

**TITLE 44 – GOVERNMENT PROCUREMENT
CHAPTER 1 - PROCUREMENT CODE**



Republic of the Marshall Islands
Jepilpilin Ke Ejukaan

PROCUREMENT CODE ACT 1988

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**TITLE 44 – GOVERNMENT PROCUREMENT
CHAPTER 1 - PROCUREMENT CODE**



Republic of the Marshall Islands
Jepilpilin Ke Ejukaan

PROCUREMENT CODE ACT 1988

AN ACT to establish a procurement system and for purposes related thereto.

<i>Commencement:</i>	<i>November 28, 1988</i>
<i>Source:</i>	<i>P.L. 1988-33</i>
<i>Amended By:</i>	<i>P.L. 2009-28</i>

PART I - PRELIMINARY

§101. Short Title.

This Chapter may be cited as the "Procurement Code (Act) 1988".
[P.L. 1988-33, §1.]

PART II- GENERAL PROVISIONS

DIVISION 1 - INTERPRETATION

§102. Interpretation.

In this Chapter, unless the context in which they are used clearly requires a different meaning, or a different definition is prescribed for a particular Part or provision:

- (a) "**business**" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity;

- (b) **“change order”** means a written order signed by the Procurement Officer, directing the contractor to make changes which the Changes clause of the contract authorized the Procurement Officer to order, with or without the consent of the contractor;
- (c) **“Chief Procurement Officer”** means the person holding the position created in Section 113 of this Act, as head of the central procurement office of the Government;
- (d) **“construction”** means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property;
- (e) **“contract”** means all types of Government agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction;
- (f) **“contract modification”** means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract;
- (g) **“contractor”** means any person having a contract with a governmental body;
- (h) **“data”** means recorded information, regardless of form or characteristic;
- (i) **“designee”** means a duly authorized representative of a person holding a superior position;
- (j) **“employee”** means an individual drawing a salary from a governmental body, whether elected or not, and any non-compensated individual performing personal services for any governmental body;
- (k) **“government”** means the executive, legislative and judicial branch of the Government of the Republic of the Marshall Islands and all its political subdivisions, including Local Government Councils;

- (l) **“Governmental Body”** means any department, commission, council, board, bureau, committee, institution, legislative body, agency, statutory corporation, or other establishment or official of the Government, except that it does not include private corporations in which the Government has an interest;
- (m) **“grant”** means the furnishing by the Government of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract;
- (n) **“person”** means any business, individual, union, committee, club, other organization, or group of individuals;
- (o) **“procurement”** means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration;
- (p) **“Procurement Officer”** means any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority;
- (q) **“public funds”** means all Government monies, except that it does not include funds exceeded by private corporations in which the Government has an interest;
- (r) **“purchasing agency”** means any governmental body other than the Chief Procurement Officer which is authorized by this Act or its implementing regulation, or by way of delegation from the Chief Procurement Officer, to enter into contracts;
- (s) **“regulation”** means a governmental body’s statement, having general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements;

- (t) “**services**” means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements;
- (u) “**supplies**” means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land; and
- (v) “**Using Agency**” means any governmental body of the Government which utilizes any supplies, services, or construction procured under this Chapter. [P.L. 1988-33, §2.]

DIVISION 2 - PURPOSES, CONSTRUCTION AND APPLICATION

§103. Purposes.

- (1) This Code shall be construed and applied to promote its underlying purposes and policies.
- (2) The underlying purposes and policies of this Chapter shall be:
 - (a) to simplify, clarify, and modernize the law governing procurement by the Government;
 - (b) to permit the continued development of procurement policies and practices;
 - (c) to make as consistent as possible the procurement laws among the various jurisdictions;
 - (d) to provide for increased public confidence in the procedures followed in public procurement;
 - (e) to ensure the fair and equitable treatment of all persons who deal with the procurement system of the Government;
 - (f) to provide increased economy in Government procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Government;
 - (g) foster effective broad-based competition within the free enterprise system; and
 - (h) to provide safeguards for the maintenance of a procurement system of quality and integrity. [P.L. 1988-33, §3.]

§104. Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Chapter, the principles of law and equity, including the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this Chapter. [P.L. 1988-33, §4.]

§105. Requirement of Good Faith.

This Code requires all parties involved in the negotiation, performance, or administration of Government contracts to act in good faith. [P.L. 1988-33, §5.]

§106. Application of this Act.

- (1) This Chapter applies only to contracts solicited or entered into after the effective date of this Chapter unless the parties agree to its application to a contract solicited or entered into prior to the effective date of this Chapter.
- (2) This Chapter shall apply to every expenditure of public funds irrespective of their source by this Government, acting through a governmental body as defined herein, under any contract, except that this Chapter shall not apply to either grants, or contracts between the Government and its political subdivisions or other governments, except as provided in Part XI of this Chapter. It shall also apply to the disposal of Government supplies. Nothing in this Chapter or in regulations promulgated hereunder shall prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.
- (3) This Chapter and its accompanying regulations shall apply to all political subdivisions, including Local Government Councils, and other local public agencies of this Government, except that the Policy Office may permit optional use of selected portions of the regulations. [P.L. 1988-33, §6.]

§107. Severability.

If any provision of this Chapter or any application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this Chapter which can be given effect without

the invalid provisions or application, and to this end the provisions of this Chapter are declared to be severable. [P.L. 1988-33, §7.]

§108. Specific Repealer.

All other acts and parts of acts inconsistent herewith are hereby repealed, and all regulations heretofore promulgated with respect to procurement or to disposal of supplies are hereby repealed. [P.L. 1988-33, §8.]

§109. Construction Against Implicit Repealer.

Since this Chapter is a general Act, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction of the subsequent legislation can be reasonably avoided. [P.L. 1988-33, §9.]

DIVISION 3 - DETERMINATION

§110. Determinations.

Written determinations required by this Chapter shall be retained in the appropriate official contract file of the Chief Procurement Officer or the Purchasing Agency. [P.L. 1988-33, §10.]

PART III - PROCUREMENT ORGANIZATION

DIVISION 1 - GOVERNMENT PROCUREMENT POLICY OFFICE

§111. Creation and Membership of the Government Procurement Policy Office.

- (1) There is hereby created in the Office of the Chief Secretary the government Procurement Policy Office which is referred to hereinafter as the Policy Office.
- (2) The Department of Finance and Office of the Auditor General are authorized to provide such services as the Policy Office may request, on such basis, reimbursable or otherwise, as may be agreed upon between the Department of Finance and Office of the Auditor General and the Policy Office. [P.L. 1988-33, §11.]

§112. Authority and duties of the Policy Office.

Except as otherwise provided in this Chapter, the Policy Office shall have the authority and responsibility to promulgate regulations, consistent with this Chapter, governing the procurement, management, control, and disposal of any and all supplies, services, and construction to be procured by the Government. The Policy Office shall consider and decide matters of policy within the provisions of this Code including those referred to it by the Chief Procurement Officer. The Policy Office shall have the power to audit and monitor the implementation of its regulations and the requirements of this Chapter, but shall not exercise authority over the award or administration of any particular contract, or over any disputes, claim, or litigation pertaining thereto. [P.L. 1988-33, §12.]

DIVISION 2 - CHIEF PROCUREMENT OFFICER**§113. Creation of the Office of the Chief Procurement Officer.**

There is hereby created an Office of the Chief Procurement Officer, headed by the Chief Procurement Officer. [P.L. 1988-33, §13.]

§114. Appointment and Qualifications.

The Public Service Commission, in consultation with the Policy Office, shall appoint the Chief Procurement Officer. The Chief Procurement Officer shall have the experience and qualifications necessary to perform the duties of his office as set forth herein. [P.L. 1988-33, §14.]

§115. Authority of the Chief Procurement Officer.

- (1) The Chief Procurement Officer shall serve as the central procurement officer of the Government.
- (2) Consistent with the provisions of this Chapter, the Chief Procurement Officer may adopt operational procedures governing the internal functions of the Office of the Chief Procurement Officer.
- (3) Except as otherwise specifically provided in this Chapter, the Chief Procurement Officer shall, in accordance with regulations promulgated by the Policy Officer:
 - (a) procure or supervise the procurement of all supplies, services, and construction needed by the Government;

- (b) exercise general supervision and control over all inventories of supplies belonging to the Government; and
- (c) establish and maintain programs for the inspection, testing, and acceptance of supplies, services, and construction. [P.L. 1988-33, §15.]

§116. Delegation of Authority by the Chief Procurement Officer.

Subject to the regulations of the Policy Office, the Chief Procurement Officer may delegate authority to designees or to any department, agency, or official. [P.L. 1988-33, §16.]

DIVISION 3 - ORGANIZATION OF PUBLIC PROCUREMENT

§117. Centralization of Procurement Authority.

Except as otherwise provided in this Part, all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing, sale, and disposal of supplies, services, and construction now vested in, or exercised by, any governmental body under the several statutes relating thereto are hereby transferred to the Policy Office and the Chief Procurement Officer, as provided in this Chapter. [P.L. 1988-33, §17.]

§118. Authority to Contract for Certain Services.

- (1) For the purpose of procuring the services of accountants, clergy, physicians, lawyers, and dentists, any governmental body of the Government may act as a Purchasing Agency and contract on its own behalf for such services, subject to this Chapter and regulations promulgated by the Policy Office. The Purchasing Agency shall consult with the Chief Procurement Officer or a designee of such officer when procuring such services.
- (2) No contract for the services of legal counsel may be awarded without the approval of the Attorney-General. [P.L. 1988-33, §18.]

§119. Exemptions.

- (1) Unless otherwise ordered by regulation of the Policy Office, the following supplies, services, and construction need not be procured through the Office of the Chief Procurement Officer, but shall

nevertheless be procured by the appropriate Purchasing Agency subject to the requirements of this Chapter and the regulations promulgated by the Policy Office:

- (a) bridge, highway, or other heavy specialized construction;
 - (b) works of art for museum and public display;
 - (c) published books, maps, periodicals, and technical pamphlets; and
 - (d) architect-engineer and land surveying services as defined in Section 151 of this Chapter.
- (2) Supplies, services, and construction procured by the local government council, the Marshall Islands Development Authority, or the Kwajalein Atoll Development Authority need not be procured through the Office of the Chief Procurement Officer, but shall nevertheless be procured by the appropriate Purchasing Agency subject to the requirements of this Chapter and the regulations promulgated by the Policy Office. [P.L. 1988-33, §19.]

DIVISION 4 - PROCUREMENT REGULATIONS

§120. Procurement Regulations.

- (1) Regulations shall be promulgated by the Policy Office in accordance with the applicable provisions of the Administrative Procedure Act.
- (2) The Policy Office shall not delegate its power to promulgate regulations.
- (3) No regulation shall change any commitment, right, or obligation of the Government or of a contractor under a contract in existence on the effective date of such regulation. [P.L. 1988-33, §20.]

DIVISION 5 - COORDINATION

§121. Collection of Data Concerning Public Procurement.

The Chief Procurement Officer shall cooperate with the Department of Finance., Office of Planning, Budget Officer, and the Auditor-General in the preparation of statistical data concerning the procurement, usage, and disposition of all supplies, services, and construction, and shall be provided such trained personnel by the Public Service Commission as may be

necessary to carry out this function. All Using Agencies shall furnish such reports as the Chief Procurement Officer may require concerning usage, needs, and stocks on hand, and the Chief Procurement Officer shall, with the approval of the Secretary of Finance and the Attorney-General, have authority to prescribe forms to be used by the Using Agencies in requisitioning, ordering, and reporting of supplies, services, and construction. [P.L. 1988-33, §21.]

DIVISION 6 - DUTIES OF THE ATTORNEY-GENERAL

§122. Duties of the Attorney-General.

The Attorney-General, or such officer as the Attorney-General may designate, shall serve as legal counsel and provide necessary legal services to the Policy Office and the Chief Procurement Officer. [P.L. 1988-33, §22.]

PART IV - SOURCE SELECTION AND CONTRACT FORMATION

DIVISION 1 - DEFINITIONS

§123. Definition of terms used in this Part.

As used in this Part:

- (a) "cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Chapter, and a fee, if any;
- (b) "established catalogue price" means the price included in a catalogue, price list, schedule, or other form that:
 - (i) is regularly maintained by a manufacturer or contractor;
 - (ii) is either published or otherwise available for inspection by customers; and
 - (iii) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved;

- (c) “Invitation for Bids” means all documents, whether attached or incorporated by reference, utilized for soliciting bids;
- (d) “purchase description” means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made part of, the solicitation;
- (e) “Request for Proposals” means all documents, whether attached or incorporated by reference, utilized for soliciting proposals;
- (f) “responsible bidder or offeror” means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance; and
- (g) “responsive bidder” means a person who has submitted a bid which conforms in all material respect to the Invitation for Bids. [P.L. 1988-33, §23.]

DIVISION 2 - METHODS OF SOURCE SELECTION

§124. Methods of Source Selection.

Unless otherwise authorized by law, all Government contracts shall be awarded by competitive sealed bidding, pursuant to Section 125 of this Chapter, except as provided in Sections 126, 127, 128, 129, 130, or 119(1)(d) of this Chapter. [P.L. 1988-33, §24, modified.]

§125. Competitive Sealed Bidding.

- (1) Contracts shall be awarded by competitive sealed bidding except as otherwise provided in Section 124 of this Act.
- (2) An Invitation for Bids shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement.
- (3) Adequate public notice of the Invitation for Bids shall be given a reasonable time prior to the date set forth therein for the opening of bids, in accordance with regulations promulgated by the Policy Office. Such notice may include publication in a newspaper of general circulation for a reasonable time prior to bid opening.

- (4) Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection.
- (5) Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Chapter. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.
- (6) Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations promulgated by the Policy Office. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the Government or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer or head of a Purchasing Agency.
- (7) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. In the event all bids for a construction project exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than five percent (5%), the Chief Procurement Officer, or the head of a Purchasing Agency, is authorized in situations where time or economic considerations preclude re-solicitation or work of a reduced scope, to negotiate and adjust the bid price including changes in the

bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.

- (8) When it is considered impractical to initially prepare a purchase description to support an award based on price, an Invitation for Bids may be issued requesting the submission of unpriced offers to be followed by an Invitation for Bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation. [P.L. 1988-33, §25.]

§126. Competitive Sealed Proposals.

- (1) When, under regulations promulgated by the Policy Office, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the Government, a contract may be entered into by competitive sealed proposals. The Policy Office may provide by regulation that it is either not practicable or not advantageous to the Government to procure specified types of supplies, services, or construction by competitive sealed bidding.
- (2) Proposals shall be solicited through a Request for Proposals.
- (3) Adequate public notice of the Request for Proposals shall be given in the same manner as provided in Section 125(3) of this Chapter.
- (4) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A Register of Proposals shall be prepared in accordance with regulations promulgated by the Policy Office, and shall be open for public inspection after contract award.
- (5) The Request for Proposals shall state the relative importance of price and other evaluation factors.
- (6) As provided in the Request for Proposals, and under regulations promulgated by the Policy Office, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and

equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submission and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

- (7) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Government taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. [P.L. 1988-33, §26.]

§127. Small Purchases.

Any procurement not exceeding \$25,000, or a lesser amount established by regulation, may be made in accordance with small purchase procedures promulgated by the Policy Office; provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this Section. [P.L. 1988-33, §27.]

§128. Sole Source Procurement.

A contract may be awarded for a supply, service, or construction item without competition when, under regulations promulgated by the Policy Office, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service, or construction item. [P.L. 1988-33, §28.]

§129. Emergency Procurement.

Notwithstanding any other provision of this Chapter, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer may make or authorize others to make emergency procurement when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations promulgated by the Policy Office; provided, that such emergency procurement shall be made with such competition as is practicable under the circumstances. A written

determination of the basis for the emergence and for the selection of the particular contractor shall be included in the contract file. [P.L. 1988-33, §29.]

§130. Competitive Selection Procedures for Services Specified in Section 18.

- (1) The service specified in Section 118(1) of this Chapter, shall be procured in accordance with this Section, except as authorized under Section 128 or Section 129 of this Chapter.
- (2) Persons engaged in providing the types of services specified in Section 118(1) of this Chapter, may submit statements of qualifications and expressions of interest in providing such types of services. The Procurement Officer may specify a uniform format for statements of qualifications. Persons may amend these statements at any time by filing a new statement.
- (3) Adequate notice of the need for such services shall be given by the Purchasing Agency through a Request for Proposals. The Request for Proposals shall describe the Services required, list the type of information and data required of each offeror, and state the relative importance of particular qualifications.
- (4) The head of the Purchasing Agency or a designee of such officer may conduct discussion with an offeror who has submitted a proposal to determine such offeror's qualifications for further consideration. Discussion shall not disclose any information derived from proposals submitted by other offerors.
- (5) Award shall be made to the offeror determined in writing by the head of the Purchasing Agency or a designee of such officer to be best qualified based on the evaluation factors set forth in the Request for Proposals, and negotiation of compensation determined to be fair and reasonable. If compensation cannot be agreed upon with the best qualified offeror, then negotiations will be formally terminated with the selected offeror. If proposals were submitted by one or more other offerors determined to be qualified, negotiations may be conducted with such other offeror or offerors, in the order of their respective qualification ranking, and the contract may be awarded to the offeror then ranked as best qualified if the amount of compensation is determined to be fair and reasonable. [P.L. 1988-33, §30.]

DIVISION 3 - CANCELLATION OF INVITATION FOR BIDS OR REQUESTS FOR PROPOSALS

§131. Cancellation of Invitations for Bids or Requests for Proposals.

An Invitation for Bids, a Request for Proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the Government in accordance with regulations promulgated by the Policy Office. The reasons therefore shall be made part of the contract file. [P.L. 1988-33, §31.]

DIVISION 4 - QUALIFICATIONS AND DUTIES

§132. Responsibility of Bidders and Offerors.

- (1) A written determination of non-responsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the Policy Office. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder or offeror and such bidder or offeror shall be disqualified.
- (2) Information furnished by a bidder or offeror pursuant to this Section shall not be disclosed outside of the Office of the Chief Procurement Officer or the Purchasing Agency without prior written consent by the bidder or offeror. [P.L. 1988-33, §32.]

§133. Pre-qualification of Suppliers.

Prospective suppliers may be prequalified for particular types of supplies, services, and construction. Solicitation mailing lists of potential contractors shall include but shall not be limited to such prequalified suppliers. [P.L. 1988-33, §33.]

§134. Cost or Pricing Data.

- (1) A contractor shall, except as provided in Subsection (3) of this Section, submit cost or pricing data and shall certify that, to the best of its knowledge and belief, the cost or pricing data submitted was

- accurate, complete, and current as of a mutually determined specified date prior to the date of:
- (a) the pricing of any contract awarded by competitive sealed proposals under Section 126 of this Chapter, or pursuant to the sole source procurement authority under Section 128 of this Chapter, where the total contract price is expected to exceed an amount established by Policy Office regulations; or
 - (b) the pricing of any change order or contract modification which is expected to exceed an amount established by Policy Office regulations.
- (2) Any contract, change order, or contract modification under which a certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which the Government finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the parties.
- (3) The requirements of this Section need not be applied to contracts:
- (a) where the contract price is based on adequate price competition;
 - (b) where the contract price is based on established catalogue prices or market prices;
 - (c) where the contract prices are set by law or regulation; or
 - (d) where it is determined in writing in accordance with regulations promulgated by the Policy Office that the requirements of this Section may be waived, and the reasons for such waiver are stated in writing. [P.L. 1988-33, §34.]

DIVISION 5 - TYPES OF CONTRACTS

§135. Types of Contracts.

Subject to the limitations of this Section, any type of contract which will promote the best interests of the Government may be used; provided, that the use of a cost-plus-a percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the Government than

any other type or that it is impracticable to obtain the supplies, services, or construction required except under such a contract. [P.L. 1988-33, §35.]

§136. Approval of Accounting System.

Except with respect to firm fixed-price contracts, no contract type shall be used unless it has been determined in writing by the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer that:

- (a) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and
- (b) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles. [P.L. 1988-33, §36.]

§137. Multi-Term Contracts.

- (1) Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the Government provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.
- (2) Prior to the utilization of a multi-term contract, it shall be determined in writing:
 - (a) that estimated requirements cover the period of the contract and are reasonably firm and continuing; and
 - (b) that such a contract will serve the best interests of the Government by encouraging effective competition or otherwise promoting economies in Government procurement.
- (3) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the

contract. The cost of cancellation may be paid from any appropriations available for such purposes. [P.L. 1988-33, §37.]

DIVISION 6 - INSPECTION OF PLANT AND AUDIT OF RECORDS RIGHT TO INSPECT PLANT.

§138. Right to Inspect Plant.

The Government may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the Government. [P.L. 1988-33, §38.]

§139. Right to Audit Records.

- (1) The Government may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data pursuant to Section 134 of this Chapter to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.
- (2) The Government shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing. [P.L. 1988-33, §39.]

DIVISION 7 - DETERMINATIONS AND REPORTS

§140. Finality of Determinations.

The determinations required by Sections 125(6), 126(1), 126(7), 128,129, 130(5), 132(1), 134(3), 135, 136, and 137(2) of this Act, are final and conclusive

unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [P.L. 1988-33, §40.]

§141. Reporting of Anti-competitive Practices.

When for any reason collusion or other anti-competitive practices are suspected among any bidders or offerors, a notice of relevant facts shall be transmitted to the Attorney-General. [P.L. 1988-33, §41.]

§142. Retention of Procurement Records.

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Attorney-General. All retained documents shall be made available to the Attorney-General or a designee upon request and proper receipt therefor. [P.L. 1988-33, §42.]

§143. Record of Procurement Actions Taken Under Section 128 and Section 129.

- (1) The Chief Procurement Officer shall maintain a record listing all contracts made under Section 128 or Section 129 of this Chapter, for a minimum of five (5) years. The record shall contain:
 - (a) each contractor's name;
 - (b) the amount and type of each contract; and
 - (c) a listing of the supplies, services, or construction procured under each contract.
- (2) A copy of such record shall be submitted to the Nitijela on an annual basis. The record shall be available for public inspection. [P.L. 1988-33, §43.]

PART V - SPECIFICATIONS

DIVISION 1 - DEFINITIONS

§144. Definitions of terms used in this Part.

"Specification", means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery. [P.L. 1988-33, §44.]

DIVISION 2 - SPECIFICATIONS

§145. Duties of the Policy Office.

The Policy Office shall promulgate regulations governing the preparation, maintenance, and content of specifications for supplies, services, and construction required by the Government. [P.L. 1988-33, §45.]

§146. Duties of the Chief Procurement Officer.

The Chief Procurement Officer shall prepare, issue, revise, maintain, and monitor the use of specifications for supplies, services, and construction required by the Government. [P.L. 1988-33, §46.]

§147. Exempted Items.

Specifications for supplies, services, or construction items procured under Section 118 or exempted pursuant to Section 119 of this Chapter, may be prepared by a Purchasing Agency in accordance with the provisions of this Part and regulations promulgated hereunder. [P.L. 1988-33, §47.]

§148. Relationship with using Agencies.

The Chief Procurement Officer shall obtain expert advice and assistance from personnel of Using Agencies in the development of specifications and may delegate in writing to a Using Agency the Authority to prepare and utilize its own specifications. [P.L. 1988-33, §48.]

§149. Maximum Practicable Competition.

All specifications shall seek to promote overall economy for the purpose intended and encourage competition in satisfying the Government 's needs, and shall not be unduly restrictive. [P.L. 1988-33, §49.]

§150. Specifications prepared by Architects and Engineers.

The requirements of this Article regarding the purposes and non-restrictiveness of specifications shall apply to all specifications, including, but not limited to, those prepared by architects, engineers, designers, and draftsmen for public contracts. [P.L. 1988-33, §50.]

PART VI- PROCUREMENT OF CONSTRUCTION, ARCHITECT ENGINEER AND LAND SURVEYING SERVICES

DIVISION 1 - DEFINITIONS

§151. Definitions of terms used in this Part.

As used in this Part:

- (a) "Architect-Engineer and Land Surveying Services" are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as hereinafter defined;
- (b) "the practice of architecture", means any professional service such as consultation, investigation, evaluation, planning, design, including aesthetic and structural design, or responsible supervision of construction or operation, in connection with any private or public buildings, structures, or projects or the equipment or utilities thereof, or the accessories thereto, wherein the safeguarding of life, health, or property is concerned or involved, when such professional service requires the application of the art and science of construction based upon the principles of mathematics, aesthetics, and the physical sciences;
- (c) "the practice of professional engineering", means any professional service such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction or operation, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the safeguarding of life, health, or property is concerned or involved when such professional service requires the application of engineering principles and data;
- (d) "the practice of land surveying", means the making of cadastral surveys of areas for their correct determination and description, either for conveyancing of or the establishment or reestablishment of land boundaries or the plotting of lands and subdivisions thereof. [P.L. 1988-33, §51.]

DIVISION 2 - MANAGEMENT OF CONSTRUCTION CONTRACTING

§152. Responsibility for selection of methods of Construction Contracting Management.

The Policy Office shall promulgate regulations providing for as many alternative methods of construction management as it may determine to be feasible. These regulations shall:

- (a) set forth criteria to be used in determining which method of construction contracting management is to be used for a particular project;
- (b) grant to the Chief Procurement Officer, or the head of the Purchasing Agency responsible for carrying out the construction project, the discretion to select the appropriate method of construction contracting management for a particular project; and
- (c) require the Procurement Officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project. [P.L. 1988-33, §52.]

DIVISION 3 - BONDS

§153. Bid Security.

- (1) Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the Procurement Officer to exceed \$100,000. Bid security shall be a bond provided by a United States Treasury listed surety company, or the equivalent in cash, or otherwise supplied in a form satisfactory to the Policy Office. Nothing herein prevents the requirement of such bonds on construction contracts under \$100,000 when the circumstances warrant.
- (2) Bid security shall be in an amount equal to at least 5% of the amount of the bid.
- (3) When the Invitation for Bids requires security, noncompliance requires that the bid be rejected unless, pursuant to Policy Office

regulations, it is determined that the bid fails to comply in a non-substantial manner with the security requirements.

- (4) The Cabinet may exempt the required bid security by waiving in part or in its entirety the amount of security in such cases where waiver of such requirement will enable a local qualified firm to undertake such construction contract won through bidding.
- (5) After the bids are opened, they shall be irrevocable for the period specified in the Invitation for Bids, except as provided in Section 125(6) of this Chapter. If a bidder is permitted to withdraw its bid before award, no action shall be had against the bidder or the bid security. [P.L. 1988-33, §53.]

§154. Contract performance and payment bonds.

- (1) When a construction contract is awarded in excess of \$100,000, except where the Cabinet has exempted under Section 153(4) of this Chapter, bid security, the following bonds or security shall be delivered to the Government and shall become binding on the parties upon the execution of the contract:
 - (a) a performance bond satisfactory to the Government, executed by a United States Treasury listed surety company, or other surety acceptable to the Government, for an amount equal to 100% of the price specified in the contract; and
 - (b) a payment bond satisfactory to the Government, executed by a United States Treasury listed surety company, or other surety acceptable to the Government for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to 100% of the price specified in the contract.
- (2) The Policy Office may promulgate regulations that authorize the Chief Procurement Officer or head of a Purchasing Agency to reduce the amount of performance and payment bonds to 50% of the contract price for each bond.
- (3) Nothing in this Section shall be construed to limit the authority of the Government to require a performance bond or other security in

addition to those bonds, or in circumstances other than specified in Subsection (1) of this Section.

- (4) Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, with respect to which a payment bond is furnished under this Section, and who has not been paid in full therefor before the expiration of a period of ninety (90) days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractual relationship express or implied with the contractor furnishing said bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be personally served or served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business.
- (5) Every suit instituted upon a payment bond shall be brought in the High Court of the Marshall Islands, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit. [P.L. 1988-33, §54.]

§155. Bond Forms and Copies.

- (1) The Policy Office shall promulgate by regulation the form of the bonds required by this Part.

- (2) Any person may request and obtain from the Government a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.
[P.L. 1988-33, 55.]

DIVISION 4 - CONSTRUCTION CONTRACT CLAUSES AND FISCAL
RESPONSIBILITY CONTRACT CLAUSES AND THEIR ADMINISTRATION.

§156. Contract Clauses and Their Administration.

- (1) The Policy Office shall promulgate regulations requiring the inclusion in Government construction contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:
 - (a) the unilateral right of the Government to order in writing:
 - (i) changes in the work within the scope of the contract; and
 - (ii) changes in the time of performance of the contract that do not alter the scope of the contract work;
 - (b) variation occurring between estimated quantities of work in a contract and actual quantities;
 - (c) suspension of work ordered by the Government; and
 - (d) site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses promulgated by the Policy Office need not be included in a contract:
 - (i) when the contract is negotiated;
 - (ii) when the contractor provides the site or design; or
 - (iii) when the parties have otherwise agreed with respect to the risk of differing site conditions.
- (2) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:
 - (a) by agreement on a fixed price adjustment before the commencement of the pertinent performance or as soon thereafter as practicable;

- (b) by unit prices specified in the contract or subsequently agreed upon;
- (c) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
- (d) in such other manner as the contracting parties may mutually agree; or
- (e) in the absence of agreement by the parties, by a unilateral determination by the Government of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Government in accordance with applicable sections of the regulations promulgated under Part VIII and subject to the provisions of Part X of this Chapter.

A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 134 of this Chapter.

- (3) The Policy Office shall promulgate regulations requiring the inclusion in Government construction contracts of clauses providing for appropriate remedies and covering the following subjects:
 - (a) liquidated damages as appropriate;
 - (b) specified excuses for delay or nonperformance;
 - (c) termination of the contract for default; and
 - (d) termination of the contract in whole or in part for the convenience of the Government.
- (4) The Chief Procurement Officer or the head of a Purchasing Agency may vary the clauses promulgated by the Policy Office under Subsections (1) and (3) of this Section, for inclusion in any particular Government construction contract; provided, that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variations be stated in the Invitation for Bids or Request for Proposals. [P.L. 1988-33, §56.]

§157. Fiscal Responsibility.

Every contract modification, change order, or contract price adjustment under a construction contract with the Government shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the Contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Procurement Officer shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section. [P.L. 1988-33, §57.]

DIVISION 5 - ARCHITECT-ENGINEER AND LAND SURVEYING SERVICES**§158. Architect-Engineer and Land Surveying Services.**

- (1) Architect-Engineer and land surveying services shall be procured as provided in this Section except as authorized by Sections 127, 128, and Section 129 of this Chapter.
- (2) It is the policy of this Government to publicly announce all requirements for architect-engineer and land surveying services and to negotiate contracts for architect-engineer and land surveying services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.
- (3) In the procurement of architect-engineer and land surveying services, the Chief Procurement Officer or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. Except as provided in Subsection (5) of this

Section, the Chief Procurement Officer or the head of a Purchasing Agency, the Chief Planner, and the Procurement Officer shall comprise the Architect-Engineer Selection Committee for each architect-engineer and land surveying services contract over \$25,000. The Selection Committee for architect-engineer and land surveying services contracts under this amount shall be established in accordance with regulations promulgated by the Policy Office. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the Government, together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three (3) firms regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, on order of preference, based upon criteria established and published by the Selection Committee, no less than three (3) of the firms deemed to be the most highly qualified to provide the services required.

- (4) The Procurement Officer shall negotiate a contract with the highest qualified firm for architect-engineer or land surveying services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the Government. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the Government, negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this Section until an agreement is reached.

- (5) The Kwajalein Atoll Development Authority and the Marshall Islands Development Authority are exempt from the requirements of this Section concerning members of the Architect-Engineer Selection Committee. The Board of Directors of each of the Kwajalein Atoll Development Authority and the Marshall Islands Development Authority shall constitute the Architect-Engineer Selection Committee for contracts for Architect-Engineer and Land Surveying services awarded by such authorities. Except as provided in the preceding sentence, the Kwajalein Atoll Development Authority and the Marshall Islands Development Authority shall follow the provisions of this Section. [P.L. 1988-33, §58.]

PART VII- MODIFICATION AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES

§159. Contract Clauses and Their Administration.

- (1) The Policy Office may promulgate regulations permitting or requiring the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate covering the following subjects:
- (a) the unilateral right of the Government to order in writing:
 - (i) changes in the work within the scope of the contract; and
 - (ii) temporary stopping of the work or delaying performance; and
 - (b) variations occurring between estimated quantities of work in a contract and actual quantities.
- (2) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:
- (a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (b) by unit prices specified in the contract or subsequently agreed upon;

- (c) by the costs attributable to the events or situations under such clauses with adjustment for profit or fee, all as specified in the contract or subsequently agreed upon;
- (d) in such other manner as the contracting parties may mutually agree; or
- (e) in the absence of agreement by the parties, by a unilateral determination by the Government of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Government in accordance with applicable sections of the regulations promulgated under Part VIII and subject to the provisions of Part X of this Chapter.

A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 134 of this Chapter.

- (3) The Policy Office may promulgate regulations including, but not limited to, regulations permitting or requiring the inclusion in Government contracts of clauses providing for appropriate remedies and covering the following subjects:
 - (a) liquidated damages as appropriate;
 - (b) specified excuses for delay or nonperformance;
 - (c) termination of the contract for default; and
 - (d) termination of the contract in whole or in part for the convenience of the Government.
- (4) The Chief Procurement Officer or the head of a Purchasing Agency may vary the clauses promulgated by the Policy Office under Subsections (1) and (3) of this Section, for inclusion in any particular Government contract; provided, that any variations are supported by a written determination that states the circumstances justifying such variation and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals. [P.L. 1988-33, §59.]

PART VIII- COST PRINCIPLES

§160. Cost Principles Regulations Required.

The Policy Office shall promulgate regulations setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that if a written determination is approved at a level above the Procurement Officer, such cost principles may be modified by contract. [P.L. 1988-33, §60.]

PART IX - SUPPLY MANAGEMENT

DIVISION 1 - DEFINITIONS

§161. Definitions of terms used in this Part.

As used in this Part:

- (a) "excess supplies" means any supplies other than expendable supplies having a remaining useful life but which are no longer required by the Using Agency in possession of the supplies;
- (b) "expendable supplies" means all tangible supplies other than nonexpendable supplies;
- (c) "non-expendable supplies" means all tangible supplies having an original acquisition cost of over \$100 per unit and a probable useful life of more than one year;
- (d) "supplies" means, for purposes of this Part, supplies owned by the Government-see Section 2(u) of this Chapter;
- (e) "surplus supplies" means any supplies other than expendable supplies no longer having any use to the Government, this includes obsolete supplies, scrap materials, and non-expendable supplies that have completed their useful life cycle. [P.L. 1988-33, §61.]

DIVISION 2 - REGULATIONS REQUIRED

§162. Supply Management Regulations Required.

The Policy Office shall promulgate regulations governing:

- (a) the management of supplies during their entire life cycle;
- (b) the sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate method designated by regulation; provided, that no employee of the owning or disposing agency shall be entitled to purchase any such supplies; and
- (c) transfer of excess supplies. [P.L. 1988-33, §62.]

DIVISION 3 - PROCEEDS

§163. Allocation of Proceeds from Sale or Disposal of Surplus Supplies.

Unless otherwise provided by law, proceeds from the sale, lease, or disposal of surplus supplies shall be paid into the General Fund. [P.L. 1988-33, §63.]

PART X - LEGAL AND CONTRACTUAL REMEDIES

DIVISION 1 - PRE-LITIGATION RESOLUTION OF CONTROVERSIES

§164. Authority to resolve protested solicitations and awards.

- (1) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Chief Procurement Officer or the head of a Purchasing Agency. The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should have known of the facts giving rise thereto.
- (2) The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with regulations promulgated by the Policy Office.

- (3) If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either shall promptly issue a decision in writing. The decision shall state the reasons for the action taken.
- (4) A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.
- (5) A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or any person adversely affected by the decision commences an action in court in accordance with Section 171(1) of this Chapter.
- (6) In the event of a timely protest under Subsection (1) of this Section and action under Section 171(1) of this Chapter, the Government shall not proceed further with the solicitation or with the award of the contract until the Chief Procurement Officer, after consultation with the head of the Using Agency or the head of the Purchasing Agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the Government.
- (7) In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the Solicitation, including bid preparation costs other than attorney's fees. [P.L. 1988-33, §64.]

§165. Authority to Debar or Suspend.

- (1) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Chief Procurement Officer or the head of a Purchasing Agency, after consultation with the Using Agency and the Attorney-General shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three (3) years. The same officer, after consultation with the Using Agency and the Attorney-General, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three

- (3) months. The authority to debar or suspend shall be exercised in accordance with regulations promulgated by the Policy Office.
- (2) The causes for debarment or suspension include the following:
- (a) conviction for commission of a criminal offense as an incident to obtaining or attempt to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
 - (b) conviction under Marshall Islands statutes for cheating, embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Government contractor;
 - (c) conviction under Marshall Islands unfair business practices or antitrust statutes arising out of the submission of bids or proposals;
 - (d) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer or the head of a Purchasing Agency to be so serious as to justify debarment action:
 - (i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
 - (e) any other cause the Chief Procurement Officer or the head of a Purchasing Agency determines to be so serious and compelling as to affect responsibility as a Government contractor, including debarment by another governmental entity for any cause listed in regulations of the Policy Office; and
 - (f) for violation of the ethical standards set forth in Part XIII of this Chapter.

- (3) The Chief Procurement Officer or the head of a Purchasing Agency shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken.
- (4) A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.
- (5) A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or the debarred or suspended person commences an action in court in accordance with Section 171(2) of this Chapter. [P.L. 1988-33, §65.]

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

- (1) This Section applies to controversies between the Government and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.
- (2) The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in Subsection (1) of this Section. This authority shall be exercised in accordance with regulations promulgated by the Policy Office.
- (3) If such a controversy is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer shall promptly issue a decision in writing. The decision shall state the reasons for the action taken.
- (4) A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the contractor.
- (5) The decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or the contractor commences an action in court in accordance with Section 171(3) of this Chapter.
- (6) If the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer does not issue the written decision required under Subsection (3) of this Section within 120 days after written request for a final decision, or within such longer period as

may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received. [P.L. 1988-33, §66.]

DIVISION 2 - SOLICITATIONS OR AWARDS IN VIOLATION OF LAW

§167. Applicability of this Division.

The provisions of this Division apply where it is determined administratively, or upon an administrative or judicial review, that a solicitation or award of a contract is in violation of law. [P.L. 1988-33, §67.]

§168. Remedies prior to an award.

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

- (a) canceled; or
- (b) revised to comply with the law. [P.L. 1988-33, §68.]

§169. Remedies after an award.

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

- (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Government; or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination;
- (b) if the person awarded the contract has acted fraudulently or in bad faith:
 - (i) the contract may be declared null and void; or
 - (ii) the contract may be ratified and affirmed if such action is in the best interests of the Government, without

prejudice to the Government's rights to such damages as may be appropriate. [P.L. 1988-33, §69.]

DIVISION 3 - INTEREST

§170. Interest.

Interest on amounts ultimately determined to be due to a contractor or the Government shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later. [P.L. 1988-33, §70.]

DIVISION 4 - JURISDICTION LIMITATION ON ACTIONS

§171. Jurisdiction.

- (1) The High Court shall have jurisdiction over an action between the Government and a bidder, offeror or contract, prospective or actual, to determine whether a solicitation or a award of contract is in accordance with the Constitution of the Marshall Islands, statutes regulations, and terms and conditions of the solicitation. The High Court shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.
- (2) The High Court shall have jurisdiction over an action between the Government and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the Constitution of the Marshall Islands, statutes, and regulations. The High Court shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for declaratory, injunctive, or other equitable relief.
- (3) The High Court shall have jurisdiction over an action between the Government and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether the action is for monetary damages or declaratory, injunctive, or other equitable relief.
- (4) In any judicial action under this Section, factual or legal determinations by employees, agents, or other persons appointed by

the Government shall have no finality and shall not be conclusive, notwithstanding any contract provision, regulation, or rule of law to the contrary, except to the extent provided in Section 140 of this Chapter. [P.L. 1988-33, §71.]

§172. Time limitations on actions.

- (1) Any action under Section 171(1) of this Chapter, shall be initiated as follows:
 - (a) within thirty (30) days after the aggrieved person knows or should have known of the facts giving rise to the action; or
 - (b) within fourteen (14) days after receipt of a final administrative decision pursuant to Section 164(3) of this Chapter.
- (2) Any action under Section 171(2) of this Chapter, shall be commenced within six (6) months after receipt of the decision of the Chief Procurement Officer or head of a Purchasing Agency under Section 165(3) of this Chapter, or the decision of the Ethics Commission under Section 197(2)(c) of this Chapter, whichever is applicable.
- (3) The statutory limitations on an action on a contract or for breach of contract shall apply to any action commenced pursuant to Section 171(3) of this Chapter. [P.L. 1988-33, §72.]

PART XI- INTERGOVERNMENTAL RELATIONS

DIVISION 1 - DEFINITIONS

§173. Definitions of terms used in this Part.

As used in this Part:

- (a) “cooperative purchasing” means procurement conducted by, or on behalf of, more than one Public Procurement Unit, or by a Public Procurement Unit with an External Procurement Activity;
- (b) “External Procurement Activity” means any buying organization not located in this Republic which, if located in this Republic, would qualify as a Public Procurement Unit. An agency of the Federated States of Micronesia, Republic of

- Palau and the United States is an External Procurement Activity;
- (c) “Government Public Procurement Unit” means the office of the Chief Procurement Officer and any other Purchasing Agency of this Government;
 - (d) “Local Public Procurement Unit” means any Local Government Council or public agency of any Local Government Council, public authority, educational, health, or other institution, and to the extent provided by law, any other entity which expends public funds for the procurement of supplies, services, and construction, and any nonprofit corporation operating a charitable hospital.
 - (e) “Public Procurement Unit” means either a Local Government Public Procurement Unit or a National Government Public Procurement Unit. [P.L. 1988-33, §73.]

DIVISION 2 - COOPERATIVE PURCHASING

§174. Cooperative Purchasing Authorized.

Any Public Procurement Unit may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any supplies, services, or construction with one or more Public Procurement Units or External Procurement Activities in accordance with an agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multi-party contracts between Public Procurement Units and open-ended Government Public Procurement Unit Contracts which are available to Local Public Procurement Units. [P.L. 1988-33, §74.]

§175. Sale, Acquisition, or Use of Supplies by a Public Procurement Unit.

Any Public Procurement Unit may sell to, acquire from, or use any supplies belonging to another Public Procurement Unit or External Procurement Activity independent of the requirements of Parts IV and IX of this Chapter. [P.L. 1988-33, §75.]

§176. Cooperative Use of Supplies or Services.

Any Public Procurement Unit may enter into an agreement, independent of the requirements of Parts IV and IX of this Chapter, with any other Public Procurement Unit or External Procurement Activity for the cooperative use of supplies or services under the terms agreed upon between the parties. [P.L. 1988-33, §76.]

§177. Joint Use of Facilities.

Any Public Procurement Unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another Public Procurement Unit or an External Procurement Activity under the terms agreed upon between the parties. [P.L. 1988-33, §77.]

§178. Supply of Personnel, Information, and Technical Services.

- (1) Any Public Procurement Unit is authorized, in its discretion, upon written request from another Public Procurement Unit or External Procurement Activity, to provide personnel to the requesting Public Procurement Unit or External Procurement Activity. The Public Procurement Unit or External Procurement Activity making the request shall pay the Public Procurement Unit providing the Personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.
- (2) The informational, technical, and other services of any Public Procurement Unit may be made available to any other Public Procurement Unit or External Procurement Activity; provided, that the requirements of the Public Procurement Unit tendering the services shall have precedence over the requesting Public Procurement Unit or External Procurement Activity. The requesting Public Procurement Unit or External Procurement Activity shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.
- (3) Upon request, the Chief Procurement Officer may make available to Public Procurement Units or External Procurement Activities the following services, among others:
 - (a) standard forms;
 - (b) printed manuals;

- (c) product specifications and standards;
 - (d) quality assurance testing services and methods;
 - (e) qualified products lists;
 - (f) source information;
 - (g) common use commodities listings;
 - (h) supplier pre-qualification information;
 - (i) supplier performance ratings;
 - (j) debarred and suspended bidders lists;
 - (k) forms for Invitations for Bids, Requests for Proposals, Instructions to Bidders, General Contract Provisions, and other contract forms; and
 - (l) contracts or published summaries thereof, including price and time of delivery information.
- (4) The Government, through the Chief Procurement Officer, may provide the following technical services, among others:
- (a) development of product specifications;
 - (b) development of quality assurance test methods, including receiving, inspection and acceptance procedures;
 - (c) use of product testing and inspection facilities; and
 - (d) use of personnel training programs.
- (5) The Chief Procurement Officer may enter into contractual arrangements and publish a schedule of fees for the services provided under Subsections (3) and (4) of this Section. [P.L. 1988-33, §78.]

§179. Use of Payments Received by a Supplying Public Procurement Unit.

All payments from any Public Procurement Unit or External Procurement Activity received by a Public Procurement Unit supplying personnel or services shall be available as authorized by law. [P.L. 1988-33, §79.]

§180. Public procurement units in compliance with code requirements.

Where the Public Procurement Unit or External Procurement Activity administering a cooperative purchase complies with the requirements of this Chapter, any Public Procurement Unit participating in such purchase shall be deemed to have complied with this Chapter. Public Procurement

Units may not enter into a cooperative purchasing agreement for the purpose of circumventing this Chapter. [P.L. 1988-33, §80.]

§181. Review of Procurement Requirements.

To the extent possible, the Chief Procurement Officer may collect information concerning the type, cost, quality, and quantity of commonly used supplies, services, or construction being procured or used by Government Public Procurement Units. The Chief Procurement Officer may also collect such information from Local Public Procurement Units. The Chief Procurement Officer may make available all such information to any Public Procurement Unit upon request. [P.L. 1988-33, §81.]

DIVISION 3 - CONTRACT CONTROVERSIES

§182. Contract Controversies; Public Procurement Unit Subject to Part X.

Under a cooperative purchasing agreement, controversies arising between an administering Public Procurement Unit and its bidders, offerors, or contractors shall be resolved in accordance with Part X. [P.L. 1988-33, §82.]

PART XII - PREFERENCES

§183. Definitions of Terms Used in this Part.

As used in this Part:

- (a) "Marshall Islands Contractor" means a natural person who is a citizen of the Marshall Islands or a company or other entity doing business in the Marshall Islands, the assets of which are at least sixty percent (60%) owned and controlled in fact by natural persons who are citizens of the Marshall Islands; and
- (b) "United States Contractor" means a natural person who is a citizen of the United States or a company or other entity doing business in the United States, the assets of which are at least sixty percent (60%) owned and controlled in fact by natural persons who are citizens of the United States and/or citizens of the Marshall Islands. [P.L. 1988-33, §83.]

§184. Preference; General.

All contracts bid under Section 125 of this Chapter, for the procurement of services, supplies, material and equipment, other than contracts for the construction, alteration, or repair of any building or public work, shall be awarded to the Marshall Islands contractor with the lowest qualified bid; provided, that the bid of said Marshall Islands contractor does not exceed 110 percent of the amount of the lowest qualified bid from a non-Marshall Islands contractor for such contract. [P.L. 1988-33, §84.]

§185. Preference; Construction.

- (1) All contracts bid under Section 125 of this Chapter, for the procurement of construction, alteration, or repair of any building or public work with a project cost estimated by the Purchasing Agency to be \$200,000, or less, shall be awarded to the Marshall Islands contractor with the lowest qualified bid; provided, that the bid of said Marshall Islands contractor does not exceed 110 percent of the amount of the lowest qualified bid from a non-Marshall Islands contractor for such contract.
- (2) Subject to Section 185(3) of this Chapter, all contracts bid under Section 125 of this Act, for construction, alteration, or repair of any building or public work with a project cost estimated by the Purchasing Agency to be greater than \$200,000 shall be awarded to the Marshall Islands Contractor or the United States Contractor with the lowest qualified bid; provided, that the bid of such contractor does not exceed 110 percent of the amount of the lowest qualified bid from a non-Marshall Islands or non-United States contractor for such contract.
- (3) The preference provided to United States Contractors under Section 185(2) of this Act, shall be effective upon, and subject to, implementation of the agreement referred to in Section 8 of Nitijela Resolution Number 62 and Section 106(b) of United States Public Law 99-239. [P.L. 1988-33, §85.]

PART XIII - ETHICS IN PUBLIC CONTRACTING

DIVISION 1 - DEFINITIONS

§186. Definitions of Terms Used in this Part.

As used in this Part:

- (a) “blind trust” means an independently managed trust which the employee beneficiary has no management rights and in which the employee beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust;
- (b) “confidential information” means any information which is available to an employee only because of the employee’s status as an employee of this Government and is not a matter of public knowledge or available to the public on request;
- (c) “conspicuously” means written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it;
- (d) “direct or indirect participation” means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity;
- (e) “financial interest” means:
 - (i) ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, more than \$100,000 per year, or its equivalent;
 - (ii) ownership of such interest in any property or any business as may be specified by the Ethics Commission;
or
 - (iii) holding a position in a business such as an officer, trustee, partner, employee, or the like, or holding any position of management;

- (f) “gratuity” means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received;
- (g) ““immediate family” means a spouse, children, parents, brothers and sisters, and such other relatives as may be designated by the Ethics Commission;
- (h) “official responsibility” means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct Government action; and
- (i) “purchase request” means that document whereby a Using Agency requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by this Act. [P.L. 1988-33, §86.]

DIVISION 2 - STANDARDS OF CONDUCT STATEMENT OF POLICY.

§187. Statement of Policy.

Public employment is a public trust. It is the policy of the Government to promote and balance the objective of facilitating the recruitment and retention of personnel needed by the Government. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service.

Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such manner as to foster public confidence in the integrity of the Government procurement organization.

To achieve the purpose of this Part, it is essential that those doing business with the Government also observe the ethical standards prescribed herein. [P.L. 1988-33, §87.]

§188. General Standards of Ethical Conduct.

- (1) Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust.

In order to fulfill this general prescribed standard, employees must also meet the specific standards, set forth in: Sections 190, 191, 192, 193, 194, and 195, of this Act.

- (2) Any effort to influence any public employee to breach the standards of ethical conduct set forth in this Section and Sections 190 through Section 195 of this Chapter is also a breach of ethical standards. [P.L. 1988-33, §88.]

§189. Criminal Sanctions.

To the extent that violations of the ethical standards set forth in this Part constitute violations of the Criminal Code, they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in this Part. [P.L. 1988-33, §89.]

§190. Employee Conflict of Interest.

- (1) It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:
 - (a) the employee or any member of the employee's immediate family has a financial interest pertaining to the procurement;
 - (b) a business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or
 - (c) any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.
- (2) Where an employee or any member of the employee's immediate family holds a financial interest in a blind trust or a Government-sponsored corporation wherein the Government holds an interest, the employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial interest; provided, that

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

- (3) Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the Ethics Commission in accordance with Section 199(4) of this Chapter, for an advisory opinion as to what further participation, if any, the employee may have in the transaction.
- (4) Notice of this prohibition shall be provided in accordance with regulations promulgated by the Ethics Commission. [P.L. 1988-33, §90.]

§191. Employee Disclosure Requirements.

- (1) Any employee, who has, or obtains any benefit from, any Government contract with a business in which the employee has a financial interest shall report such benefit to the Ethics Commission: provided, however, that this Section shall not apply to a contract with a business where the employee's interest in the business has been placed in a disclosed blind trust.
- (2) Any employee who knows or should have known of such benefit, and fails to report such benefit to the Ethics Commission, is in breach of the ethical standards of this Section.
- (3) Notice of this requirement shall be provided in accordance with regulations promulgated by the Ethics Commission. [P.L. 1988-33, §91.]

§192. Gratuities and Kickbacks.

- (1) It shall be a breach of ethical standards for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other

- particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor.
- (2) It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order.
 - (3) The prohibition against gratuities and kickbacks prescribed in this Section shall be conspicuously set forth in every contract and solicitation therefor. [P.L. 1988-33, §92.]

§193. Prohibition Against Contingent Fees.

- (1) It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a Government contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bonafide established commercial selling agencies for the purpose of securing business.
- (2) Every person, before being awarded a Government contract, shall represent, in writing, that such person has not retained anyone in violation of Subsection (1) of this Section. Failure to do so constitutes a breach of ethical standards.
- (3) The representation prescribed in Subsection (2) of this Section shall be conspicuously set forth in every contract and solicitation therefor. [P.L. 1988-33, §93.]

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

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

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- (2) It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the Government, in connection with any:
- (a) judicial or other proceeding, application, request for a ruling, or other determination;
 - (b) contract;
 - (c) claim; or
 - (d) charge or controversy, in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the Government is a party or has a direct and substantial interest.
- (3) It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or as an agent for anyone other than the Government, in connection with any:
- (a) judicial or other proceeding, application, request for a ruling, or other determination;
 - (b) contract;
 - (c) claim; or
 - (d) charge or controversy, in matters which were within the former employee's official responsibility, where the Government is a party or has a direct or substantial interest.
- (4) It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the Government, in connection with any:
- (a) judicial or other proceeding, application, request for a ruling, or other determination;
 - (b) contract;
 - (c) claim; or
 - (d) charge or controversy, in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of

the employee's official responsibility, where the Government is a party or has a direct and substantial interest.

- (5) It shall be a breach of ethical standards for any former employee, unless the former employee's last annual salary did not exceed \$30,000, to engage in selling or attempting to sell supplies, services, or construction to the Government for one year following the date employment ceased.

The term "sell" as used herein means signing a bid, proposal, or contract; negotiating a contract; contacting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling disputes concerning performance of a contract; or any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person; provided, however, that this Section is not intended to preclude a former employee from accepting employment with private industry solely because the former employee's employer is a contractor with this Government, nor shall a former employee be precluded from serving as a consultant to the Government. [P.L. 1988-33, §94.][threshold changed from \$25,000 to \$30,000 by P.L.2009-28]

§195. Use of Confidential Information.

It shall be a breach of ethical standards for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person. [P.L. 1988-33, §95.]

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

- (1) Civil and administrative remedies against employees which are in existence on the effective date of this Chapter shall not be impaired.
- (2) In addition to existing remedies for breach of the ethical standards of this Part or regulations promulgated hereunder, the Ethics Commission may impose any one or more of the following:
 - (a) oral or written warnings or reprimands;
 - (b) suspension with or without pay for specific periods of time; and

- (c) termination of employment.
- (3) The value of anything received by an employee in breach of the ethical standards of this Part or regulations promulgated hereunder shall be recoverable by the Government as provided in Section 198 of this Chapter.
- (4) All procedures under this Section shall be in accordance with due process requirements and existing law. In addition, notice and an opportunity for a hearing shall be provided prior to imposition of any suspension or termination of employment. [P.L. 1988-33, §96.]

§197. Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards.

- (1) Civil and administrative remedies against non-employees which are in existence on the effective date of this Chapter shall not be impaired.
- (2) In addition to existing remedies for breach of the ethical standards of this Part or regulations promulgated hereunder, the Ethics Commission may impose any one or more of the following:
 - (a) written warnings or reprimands;
 - (b) termination of transactions; and
 - (c) debarment or suspension from being a contractor or subcontractor under Government contracts.
- (3) The value of anything transferred in breach of the ethical standard of this Article or regulations promulgated hereunder by a non-employee shall be recoverable by the Government as provided in Section 198 of this Chapter.
- (4) Debarment or suspension may be imposed by the Ethics Commission in accordance with the procedures set forth in Section 165 of this Chapter, for breach of the ethical standards of this Part; provided, that such action may not be taken without the concurrence of the Attorney-General.
- (5) All procedures under this Section shall be in accordance with due process requirements, including, but not limited to, a right to notice and an opportunity for a hearing prior to imposition of any

termination, debarment, or suspension from being a contractor or subcontractor under a Government contract. [P.L. 1988-33, §97.]

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

- (1) The value of anything transferred or received in breach of the ethical standards of this Part or regulations promulgated hereunder by an employee or a non-employee may be recovered from both the employee and non-employee.
- (2) Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the Government and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties. [P.L. 1988-33, §98.]

DIVISION 3 - ETHICS COMMISSION

§199. Ethics Commission.

- (1) There is hereby created an Ethics Commission of three (3) members which shall include the Secretary of Foreign Affairs, Secretary of Finance and the Attorney-General.
- (2) The Ethics Commission shall promulgate regulations to implement this Part and shall do so in accordance with the applicable provisions of the Administrative Procedure Act.
- (3) On written request of employees or contractors, the Ethics Commission may render written advisory opinions regarding the appropriateness of the course of conduct to be followed in proposed transactions. Such requests and advisory opinions must be duly published in the manner in which regulations of this Government are published. Compliance with requirements of a duly promulgated advisory opinion of the Ethics Commission shall be deemed to constitute compliance with the ethical standards of this Part.

- (4) On written request of an employee, the Ethics Commission may grant an employee a written waiver from the application of Section 190 of this Act, and grant permission to proceed with the transaction to such extent and upon such terms and conditions as may be specified. Such waiver and permission may be granted when the interests of the Government so require or when the ethical conflict is insubstantial or remote. [P.L. 1988-33, §99.]

§1100. Appeal of Decisions of the Ethics Commission.

- (1) Except as provided under Subsection (2) of this Section, a decision of the Ethics Commission under Sections 196 or Section 197 of this Chapter, shall be reviewable in accordance with the Administrative Procedure Act.
- (2) A decision of the Ethics Commission regarding debarment or suspension under Section 197(2)(c) of this Chapter shall be reviewable as provided in Section 172(2) of this Chapter. [P.L. 1988-33, §100.]