

## Title 12

### PUBLIC WORKS AND CONTRACTS

#### Chapters:

- 01** (Reserved)
- 02** Procurement of Construction, Goods, and Services
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#### Chapter 01 (Reserved)

#### Chapter 02

### PROCUREMENT OF CONSTRUCTION, GOODS, AND SERVICES

#### Sections:

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#### **12.0201** Short title.

This chapter is to be known and may be cited as the American Samoa Procurement Act of 1983.

**History:** 1983, PL 18-1 § 2.

#### **12.0202** Definitions.

As used in this chapter, unless the context otherwise requires, the following meanings apply:

- (1) "Chief Procurement Officer" means the head of the Central Procurement Office of

the Government.

(2) "Construction" means the process of building, altering, repairing, improving, or demolishing of a public structure or building, or public improvements commonly known as "capital improvements". It does not include the routine maintenance of existing structures, buildings, or public real property.

(3) "Contract" means all types of agreements, regardless of what they may be called, for procurement.

(4) "Contractor" means a person having a contract with an authorizing agency.

(5) "Employee" means an individual receiving a salary from the government, including elective officials and non-salaried individuals performing personal services for the government.

(6) "Goods" means all tangible and intangible personal property, of any kind or nature, including but not limited to equipment, materials, supplies, printing, and insurance.

(7) "Government" means the American Samoa Government, which includes the executive, legislative, and judicial branches.

(8) "Governor" means the Governor of American Samoa.

(9) "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids.

(10) "Local bidder" means:

(A) for purposes of procurement of construction, a sole proprietorship which is wholly owned by an American Samoan or a permanent resident as defined in 41.0202 A.S.C.A., or a partnership, joint venture, or other unincorporated association which is wholly owned by those persons, or a corporation which is majority owned by those persons and which is submitting a bid to an invitation for bids;

(B) for purposes of procurement of goods or services, a person that has a valid business license and a foreign corporation permit to transact business, if required, under the laws of American Samoa and a fixed or principal place of business in American Samoa, and that is submitting a bid to an invitation for bids.

(11) "Off-island bidder" means a person submitting a bid in response to an invitation for bids who does not qualify as a local bidder.

(12) "Person" means an individual, sole proprietorship, partnership, joint venture, corporation, other unincorporated association, or a private legal entity.

(13) "Procurement" means buying, purchasing, renting, leasing or acquiring construction, goods, or services. It also includes all functions that pertain to the obtaining of construction, goods or services, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

(14) "Rules" means rules which have been adopted under authority of this chapter in accordance with the provisions of the Administrative Procedure Act, 4.1001 et seq.

(15) "Reasonable", in reference to a bidder, means a person whose bid is equitable, fair, and suitable, and is not excessive or inappropriate in any material respect.

(16) "Responsible", in reference to a bidder, 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.

(17) "Responsive", in reference to a bidder, means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

(18) "Services" means the furnishing of time, labor, or effort by a person other than an

employee, and not involving the delivery of a specific end product other than reports, plans, and incidental documents.

**History:** 1983, PL 18-10 § 3; amd 1986, PL 19-49 § 1; 1986, PL 19-58 § 1.

**Amendments:** 1986 Subsection (6): amended generally. Subsection (10)(A): changes reference “41.0502 A.S.C.A.” to “41.0202 A.S.C.A.”

**Reviser’s Comment:** Subsection (6) has been amended according to PL 19-49 although this amendment was not reflected in PL 19-58.

### **12.0203 Requirement of good faith.**

This chapter requires all parties involved in the negotiation, performance, or administration of government contracts to act in good faith.

**History:** 1983, PL 18-10 § 4.

### **12.0204 Application of this chapter.**

This chapter applies to every expenditures of public funds irrespective of source, including federal assistance moneys except as otherwise specified by law, acting through a governmental body as defined in this chapter, under any contract, except that this chapter does not apply to either grants by the government or contracts between the government and its political subdivisions or other governments. This chapter also applies to the disposal of Territorial supplies. This chapter or rules adopted under this chapter may not prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

**History:** 1983, PL 18-10 § 5.

### **12.0205 Creation of the Office of the Chief Procurement Officer.**

There is created an Office of Procurement, headed by the Chief Procurement Officer.

**History:** 1983, PL 18-10 § 6.

### **12.0206 Appointment and qualifications.**

The Governor shall appoint and the Legislature shall confirm, a Chief Procurement Officer. The Chief Procurement Officer shall have a total of 5 years experience, 3 of which must have been in public procurement within the previous 6 years next preceding the date of his appointment as the Chief Procurement Officer. He shall have 3 years of specific experience in public procurement which involved large-scale procurement of supplies, services, materials or construction. He shall be a person with demonstrated executive and organizational ability.

**History:** 1983, PL 18-10 § 7.

### **12.0207 Tenure and removal.**

The Chief Procurement Officer shall be a full-time public official who serves at the Governor’s pleasure.

**History:** 1983, PL 18-10 § 8.

**12.0208 Authority of the Chief Procurement Officer.**

(a) The Chief Procurement Officer shall serve as the central procurement official of the government.

(b) Consistent with the provisions of this chapter, the Chief Procurement Officer shall adopt operational procedures or rules governing the internal functions of his office.

(c) Except as otherwise specifically provided in this chapter the Chief Procurement Officer shall, in accordance with rules adopted:

(1) procure or supervise the procurement of all construction, goods, and services, needed by the government;

(2) exercise general supervision and control over all inventories of goods belonging to the government;

(3) sell, trade, or otherwise dispose of surplus goods, to the government; and

(4) establish and maintain programs for the inspection, or testing, and acceptance, of construction, goods, and services.

(d) The Office of Chief Procurement Officer designated as the agency responsible for acquiring surplus federal property under the Federal Property and Administrative Services Act of 1949 as amended, and for purposes of that act is the American Samoa Agency for Surplus Property.

**History:** 1983, PL 18-10 § 9.

**12.0209 Centralization of procurement authority.**

Except as otherwise provided by law or executive order, all rights, powers, duties, and authority relating to the procurement of construction, goods and services, and the management, control, warehousing, sale, and disposal of construction, goods, and services, now vested in, or exercised by, a governmental agency are transferred to the Chief Procurement Officer.

**History:** 1983, PL 18-10 § 10.

**12.0210 Local preference.**

(a) It is the purpose of this section to establish preferences to local bidders in awarding procurement contracts, in order to promote local business development and activity.

(b) In awarding contracts for the procurement of construction, bids from off-island bidders may not be accepted where the contract value is estimated at 1.5 million dollars or less. In awarding all other contracts for the procurement of construction for which qualifying bids are received from both local bidders and off-island bidders, the bids must be evaluated so as to give preference to responsive, responsible, and reasonable local bidders by application of the following schedule of local add-on percentages to all bids submitted by the lowest responsive, responsible, and reasonable off-island bidder.

**Contract Value**

**Local Add-On Percentage**

More than 1.5 million dollars

10%

(c) In awarding contracts for procurement of goods or services for which qualifying bids are received from both local bidders and off-island bidders, the bids must be evaluated so as to give preference to responsive, responsible, and reasonable local bidders

by application of the following schedule of local add-on percentages to the bids submitted by the lowest responsive, responsible, and reasonable off-island bidder.

**Contract Value Local Add-On Percentage**

3-0-up to \$10,000	25%
More than \$10,000 up to \$50,000	12%
More than \$50,000 up to \$100,000	10%
More than \$100,000 up to \$200,000	5%
More than \$200,000	-0-

(d) If by the addition of the add-on percentage according to subsections (b) and (c) of this section the bid submitted by the lowest responsive, responsible, and reasonable local bidder is equal to or less than the bid of the lowest responsive, and reasonable off-island bidder, then the local bidder must be awarded the contract.

(e) Procurement requirements may not be artificially divided or combined so as to circumvent the provisions of this section.

(f) The Governor may suspend or reduce a local preference in this section, if he finds that this action is desirable or necessary in the public interest as a result of financial or economic conditions affecting directly or indirectly the government generally, for a period or periods not exceeding 18 months in total. The preferences suspended or reduced must be fully restored until permanent modifications are proposed to the Legislature. Suspension or reduction under this section is to be adopted under the Administrative Procedure Act, 4.1001 et seq.

(g) This section shall not apply to any procurement which is funded wholly or partially with federal funds.

**History:** 1983, PL 18-10 § 11; 1994, PL 23-16; amd 2000, PL 26-20.

**12.0211 Bidding procedures.**

(a) The Chief Procurement Officer complies with the bidding procedures set forth in this section and all applicable rules. The Chief Procurement Officer names a procurement officer who is responsible for administering procurement on behalf of an agency under the provisions of this chapter and the rules.

(b) An invitation for bids must be issued and must include a purchase description, and all contractual terms and conditions applicable to the procurement.

(c) Reasonable public notice of the invitation for bid must be given for procurements under the rules. The notice must be published in a newspaper of general circulation in American Samoa where the contract value is estimated to exceed \$100,000. Other means of notice must be specified by the rules.

(d) Bids must 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 the bid, and other relevant information as is specified by the rules together with the names of all bidders must be recorded and the record of each bid must be open to public inspection by interested persons.

(e) Bids must be unconditionally accepted without alteration or correction except as is otherwise authorized by law or rule. All bids must be evaluated based upon the requirements set forth in the invitation for bids, which may include criteria as is necessary to reasonably permit a determination as to the acceptability of the bid for the

particular purpose intended.

(f) Correction or withdrawal of inadvertently erroneous bids, before or after award, or cancellation of awards or contracts based on bid mistakes, is permitted in accordance with the procurement rules. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the government or fair competition are permitted. Except as permitted by rule, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, must be supported by written determination made by the Chief Procurement Officer.

(g) The contract must be awarded with reasonable promptness by written notice to the lowest responsive, responsible, and reasonable bidder whose bid meets the requirements of this chapter and the rules.

(h) In the event all bids exceed available funds as certified by the appropriate fiscal officer, and the bid of the lowest responsive, responsible, and reasonable bidder does not exceed those funds by more than 5 percent, and time or economic considerations preclude resolicitation of work of a reduced scope, the Chief Procurement Officer is authorized to negotiate an adjustment of the bid price, including changes in bid requirements, with the lowest responsive, responsible, and reasonable bidder in order to bring the bid within the amount of available funds.

**History:** 1983, PL 18-10 § 12.

**Case Notes:**

Administrative rule allowing rejection of bids on account of ambiguities in the solicitation, if construed to allow rejection of a bid which was clearly the low one on account of an ambiguity in the solicitation that had been cured by the bids themselves, would violate competitive bidding statute prohibiting changes prejudicial to fair competition. A.S.A.C. § 10.0232; A.S.C.A. § 12.0211. *Pago Petroleum Products, Inc., v. American Samoa Power Authority*, 10 A.S.R.2d 75 (1989).

Clause in bid solicitation by government agency reserving the agency's right to reject all offers, if construed to allow such rejection for no reason at all or just because the government might get a better price if bidders are allowed to rebid after looking at their competitors' bids, would violate competitive bidding statute prohibiting changes prejudicial to fair competition. A.S.C.A. § 12.0211. *Pago Petroleum Products, Inc., v. American Samoa Power Authority*, 10 A.S.R.2d 75 (1989).

**12.0212 Small or open purchase-Sole source procurement-Negotiation.**

(a) A procurement not exceeding the amount established by rule may be made in accordance with small purchase procedures promulgated by the Chief Procurement Officer. Procurement requirements may not be artificially divided so as to constitute a small purchase under this section.

(b) A contract may be awarded for construction, goods, or services without competition when, under rules promulgated, the Chief Procurement Officer determines in writing that there is only one source for the required construction, goods, or services.

(c) A contract may be awarded by negotiation when it is determined in writing that conditions are not appropriate for the use of competitive bidding in accordance with standards and procedures established by the rules.

**History:** 1983, PL 18-10 § 13.

**12.0213 Emergency procurement.**

Notwithstanding any other provision of this chapter, the Governor may make or authorize a governmental agency to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined under

26.0105(d) A.S.C.A. An emergency procurement must be competitive as practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file.

**History:** 1983, PL 18-10 § 14.

#### **12.0214 Rules.**

The Chief Procurement Officer shall adopt rules for the government as necessary and appropriate for the implementation of this chapter within 120 days of the effective date of this chapter. The Chief Procurement Officer maintains a separate manual of all rules and amendments to the rules, which must be open to inspection and copying during normal business hours.

**History:** 1983, PL 18-10 § 15.

#### **12.0215 Responsibility of bidders and offerors.**

(a) A written determination of nonresponsibility of a bidder or offeror must be made in accordance with rules promulgated by the Chief Procurement Officer. 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 nonresponsibility with respect to that bidder or offeror.

(b) Information furnished by a bidder or offeror pursuant to this section may 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.

**History:** 1983, PL 18-10 § 16.

#### **12.0216 Prequalification of suppliers.**

Prospective suppliers may be prequalified for particular types of construction, goods and services. Solicitation mailing lists of potential contractors include but are not limited to prequalified suppliers.

**History:** 1983, PL 18-10 § 17.

#### **12.0217 Ethical standards in procurement-Collusion.**

(a) Public employment is a public trust. In governmental contracting, public employees discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors and conduct themselves in a manner as to foster public confidence in the integrity of the government. To achieve this purpose, the Governor shall include in his procurement rules general standards of ethical conduct for government employees and contractors, fixing employee disclosure requirements, defining employees conflicts of interest, restricting the use of confidential information prohibiting gratuities, kick backs, and contingent fees, and defining the scope of participation by present and former employees in the contract source, bidding, and award process as set forth in this chapter and the procurement rules.

(b) Collusion or secret agreements between bidders for the purpose of securing an advantage to the bidders as against the authorizing agent in the awarding of contracts is prohibited. The authorizing agent may declare the contract void if he finds sufficient evidence after a contract has been let that the contract was obtained by a bidder or bidders

by reason of collusive or secret agreement among the bidders to the disadvantage of the government.

**History:** 1983, PL 18-10 § 18.

**12.0218 Civil penalties.**

(a) An employee who violates a provision of this chapter or the rules is subject to adverse action, including but not limited to reprimand, suspension without pay, or termination of employment, in addition to other penalties prescribed by law.

(b) A person other than an employee who violates a provision of this chapter or the rules shall be subject, by the procurement officer with which that person is dealing directly at the time of the violation, to written warning of reprimand, termination of contract or transaction, or suspension from being a contractor or subcontractor under a government contract in addition to other penalties prescribed by law.

(c) All proceedings under this section must be in accordance with due process requirements, including but not limited to reasonable notice and opportunity for hearing, and must be conducted in accordance with the hearing procedures prescribed by the Administrative Procedure Act, 4.1025 A.S.C.A., et seq., and the rules.

**History:** 1983, PL 18-10 § 19.

**12.0219 Criminal penalties.**

(a) Except as otherwise provided in this section. a violation of a provision of this chapter is punishable as a class B misdemeanor.

(b) A person who gives or receives anything of value for the purpose of securing or influencing the award of a contract subject to the provisions of this chapter, is upon conviction, guilty of a class C felony.

**History:** 1983, PL 18-10 § 20

**Chapters 03—04**

**(RESERVED)**

**Chapter 05**

**GOVERNMENT HOUSING FACILITIES**

**Sections:**

- 12.0501 Policy-Exclusions.**
- 12.0502 Occupancy of government housing.**
- 12.0503 Eligibility of local hires.**
- 12.0504 Termination of tenancy.**
- 12.0505 Summary proceedings for obtaining possession.**
- 12.0510 Surplus housing-Maintenance-Transfer or sale.**
- 12.0511 Sale of government housing.**
- 12.0512 Repealed.**

**12.0501 Policy-Exclusions.**

It is the policy of the government to own and operate housing facilities as are necessary to meet the needs of technicians and specially trained personnel who from time to time may be recruited under contract to the government. This housing shall be known as government housing. The elementary school principal fales are excluded in this chapter.

**History:** 1978, PL 15-67.

#### **12.0502 Occupancy of government housing.**

Government housing may only be occupied by contract specialists employed by the government who are recruited off-island and employed in accordance with the provisions applicable to contract specialists, and by local hire employees of the government who meet the provisions of section 12.0503.

**History:** 1985, PL 19-18 § 1.

#### **12.0503 Eligibility of local hires.**

Employees of the government who are lured locally may occupy government housing only if all of the following conditions are met:

(a) The Governor determines there exists unoccupied housing units in excess of current and prospective needs of contract specialists;

(b) The Governor determines that the employee is one who provides a service which is essential to the government; and

(c) The employee's right to occupy government housing is established by a written agreement between the government and the employee.

**History:** 1985, PL 19-18 § 1.

#### **12.0504 Termination of tenancy.**

(a) The right of a contract specialist to occupy government housing ceases thirty days after termination of the contract.

(b) For all other persons, the right to occupy government housing ceases thirty days after receipt of a notice of termination of the tenancy.

(c) Any occupant of government housing holding residence beyond the thirty days specified in subsections (a) and (b) will be liable for fair market value rent for the unit, in accordance with a market rate rental schedule established by the government and available upon request.

**History:** 1985, PL 19-18 § 1.

#### **12.0505 Summary proceedings for obtaining possession.**

(a) If an occupant of government housing refuses to leave the premises within thirty days as specified in section 12.0504, the Office of the Attorney General may file in the district court a petition for possession of premises and set a hearing date within fourteen days of filing the petition, provided the respondent occupant is served not less than ten days prior to the hearing date.

(b) After the hearing, the district court may issue an order awarding possession to the government. If the respondent fails to appear at the hearing, an order awarding possession to the government shall be entered against the respondent.

(c) Respondent has 10 days after the order issues to file a motion of appeal, and a motion for stay of judgement which shall be accompanied by a \$1,000 surety bond or cash deposit to the court.

**History:** 1985, PL 19-18 § 1.

**12.0510 Surplus housing—Maintenance— Transfer or sale.**

To the fullest extent practicable, government housing which is no longer needed for the purposes of 12.0501 shall be declared surplus by the Governor. Upon such declaration, a determination shall also be made by the Governor as to whether the surplus housing can continue to be maintained reasonably at acceptable standards for occupancy. Units that cannot be so maintained shall be demolished. Units that can be so maintained shall be transferred to housing or nonhousing use by federal agencies or to non-housing use by the government, and if not so transferred shall be disposed of by sale. Units suitable only for housing purposes and located in nonresidential areas under zoning laws shall be removed or demolished unless the Governor and Zoning Board approve further use for housing.

**History:** 1978, PL 15-67.

**12.0511 Sale of government housing.**

Sale of surplus housing shall be at auction to the highest eligible bidder. Eligibility to bid shall be limited to U.S. nationals or citizens who are allowed under law to own real property in American Samoa. Sales shall be for cash, under rules as shall be provided by regulation approved by the Governor, and proceeds of sales shall be paid into the general fund.

**History:** 1978, PL 15-67; readopted 1980, PL 16-88 §§ 1, 2; 1982, PL 17-31 §§ 1, 2.

**Revisor's Comment:** The law dealing with alienation of kind contained in the A.S.C.A., as recodified by the Legislative Reference Bureau had been questioned as to whether the requirements of Art. I, § 3 and Art. II, § 9, American Samoa Constitution, had been fulfilled. Since the records were not available to answer the question, the Legislature passed PL 16-88 and PL 17-31 to ensure that the law dealing with alienation of land complies with the Constitution.

**12.0512 Violation-Penalty.**

Repealed by PL 19-18 § 2.