices;
Paragraph 4. The following items may be waived in purchases for prompt delivery (ie. for delivery within 30 days of the date scheduled for placement of the corresponding bids):
I. the provisions of item XI of this article;
II. the monetary restatement referred to in item XIV (c) of this article, corresponding to the period between the actual payment date and that originally scheduled therefor, provided that this period does not exceed 15 days.
(...)
Article 41. (...)
Paragraph 2. The right to challenge any purported failures or irregularities in a bidding prospectus before the Administration shall not be accorded to any bidder that fails to do so no later than two business days before the opening of the eligibility envelopes in a competitive bidding; the opening of the envelopes containing a bid in response of invitations to bid, requests for quotation, or bidding contests; or the holding of the corresponding auction. After the aforementioned deadline, any notice to this effect against the bidding prospectus will not be deemed an appeal
(...)
Article 42. (...)
Paragraph 2. Payments to Brazilian bidders contracted as a result of the bidding process referred to in the preceding paragraph shall be made in Brazilian currency at the exchange rate effective on the business day before the date of actual payment.
Paragraph 5. For the performance of works and services or the acquisition of goods with funds or grants from an official foreign cooperation agency or multilateral financial organism to which Brazil is a party, the corresponding bidding process may account for the conditions spelled out in the accords, protocols, conventions or treaties approved by Congress to this effect, as well as for the rules and procedures adopted by said entities, including as to the criteria applying to selection of the bid that is the most advantageous to the Administration. These criteria may include pricing and other assessment factors as required by the aforementioned entities for the release of funds or grants, provided that they do not conflict with objective judgment principles and are approved by a substantiated opinion issued by the contract execution body and ratified by its higher authority.
(...)
Article 43. (...)
Pa[redacted]h 4. [redacted]prov[redacted] of t[redacted]ticle[redacted]valid[redacted]omp[redacted]e bid[redacted]

and, to the extent applicable, for bidding contests, auctions, requests quotation, and invitations to bid.
(...)
Article 44. (...)
Paragraph 3. Bids containing token, paltry or zero global or unit pr inconsistently with input prices and market wages plus their respective cha will not be admitted (even if the bidding prospectus has not establis minimum prices), except if they refer to materials and installations pertai to the bidder whose remuneration is fully or partially waived by the sa
Paragraph 4. The preceding paragraph also applies to bids that rely on for manpower or imports of any kind.
Article 45. (...)
Paragraph 1. For the purposes of this article, the types of bidding (except the contest bidding) are as follows:
(...)
IV. the highest bid or offer—for disposal of assets or granting of usufr
Paragraph 3. For biddings subject to the best price criterion, qualified bid will be ranked in increasing order vis-à-vis the prices offered; in case of a the criterion set out in the preceding paragraph shall exclusively preva
Paragraph 4. For obtaining computer science items and services, the Pu Administration will observe the provisions of Law No. 8248, article 3 October 23, 1991, and will also take into account the factors spelled ou paragraph 2 thereof; for the purposes of this paragraph, the technology price criterion shall be employed, or other criterion authorized in an Execut Branch decree.
(...)
Article 46. The best technology or technology and price bidding processes s be adopted exclusively for services of a predominantly intellectual nat especially as regards planning, calculations, oversight, supervision, man ment and counsel in general, and particularly as regards the preparation preliminary technical studies, basic and working plans, with due regard for provisions of paragraph 4 of the preceding article.
(...)
Paragraph 4. (vetoed)
(...)
Article 48. (...)
II. bids at an overall amount higher than the applicable limits, or with cle unenforceable prices, i.e., those bids whose feasibility is not proven documentation evidencing that the input costs are compatible with mar prices and that the productivity ratios are consistent with the performance the subject matter of the contract; these conditions shall be specified in bidding announcement or prospectus.
Sole Paragraph. If no bid or bidder is qualified, the Administration may aff eight (8) business days for the placement of other bids devoid of disqualifying clauses referred to in this article; this deadline may be reduced three (3) business days for invitations to bid.
(...)
Ar[redacted]53. [redacted]

Paragraph 3. Cash payments under international auctions may be made within twenty-four (24) hours.
Paragraph 4. The auction prospectus shall be widely disclosed, mainly in the municipality wherein it is to take place.
Article 55. (...)
Paragraph 1. (vetoed)
(...)
Article 56. (...)
Paragraph 1. Performance bonds may be submitted in the form of:
I. cash pledge, or government bonds;
II. guarantee insurance; and
III. bank guarantee.
Paragraph 2. The guarantee referred to in the main section of this article cannot exceed five percent (5%) of the amount of the contract, and shall have its amount updated on the same conditions as those spelled out therein, with due regard for paragraph 3 of this article.
Paragraph 3. Works, services and supplies involving large sums, technical complexity, and substantial financial risks, duly evidenced in a technical opinion issued by the competent authority, may have the guarantee limit set forth in the preceding paragraph increased up to ten percent of the amount of the contract.
(...)
Article 57. (...)
I. (vetoed)
II. the performance of services on an ongoing basis, whose term may be determined as required to obtain pricing and other conditions to the best advantage of the Administration, provided that such term does not exceed sixty (60) months;
III. (vetoed)
(...)
Article 61. (...)
Sole Paragraph. The effectiveness of contracts or addenda is contingent on their summary publication in the official press by the Administration by the fifth business day in the month following that of the signing thereof but no later than twenty (20) days after such signing, whatever the amount involved, even if free of charge, with due regard for article 26 of this law.
Article 62. (...)
Paragraph 2. The provisions of article 55 hereof are valid, to the extent applicable, to letter agreements, commitment notes, purchase authorizations, service orders, or other proper instruments.
Article 65. (...)
II. (...)
d) to restablish the originally agreed ratio between the contractor's duties and their compensation by the Administration in order to achieve a fair remuneration for the work, service or supply thereunder, with a view to safeguarding the economic and financial equilibrium of the contract vis-à-vis the occurrence of unexpected or unforecast events or others whose consequences may cause a delay in or impair the performance of the contract, or in the event of force

majeure, acts of God or acts of state that may entail an extraordinary ev from an economic and contractual viewpoint.
(...)
Article 71. (...)
Paragraph 1. (vetoed)
Paragraph 2. (vetoed)
Paragraph 3. (vetoed)
(...)
Article 79. (...)
IV. (vetoed)
(...)
Paragraph 3. (vetoed)
Paragraph 4. (vetoed)
Article 92. To admit, make possible or cause any modifications or advanta including contractual extensions, in favor of the awardee during implemen tion of the agreements signed with the public authorities, outside what permitted under the law, in the announcement to bid or in the respect contractual instruments, or to pay the invoice without observing the chro logical order of its submission, with due regard for article 121 hereof. Penalty. confinement from two to four years, and a fine.
(...)
Article 109. (...)
I. (...)
e) termination of the agreement as referred to in article 79, I hereof.
(...)
Paragraph 6. The terms established in paragraph 3, I and II of this article sl be two business days for *invitations to bid.*
(...)
Article 113. (...)
Paragraph 2. At least one business day before the date scheduled for receipt the bids, the Accounts Tribunal and bodies of the in-house monitoring syst may ask to examine a copy of the bidding prospectus that has already b published, whereupon the bodies or entities of the interested Administrati shall agree to adopt any remedial measures applied thereto as a result of s examination.
(...)
Article 120. The amounts hereunder shall be automatically restated on same time basis and rates as the variation in the General Market Price In (IGPM) as of December 1991.
Sole Paragraph. The Federal Executive Branch shall cause the new amou officially effective at the time of each event mentioned in the main section this article to be published in the Official Gazette of the Federal Executive; such purposes, fractions lower than CR$ 1,00 (one cruzeiro real) will not taken into account.
Article 121. The provisions of this law do not apply to biddings instated contracts signed prior to the effectiveness hereof, except for the provisions article 57; article 65, paragraphs 1, 2 and 8; and article 78, XV hereof, as w as for the provisions of the main section of article 5 hereof as to payment

obligations in chronological order; this order may be observed, within ninety (90) days of the effectiveness of this law, separately for the obligations related to the contracts subject to the regulations preceding Law No. 8666 of June 21, 1993.

Article 124. The provisions of this law apply to biddings and contracts for the concession or granting of public utility services, to the extent such provisions do not conflict with specific regulations on the matter.

Sole Paragraph. The requirements dealt with in article 7, paragraph 2, II to IV shall be waived for bidding processes related to the concession of services with prior execution of works, for which no disbursement by the Public Administration has been forecast.

(...)

Article 2.—Article 18, sole paragraph of Law No. 8666 of June 21, 1993 is hereby revoked.

Article 3.—The Executive Branch will publish in the Official Gazette of the Federal Executive, within thirty days, the entire Law No. 8666 of June 21, 1993 as amended herein.

Article 4.—The acts performed under Provisional Measures Nos. 351 of September 16, 1993; 360 of October 18, 1993; 372 of November 17, 1993; 388 of December 16, 1993; 412 of January 14, 1994; 429 of February 16, 1994; 450 of March 17, 1994; and 472 of April 15, 1994 are hereby ratified.

Article 5.—This law takes effect on the date of its publication.

Brasília, June 8, 1994; 173rd of Independence, and 106th of the Republic.

ITAMAR FRANCO

Rubens Ricupero

Romildo Canhim

365