



MALAWI GOVERNMENT

# PROCUREMENT REGULATIONS

ISSUED BY

THE OFFICE OF THE DIRECTOR OF PUBLIC PROCUREMENT



# PROCUREMENT REGULATIONS

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THE OFFICE OF THE DIRECTOR OF PUBLIC PROCUREMENT

## GOVERNMENT NOTICE No. 28

## PUBLIC PROCUREMENT ACT, 2003

(No. 8 of 2003)

## PUBLIC PROCUREMENT REGULATIONS, 2004

## ARRANGEMENT OF REGULATIONS

## REGULATION

## PART I—PRELIMINARY

1. Citation
2. Interpretation
3. Purpose and scope of procurement regulations
4. Accessibility of legal texts governing public procurement
5. Language
6. Cancellation of procurement proceedings before opening of bids
7. Cancellation of procurement proceedings after opening of bids
8. Defence-related items eligible for special treatment

PART II—INSTITUTIONAL AND ORGANIZATIONAL  
ARRANGEMENTS FOR PROCUREMENT*Division I—Office of the Director of Public Procurement*

9. Structure of Office of the Director of Public Procurement
10. Oversight functions of the Director
11. Recommendations and reporting by Director
12. Development of legal framework for procurement
13. Assistance in developing and enhancing the efficiency of procurement operations
14. Functions of the Director related to review procedures
15. Human resources development
16. Use of information and communications technology

*Division II—Internal Procurement Committees*

17. Composition of Internal Procurement Committees
18. Functions of Internal Procurement Committees
19. Quorum requirements

*Division III—Procurement Units*

20. Establishment of Procurement Units
21. Staffing of specialized Procurement Units
22. Functions of Procurement Units

## PART III—PROCUREMENT PLANNING

*Division I—Prerequisite Steps for Initiating Procurement Proceedings*

23. Annual planning for budget preparation purposes
24. Planning for individual procurement proceedings
25. General principles of describing requirements

## REGULATION

26. Apportioning of procurement
27. Valuation of procurement contracts
28. Requisition for procurement

*Division II—Selection of Appropriate Contract Form*

29. Determination of appropriate contract form
30. Indefinite-quantity contracts
31. Framework agreements
32. Works contracts

## PART IV—BIDDER QUALIFICATIONS

*Division I—Qualification Data and Assessment*

33. Qualification assessment criteria
34. Suitability to pursue the professional activity
35. Information as to economic and financial standing
36. Information as to technical capacity
37. Selection followed by post-qualification procedure
38. Subcontractor qualifications
39. False and deficient qualification information

*Division II—Pre-qualification Proceedings*

40. Purpose of pre-qualification proceedings
41. Contents of pre-qualification documents
42. Confirmation of qualification information

*Division III—Databases and Classification of Suppliers*

43. Registration and classification of suppliers

## PART V—PROCUREMENT METHODS

*Division I—General Provisions*

44. Notice of procurement method to be used
45. Price of bidding documents
46. Clarification and modification of bidding documents
47. Deadline for submission of bids
48. Reception and security of bids
49. Rejection of late bids
50. Bid validity period
51. Evaluation of bids in different currencies
52. Prompt payment discounts
53. Unrealistically low bids
54. Confidentiality of bid evaluation
55. Rejection of bids
56. Notice requirement for rejection of all bids: cancellation of procurement proceedings
57. Notice to other bidders
58. Return of samples



## REGULATION

*Division II—Procedures for Tendering Proceedings*

59. Contents of invitation to tender and invitation to pre-qualify
60. Publication of invitation to tender
61. Provision of bidding documents
62. Preparation of bidding documents
63. Contents of bidding documents
64. Formulation of technical evaluation criteria
65. Technical specifications for procurement of goods
66. Technical specifications for procurement of works
67. Bills of quantities and activity schedules
68. Technical specifications for procurement of services other than consultants' services
69. Pre-bid conference
70. Site visits
71. Submission of signed bid in single envelope
72. Requirements applicable to bid securities
73. Required validity period of bid security
74. Modification or withdrawal of bids
75. Opening of bids
76. Timeframe for evaluation of bids
77. Purpose and scope of preliminary screening
78. Detailed evaluation of bids
79. Correction of errors on face of bids
80. Application of evaluation criteria
81. Assessing responsiveness of bids
82. When domestic price preference may be applied
83. Procedure for application price preference for domestically manufactured goods
84. Price preference for domestic suppliers of works
85. Conditions for use of tendering for commodities
86. Procedures for restricted tendering
87. Procedures for two-stage tendering

*Division III—Procedures for Procurement of Consultants' Services*

88. Minimum quality rating
89. Preparation of short list
90. Issuance of request for proposals
91. Avoidance of conflict of interest
92. Contents of requests for proposals for services
93. Choice of selection procedures
94. Submission of proposals
95. Evaluation and selection
96. Evaluation of proposals in quality-and-cost-based selection procedure
97. Criteria for evaluation of quality
98. Relative weighting of criteria
99. Sub-criteria for evaluation of key personnel

## REGULATION

- 100. Technical and quality rating of proposals
- 101. Rejection of unresponsive proposals
- 102. Notification of results of first stage quality evaluation
- 103. Quality evaluation report and retention of evaluation records
- 104. Opening of financial proposals
- 105. Evaluation of financial proposals
- 106. Selection of successful financial proposals
- 107. Combined quality and financial evaluation
- 108. Negotiations and award of contract
- 109. Failure to reach agreement with successful bidder
- 110. Rejection of all proposals
- 111. Selection procedure based on quality
- 112. Selection based on least cost
- 113. Design contests
- 114. Procedures for award of public service concession and contracts for procurement of infrastructure on basis of private investment

*Division IV—Request for Quotations Procedures*

- 115. Conditions for use of request for quotations procedure
- 116. Quotation and acceptance procedures

*Division V—Single-source Procurement*

- 117. General policy of diligence
- 118. Low-value procurement without competition
- 119. Procurement of functionally equivalent goods
- 120. Single-source procurement on the grounds of urgency
- 121. Documentation of single-source procurement
- 122. Publication of prior notice

## PART VI—CONTRACT FORMATION

- 123. Acceptance and entry into force of contract
- 124. Security for performance of the contract
- 125. Form of performance security
- 126. Validity period of performance security

## PART VII—CONTRACT ADMINISTRATION

- 127. Support operations for contract administration
- 128. Contents of procurement contract
- 129. Basic pricing approaches
- 130. Unit-price construction contracts
- 131. Lump-sum construction contracts
- 132. Price adjustment
- 133. Shipment terms
- 134. After-sale services
- 135. Insurance requirements
- 136. Return of performance security
- 137. Maintenance guarantee

## REGULATION

- 138. Manufacturer's warranty
- 139. Subcontracting
- 140. Administration of subcontracts
- 141. Quality assurance, inspection and testing
- 142. Stipulation of inspection requirements
- 143. Inspection of goods
- 144. Pre-shipment inspection services
- 145. Examination and receipt of goods
- 146. Receiving report
- 147. Remedies for breach of contract
- 148. Rejection of goods
- 149. Payment on submission of invoice
- 150. Prompt payment
- 151. Retention
- 152. Advance payments
- 153. Progress payments
- 154. Final payment
- 155. Contract modifications
- 156. Agreement to submit disputes to arbitration
- 157. Liquidated damages for delay
- 158. Contract termination
- 159. Termination for convenience

PART VIII—INFORMATION AND COMMUNICATION TECHNOLOGY  
FOR PUBLIC PROCUREMENT

- 160. Use of electronic media in the procurement process
- 161. Introduction of information and communications technology

PART IX—PARTICIPATION BY SMALL ENTERPRISES

- 162. Definition of terms
- 163. General policy regarding small- and medium-sized enterprises
- 164. Measures to promote small- and medium-sized enterprises participation
- 165. Small-enterprise set-asides
- 166. Representations by small enterprises
- 167. Requisitioning unit and community participation

PART X—ACCOUNTABILITY AND TRANSPARENCY IN PUBLIC PROCUREMENT

*Division I—Measures to Promote Transparency*

- 168. Record of procurement proceedings
- 169. Disclosure
- 170. Availability of record for oversight organs
- 171. Record keeping and reporting requirements
- 172. Retention of documentation
- 173. Notice of procurement contract award

## REGULATION

*Division II—Accountability*

174. Liability for defective design
175. Declaration and disclosure requirements; restriction on bidding by public officials
176. Identification of activities on behalf of the procuring entity subject to conflict of interest restrictions
177. Post-employment restrictions on public procurement officials
178. Contingent fee arrangements
179. Conspicuous notice of prohibitions
180. Prohibition of solicitation of improper inducements
181. Disclosure of offer of inducement
182. Prohibition of award to consultant-affiliated bidder
183. Confidentiality of procurement information
184. Confidentiality obligations of third parties
185. Dissemination of applicable conflict of interest and conduct rules to public employees
186. Remedies against breach of conduct standards by public officials
187. Recovery in case of breach of conduct standards
188. Supervision and checking
189. Reporting of violations by procuring entities

*Division III—Debarment of Suppliers and Bidders*

190. Authority to debar suppliers and bidders
191. Grounds for debarment
192. Procedure for exclusion from participation in procurement

*Division IV—Review Procedures*

193. Review procedures relating to award of procurement contract
194. Compensation for aggrieved bidder
195. Recording of dispositions
196. Detailed review procedures

## SCHEDULES

Schedule A—List of the types of defence-related items eligible for special treatment in accordance with sections 27 (5) and 30 (2) of the Act

Schedule B—Procedures for design contests

Schedule C—Procedures for award of public service concession and contracts for procurement of infrastructure on basis of private investment

Schedule D—Review Procedures

IN EXERCISE of the powers conferred by section 43 of the Public Procurement Act, 2003, I, DR. BINGU WA MUTHARIKA, President of Malawi and Minister responsible for Public Procurement, on the recommendation of the Director of Public Procurement, make the following Regulations—

PART I—PRELIMINARY

1. These Regulations may be cited as the Public Procurement Regulations, 2004. Citation
2. In these Regulations, unless the context otherwise requires, the several terms defined in the Act shall have the meanings set therein section 2 of the Act and— Interpretation
  - “bid” means the tender, offer, proposal or quotation submitted by a bidder in response to an invitation from the procuring entity;
  - “consultancy services” means activities of an intellectual and advisory nature that do not lead to a measurable physical output, and includes design, supervision, training, auditing and software development;
  - “non-consultancy services” means any object of procurement other than goods, construction and consultants’ services;
  - “Procurement Units” means the units established by procuring entities pursuant to section 10 of the Act, for the purposes of fulfilling procurement-related functions, and includes Specialized Procurement Units as provided for in the Act;
  - “requisitioning unit” means the State entity or community by whom the goods, works or service being procured are intended to be utilized.
- 3.—(1) The purpose of these Regulations is to establish detailed rules and procedures for fulfilling the objectives and implementing the provisions of the Act. Purpose and scope of procurement regulations
- (2) These Regulations apply to all procurement covered by section 3 of the Act.
- (3) Compliance with these Regulations is obligatory for procuring entities and other participants in procurement.
- 4.—(1) The Act, the regulations, instructions and other administrative decisions of general character are subject to publication in the *Gazette*. Accessibility of legal texts governing public procurement
- (2) In addition, the Director of Public Procurement shall, pursuant to section 5 (2) (b) of the Act, periodically issue an updated compilation of the main legal texts governing public procurement.
5. All pre-qualification documents, bidding documents, and all contract agreements and contract conditions shall be in English. Language
- 6.—(1) Cancellation of procurement proceedings shall only be done when it is clearly in the public interest, and cancellation is in the public interest in cases such as the following— Cancellation of procurement proceedings before opening of bids
  - (a) when the procurement need in question has ceased to exist;
  - (b) when the bidding documents have to be modified to such an extent that economy and efficiency in procurement dictate the

re-commencement of the tendering proceedings, and would likely lead to an inevitable cancellation of the proceedings after the opening of bids if no action is taken at this stage to cancel the proceedings.

(2) If the procurement proceedings are cancelled before opening of bids, any bids that have been received shall be returned unopened, if presentation of bids in sealed form was required.

Cancellation of  
procurement  
proceedings  
after opening of  
bids

7.—(1) In order to protect the integrity of the public procurement process, it is essential that cancellation of procurement proceedings after opening of bids be avoided to the greatest extent possible and limited strictly to exceptional cases.

(2) Cancellation of procurement proceedings after opening of bids is subject to approval by the head of the procuring entity, and may be authorized only in the following cases—

(a) the object of the procurement is no longer required;

(b) it has become necessary to modify the specifications;

(c) defects or gaps in the specifications have been revealed, including failure to accommodate the fulfilment of the procurement need by a substantially less expensive and functionally equivalent article other than the one called for in the bidding documents, and failure to include all items of cost to the procuring entity;

(d) there is evidence of collusion among bidders in setting bid prices; and

(e) there is no substantially responsive bid or the bids exceed the budget.

Defence-related  
items eligible  
for special  
treatment  
*Schedule A*

8. The list of the types of defence-related items eligible for special treatment in accordance with sections 27 (5) and 30 (2) of the Act is set forth in Schedule A.

## PART II—INSTITUTIONAL AND ORGANIZATIONAL ARRANGEMENTS FOR PROCUREMENT

### *Division I—Office of the Director of Public Procurement*

Structure of  
Office of the  
Director of  
Public

9. The Office of the Director of Public Procurement, established pursuant to section 4 of the Act, shall be organized so as best to support the fulfilment of the functions assigned to the Director of Public Procurement.

Procurement  
Oversight  
functions of  
the Director

10.—(1) All procurement in Malawi is subject to oversight by the Director of Public Procurement.

(2) The oversight activities of the Director of Public Procurement are governed by the Act, and these Regulations and other regulatory instruments, including setting thresholds for public procurement entities, that may be issued, from time to time, by the Director.

(3) The Director of Public Procurement is authorized to collect information and require reports from procuring entities and requisitioning units concerning the conduct of procurement activities in Malawi.

(4) The office of the Director of Public Procurement shall inform procuring entities, requisitioning units and other organs of public administration as to the types of statistical and reporting information related to procurement that are required to be collected and the frequency of the collection of such statistical data and reports.

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(d) there is evidence of collusion among bidders in setting bid prices; and

(e) there is no substantially responsive bid or the bids exceed the budget.

Defence-related  
items eligible  
for special  
treatment  
*Schedule A*

8. The list of the types of defence-related items eligible for special treatment in accordance with sections 27 (5) and 30 (2) of the Act is set forth in Schedule A.

## PART II—INSTITUTIONAL AND ORGANIZATIONAL ARRANGEMENTS FOR PROCUREMENT

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(4) The office of the Director of Public Procurement shall inform procuring entities, requisitioning units and other organs of public administration as to the types of statistical and reporting information related to procurement that are required to be collected and the frequency of the collection of such statistical data and reports.

(5) At a minimum, the information to be collected pursuant to paragraph (4) shall include the number and value of contracts awarded, separately addressing public goods, works and services contracts awarded by procuring entities, and the data shall be broken down by the procurement method used, and according to category of products and services.

(6) Where the contracts have been concluded according to the single-source procedure, the data referred to paragraph (4) shall also be broken down according to the circumstances referred to in section 30 (10) of the Act.

(7) The Director of Public Procurement may also maintain data bases of suppliers, contractors and consultants, including on their past contract performance.

(8) Procuring entities shall collect the necessary information and, as required by the Director of Public Procurement pursuant to paragraph (4), report on a quarterly basis to the Director on implementation of procurement activities.

(9) The Director of Public Procurement shall establish procedures and mechanisms to ensure the effective and timely solicitation of viewpoints of interested parties in the development of procurement policies, regulations, procedures and forms.

11.—(1) The Director of Public Procurement shall analyze all information collected pursuant to regulation 10 and make recommendations to procuring entities as to improvements in the implementation of procurement procedures.

Recommendations and reporting by Director

(2) In accordance with section 5 (2) (g) and section 41 (1) of the Act, the Director of Public Procurement shall submit an annual report to the Minister on the implementation of the Act, the regulations and instructions, and on related institutional arrangements, in relation to the implementation of the budget, and the requirements of the legal and regulatory framework for public procurement; and the report shall also cover consultations held with consultative and study organs.

12.—(1) The Director of Public Procurement shall, in consultation with interested parties, develop standard bidding documents, general conditions of contract and such other forms as the Director may deem necessary or useful for the implementation of the Act and regulations.

Development of legal framework for public procurement

(2) Procuring entities shall utilize the standard bidding documents and other documents developed pursuant to paragraph (1).

(3) The Director of Public Procurement shall review and propose to the Government improvements to legislative and regulatory texts applicable to public procurement.

(4) The Director of Public Procurement shall provide opinions to the Government and to procuring entities as to the application of legal texts related to public procurement, with a view to fostering harmonized interpretation and application of the Act and these Regulations.



(5) The Director of Public Procurement shall take steps, in accordance with section 5 (2) (b) of the Act and regulation 4 (2), to ensure the availability and the accessibility to public officials and the general public of this Act and regulations made hereunder; and those measures may include—

(a) publication of a periodic bulletin containing information about the procurement system and procurement proceedings in Malawi, including, from time to time, compilations of legal instruments applicable to the procurement process; and

(b) conducting civic education programmes about the legal, procedural and organizational framework for procurement.

Assistance in  
developing and  
enhancing the  
efficiency of  
public  
procurement  
operations

13.—(1) The Director of Public Procurement shall devise and implement programmes aimed at assisting procuring entities and bidders in conducting and participating in public procurement proceedings in Malawi; and the programmes shall include, but not be limited to the following—

(a) organizing and conducting educational programmes and professional training;

(b) assisting in the establishment and development of, and recruitment for, specialized procurement units;

(c) developing proposals and plans for the phased introduction of professional procurement staffing in procuring entities, and establishing minimum entry-level requirements, procedures for professional certification, descriptions of authority and responsibilities of procurement officers, and grounds for termination;

(d) certification of procurement officers, and of members of Internal Procurement Committees, for entities at various levels of administration and regions in Malawi;

(e) assisting in the dissemination of information to bidders about the rules and procedures governing public procurement and about procurement opportunities in Malawi; and issuing opinions, providing advice, and proposing solutions to facilitate the work of procuring entities with a view to fulfilling the objectives of the Act;

(f) establishing a central data bank for the purpose of recording information on the performance record of suppliers in the implementation of procurement contracts with procuring entities in Malawi in order to evaluate their performance;

(g) developing proposals for methods of disseminating procurement-related information, including the issuance of procurement bulletins;

(h) examining possible uses of information and communications technology and other technical innovations in procurement with a view to more cost effective and higher quality performance of public administration and delivery of public services; more effective management of operations of procuring entities; and increased competition and participation by bidders; and

(i) studying the experiences and practices of other countries with a view to introducing innovations in Malawi.

14. Pursuant to the section 5 (2) (j) of the Act, the functions of the Director related to the review procedures under Part VI of the Act, shall include—

Functions of the Director related to review procedures

(a) appointing the members, and maintaining lists of the members, of the standing Review Committee established pursuant to section 38 (6) of the Act; and

(b) providing secretariat services for three-member *ad hoc* review committees established from the membership of the standing Review Committee.

15.—(1) Pursuant to section 5 (2) (d) of the Act, the Director of Public Procurement shall devise, and facilitate the implementation of, strategies and programmes for the promotion of professional standards and development.

Human resources development

(2) Specific tasks to be undertaken by the Director of Public Procurement in order to fulfil the mandate referred to in paragraph (1) shall include—

(a) developing qualification requirements for appointment to Procurement Units, Procurement Committees and to the standing Review Committee;

(b) designing and implementing a scheme for certification of compliance of appointees to Procurement Units, Procurement Committees and the standing Review Committee with requirements referred in sub-paragraph (a);

(c) designing of career development and promotion schemes for public officials serving in the procurement field;

(d) developing, and facilitating the institutionalization of, a training programme aimed at promoting professional skills and standards in procurement in Malawi, including training courses that shall be made available upon induction to procurement functions, as well as on an ongoing and systematic basis continually to boost skill levels of officials; and to that end, the Director may recommend to the Government the designation of one or more entities as responsible for conducting procurement training on an ongoing basis;

16.—(1) Pursuant to section 5 (2) (f) of the Act, the Director of Public Procurement shall devise, and facilitate the implementation of, strategies for introducing and spreading the use of information and communications technology in the procurement process.

Use of information and communications technology

(2) Specific tasks to be undertaken by the Director of Public Procurement in order to fulfil the mandate referred to in paragraph (1) shall include, but not limited to—

(a) conducting an assessment of the current extent of the use of information and communications technology in procurement in Malawi;

(b) recommending possible ways of introducing in procurement the use of information and communications technology;

(c) identifying ways in which traditional procurement processes may be revised in order to obtain the greatest possible benefit from the application of information and communications technology;

(d) proposing possible pilot projects for introduction of information and communications technology to the procurement process; and

(e) developing a website related to procurement in Malawi.

### *Division II—Internal Procurement Committees*

Composition of  
Internal  
Procurement  
Committees

17.—(1) In accordance with section 9 (1) of the Act, Internal Procurement Committees shall consist of a minimum number of three member and, in the case of appointment of external members pursuant to section 9 (1) (c), a minimum number of five members, and for the purpose of these Regulations, the minimum number of three shall comprise—

(a) the Controlling Officer or his or her deputy;

(b) the head of the respective procurement unit or his or her deputy;  
and

(c) the head of accounts or his or her deputy,

and no Internal Procurement Committee meeting shall proceed without the presence of the three mentioned members.

(2) An Internal Procurement Committee shall comprise a maximum of seven members.

(3) The members of Internal Procurement Committees referred to in section 9 (1) (a) and (b) of the Act shall be appointed by heads of procurement agencies and heads of other public departments and organizations, as the case may be.

(4) Membership in an Internal Procurement Committee is an additional task, requiring occasional meetings, and is not a full-time assignment.

(5) The Controlling Officer may rotate membership of the Internal Procurement Committee as he or she deems appropriate in accordance with section 9 (1) (a) and (b) of the Act, and members referred to in section 9 (1) (c) of the Act shall be appointed on an *ad hoc* basis for particular procurement proceedings, as the need arises.

(6) The head of the respective Procurement Unit in a Ministry or Department or parastatal organization shall serve as secretary of the Internal Procurement Committee.

(7) Members of Internal Procurement Committees may be removed only by the appointing official and only for the following reasons—

(a) incapacity or other inability to perform;

(b) abuse of office; and

(c) corrupt or fraudulent practices.

18.—(1) The general functions of the Internal Procurement Committees in the Ministries, Departments and parastatal organizations shall be, in accordance with the functions set forth in section 8 (3) of the Act, and on the basis of preparatory work by the concerned Procurement Unit established pursuant to section 10 of the Act, and regulation 20 the following—

Functions of  
Internal  
Procurement  
Committees

- (a) verification of proper procurement planning and preparation of procurement proceedings;
- (b) verification of stock positions of the goods to be procured;
- (c) approval of the draft advertisements and other bidding documents;
- (d) conducting opening of bids;
- (e) conducting the preliminary screening of bids opened;
- (f) rejection of bids that do not comply with the instructions to bidders;
- (g) comparison and evaluation of bids, and selection of the winning bid;
- (h) approval of specific terms and conditions relating to—
  - (i) contract amounts;
  - (ii) completion periods; and
  - (iii) stages and conditions of part payments;
- (i) assessment of the quality of the procured goods, works and services;
- (j) consideration and approval of applications for contract variations above thresholds as set and issued by the Director of Public Procurement; and
- (k) maintaining minutes of the Internal Procurement Committee meetings.

(2) The Controlling Officer shall, upon recommendation from the head of the procurement unit in his or her Ministry or Department or organization, appoint at least three members to sit on an evaluation team, taking into consideration the required expertise in the procurement.

19. Internal Procurement Committees shall hold their meetings in accordance with quorum requirements, based on the presence of a majority of the membership.

Quorum  
requirements

### *Division III—Procurement Units*

20.—(1) For the purposes of these Regulations, specialized procurement units as stipulated in sections 10 and 11 of the Act refer to the generic procurement units that are established in all Ministries, Departments and parastatal organizations.

Establishment  
of  
Procurement  
Units

(2) Controlling Officers, heads of agencies and heads of other public departments shall establish procurement units and assign to the heads of such units authority to conduct procurement activities in accordance with the Act and these Regulations, including provision of secretariat services to the Internal Procurement Committees.

Staffing of  
Procurement  
Units

21. The positions in Procurement Units shall be staffed by officers competently qualified in accordance with section 11 of the Act and shall be referred to as "Procurement Officers" who shall be full-time public officials and may be removed from office by the authority by whom he was appointed, only upon a showing of just cause.

Functions of  
Procurement  
Units

22. The functions of Procurement Units shall include—

- (a) planning and coordination of procurement;
- (b) preparation of invitations to bid and of bidding documents;
- (c) publication and distribution of invitations to bid;
- (d) reception and safeguarding of bids;
- (e) performance of secretariat services which shall include provision of technical advice to the Internal Procurement Committee; and
- (f) administering implementation of procurement contracts to the extent that is not carried out by requisitioning units.

### PART III—PROCUREMENT PLANNING

#### *Division I—Prerequisite Steps for Initiating Procurement Proceedings*

Annual  
planning for  
budget  
preparation  
purposes

23. Prior to the determination of annual budgetary allocations, procuring entities shall provide to the Ministry of Finance, or in the case of local authorities, to the Local Government Finance Committee, a general plan describing the extent, timing and purposes of projected procurement requirements for the budgetary period.

Planning for  
individual  
procurement  
proceedings

24.—(1) A procuring entity may initiate actual procurement proceedings only after the determination and approval of budgetary allocations, and only after obtaining a certification from the Ministry of Finance that budgetary allocations sufficient to fund the procurement are available for that purpose; and a specific reference to that certification shall be included in the bidding documents.

(2) Procuring entities shall devise procurement plans, taking into account the following factors and steps as appropriate under the circumstances—

- (a) identification and assessment of the need for the procurement;
- (b) designation of procurement planning team;
- (c) conducting market research in order to identify various technical solutions, in particular in the commercial market, to identify the range of available suppliers, and to determine the most favourable contractual and guarantee terms available in the commercial market that would be suitable for procurement;
- (d) studying acquisition history for similar goods, works or services;
- (e) conducting feasibility and other pre-contract studies;
- (f) defining and describing the requirement;
- (g) estimation of the cost of a proposed procurement;
- (h) identification of the sources and amount of financing;



(i) selection of contracting approach and structure, including verification of possible availability of framework or indefinite quantity contract arrangements for the item in question;

(j) selection of appropriate procurement method; and possible combinations and packages of tasks and contracts; and

(k) determination of required contract administration resources.

(3) The procuring entity, prior to conducting procurement of goods, shall, in accordance with applicable procedures, ascertain whether the required supplies are available in Central Government Stores (Director of Supplies), and the Central Government Stores may verify the actual need for the supplies requested, and whether they are available in other depots.

25.—(1) No requirement or reference shall be made in the technical specifications to a particular trademark or name, patent, design or type, specific original, producer or service provider, unless—

General principles of describing requirements

(a) there is no sufficiently precise or intelligible way of describing the procurement requirements; and

(b) words such as “or equivalent” are included in the specifications.

(2) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, works or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the pre-qualification documents or bidding documents.

(3) Due regard shall be given to the use of standardized trade terms such as the current version of International Commercial Terms (INCOTERMS), where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the pre-qualification or bidding documents.

26.—(1) Without prejudice to section 3 (4) of the Act, when apportioning of an acquisition would be technically or financially feasible, the acquisition may be divided into lots, which may be awarded through separate procurement contracts.

Apportioning of procurement

(2) If one or more lots are not awarded, the procuring entity may initiate a new proceeding, modifying the content of the lots.

27.—(1) For the purposes of applying monetary thresholds in the Act and these Regulations, selecting the appropriate procurement method, the procuring entity shall assess the expected value of a procurement contract or package of contracts taking into account—

Valuation of procurement contracts

(a) all forms of remuneration, including any premiums, fees, commissions and interest receivable;

(b) the likelihood and expected value of recurring orders;

(c) the minimum expected duration and expenditure for a lease or for a contract of indefinite duration, taking into account relevant experience of similar contracting actions in the past; and

(d) the estimated value of optional additional purchases to be permitted under the contract.

(2) The selection of the valuation method by the procuring entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding monetary thresholds referred to in the Act or in these Regulations.

Requisition  
for  
procurement

28.—(1) In all cases, the request to initiate procurement shall be addressed to the head of the Procurement Unit, and the requisitioning unit has the responsibility to solicit the approval of the budget authorities to justify availability of funds.

(2) The Procurement Unit shall examine the procurement request for compliance with the Act and these Regulations, and in the event of non-compliance, the procurement request shall be sent back promptly and directly to the requisitioning unit for the appropriate modifications.

#### *Division II—Selection of Appropriate Contract Form*

Determination  
of  
appropriate  
contract  
form

29. In the planning and preparation of procurement, the procuring entity shall determine the appropriate contracting approach and structure to be utilized for any given procurement taking into account standard contract forms promulgated by the Director of Public Procurement and the conditions for their use.

Indefinite  
quantity  
contracts

30.—(1) When, for economic, technical or financial reasons, the frequency or extent of the procuring entity's requirements cannot be determined with sufficient accuracy in the bid solicitation documents, the procuring entity may conclude an indefinite quantity agreement with a particular supplier, under which an indefinite number of purchase orders may be made.

(2) An indefinite quantity contract shall set forth the nature, specifications, and price of deliveries; the minimum and maximum levels of the deliveries, in terms of value or quantity; and the duration of the contract.

(3) An indefinite quantity contract shall be implemented through the issuance of successive purchase orders, as needs arise, and each purchase order shall specify which of the items enumerated in the basic indefinite quantity agreement, and the quantity, that are being ordered.

Framework  
agreements

31.—(1) For the purpose of this regulation "framework agreement" means an agreement between one or more suppliers and a procuring entity under which the procuring entity, after following the procedures laid down by the Act and these Regulations for the award phase, selects the parties to the agreement on the basis of the bids they have submitted according to objective criteria, such as quality, quantity, technical merit, delivery period or period of completion and price; and under such agreement the suppliers, under certain terms laid down by the procuring entity, undertake to fulfill contracts awarded under the agreement.

(2) A framework agreement may take various forms, including—

(a) the form of a requirements contract, in which a single supplier is selected and the procuring entity promises to place all of its orders with the successful supplier and the supplier promises to fulfil the orders; and

(b) the form of an indefinite quantity contract, in which one or more suppliers are selected for a guaranteed minimum quantity of future orders of one or more goods, works or services at an agreed price.

(3) A framework agreement may designate one or more procuring entities as eligible to place orders under the agreement.

(4) Procuring entities which have concluded a framework agreement within the meaning of paragraph (1) with more than one supplier shall reopen competition between the parties to the framework agreement in accordance with the following procedure—

(a) for every contract to be awarded, the procuring entity shall consult all suppliers who are party to the framework agreement, in writing;

(b) the procuring entity shall fix a time-limit which is sufficiently long to allow bids for each specific contract to be submitted, taking into account factors such as the complexity of the subject of the contract and the time needed to send in bids;

(c) bids shall be submitted in writing, and their content shall remain confidential until the time limit for reply has expired; and

(d) procuring entities shall award each contract to the supplier who has submitted the best bid on the basis of the award criteria established in accordance with the framework agreement.

(5) The procedure set out in paragraph (4) may be applied only between the procuring entity and the suppliers originally party to the framework agreement.

(6) Procuring entities shall enter into framework agreements as defined in paragraph (1) with a minimum of three parties, where there is a sufficient number of suppliers satisfying the selection criteria.

(7) The term of a framework agreement may not exceed one year.

(8) Procuring entities may not use framework agreements improperly or in such a way as to restrict or to distort competition.

32.—(1) A contract for repairing or other forms of construction is awarded in formats, including the following— Works contracts

(a) unit price works contracts;

(b) lump sum works contracts;

(c) turnkey works contracts; and

(d) time-and-material rate contracts.

(2) A contract based on unit price is awarded based on unit prices in the winning bid for estimated quantities of defined items of work that are required in order to carry out the works, and total payment is based on the units of work actually done and measured in the field.

(3) Bidders must consider the following points for contracts based on unit price—



(a) list of the quantities of labour and other inputs listed in the bill of quantities in the bidding documents, for which bidders give their unit prices in their bids; and

(b) list of quantities of work with total prices.

(4) In lump-sum contracts, the supplier agrees to perform the specified work for a fixed sum of money, and it is the supplier's responsibility and risk to remain on budget, since the procuring entity is liable only for the lump-sum price of the contract, subject to changes ordered by the procuring entity.

(5) In turnkey contracts the supplier is responsible for design, consultancy, building and implementation of the project, and in such contracts the supplier ensures the standard criteria for designing, implementation and technical specifications, in accordance with the procurement contract.

(6) In the case of maintenance and repair services, and other contracting situations in which the amount and combinations of various types of labour and materials cannot be predicted with certainty at the time of entry into the procurement contract, the procuring entity may enter into a time-and-materials-rate contract.

(7) A time-and-materials-rate contract shall stipulate hourly labour rates, including overhead and profits; reimbursement of materials; and a ceiling price within which the contractor shall make a good faith effort to remain.

#### PART IV—BIDDER QUALIFICATIONS

##### *Division I—Qualification Data and Assessment*

33.—(1) The procuring entity shall ensure that the supplier with whom it enters into a procurement contract meets such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings, namely:—

(a) that the supplier possesses the necessary professional and technical qualifications and competence to perform the procurement contract;

(b) that the supplier possesses the necessary financial resources to perform the procurement contract;

(c) that the supplier possesses the necessary equipment and other physical facilities to perform the procurement contract;

(d) that the supplier possesses the necessary managerial capability, reliability, experience, and reputation to perform the procurement contract; and

(e) that the supplier possesses the necessary personnel to perform the procurement contract.

(2) In addition, the procuring entity shall ensure that the supplier—

(a) has legal capacity to enter into the procurement contract;

(b) is not insolvent, in receivership, bankrupt or being wound up, its affairs are not being administered by a court or a judicial officer, its business activities have not been suspended, and it is not the subject of legal proceedings for any of the foregoing;

(c) has fulfilled its obligations to pay taxes and social security contributions.

(d) has not, and its directors or officers have not, been convicted of any criminal offence related to its professional conduct, corruption, or the making of false statements or misrepresentations as to its qualifications to enter into a procurement contract within a period of one year preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(3) Subject to the right of bidders to protect their intellectual property or trade secrets, the procuring entity may require bidders participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that bidders are qualified in accordance with the criteria referred to in paragraphs (1) and (2), and in handling this information procuring entities shall take into consideration the legitimate interests of bidders as regards the protection of their technical or trade secrets.

(4) The bidding documents shall indicate the types of documentation, if any, to be provided by bidders to attest to their conformity with the qualification requirements set forth in the bidding documents.

34.—(1) Any bidder, whether local or foreign, wishing to take part in a procurement contract may be requested to prove his enrolment, as prescribed in his country of establishment, in one of the professional or trade registers or to provide a declaration on oath or certificate in a prescribed format.

Suitability  
to pursue the  
professional  
activity

(2) In procedures for the award of service contracts where the service providers have to possess a particular authorization or to be members of a particular organization in their home country in order to be able to perform the service concerned, the procuring entity may require them to prove that they hold such authorization or membership.

35. Supporting documents to prove economic and financial standing under this Part may include—

Information  
as to  
economic  
and financial  
standing

(a) appropriate statements from the bidder's bankers;

(b) statement of accounts or extracts therefrom relating to the business of the bidder;

(c) statements of liabilities and assets, and of profit and loss;

(d) a statement of the overall inventory turnover of the business of the bidder and the turnover in respect of works in the previous three financial years of the bidder;

(e) other information if the types of information referred to subparagraphs (a) to (d) are not appropriate or not available in order to assess the bidder's economic and financial standing.

36.—(1) The technical and professional capabilities of bidders shall be assessed and examined in accordance with paragraphs (2), (3) and (4).

Information  
as to  
technical  
capacity

(2) In the procedures for awarding supply contracts, evidence of the bidder's technical capability may be furnished by means such as the following, according to the nature, quantity and purpose of the products to be supplied—

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved, and—

(i) where the supplies are made to public authorities, evidence of delivery shall be in the form of certificates and delivery notes;

(ii) where the supplies are to private purchasers, delivery shall be certified by the purchaser or, failing which, simply declared by the supplier to have been effected;

(b) a description of the bidder's technical facilities, its measures for ensuring quality and its study and research facilities;

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the supplier, especially those responsible for quality control;

(d) samples, descriptions and photographs of the products supplied, the authenticity of which must be certified if the procuring entity so requests;

(e) certificates issued by official quality control institutes or agencies of recognized competence attesting to the conformity of products clearly identified by references to specifications or standards;

(f) where the products to be supplied are complex or exceptional, or are required for a special purpose, a check carried out by the procuring entity or on its behalf by a competent official body of the country in which the bidder is established, subject to that body's agreement, on the production capacities of the bidder and, if necessary, on his study and research facilities and quality control measures; and

(g) a bidder who is not a manufacturer shall be required to produce evidence of a manufacturer's authorization.

(3) In the procedures for awarding service contracts, the ability of bidders to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability, and evidence of the service provider's technical capability may be furnished by one or more means such as the following means according to the nature, quantity and purpose of the services to be provided—

(a) the bidder's educational and professional qualifications and those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;

(b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided, and—

(i) where the services are provided to procuring entities, evidence of their performance shall be in the form of certificates issued or countersigned by the competent authority;

(ii) where they are provided to private purchasers, their performance shall be certified by the purchaser or, failing which, simply declared by the bidder to have been effected;

(c) a description of the bidder's measures for ensuring quality and his study and research facilities;

(d) where the services to be provided are complex or exceptional, or are required for a special purpose, a check carried out by the procuring entity or on its behalf by a competent official body of the country in which the bidder is established, subject to that body's agreement, on the technical capacities of the bidder and, if necessary, on his study and research facilities and quality control measures; and

(e) an indication of the proportion of the contract which the bidder may intend to sub-contract.

(4) In the procedures for awarding non-consultancy service contracts, the ability of bidders to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability, and evidence of the service provider's technical capability may be furnished by one or more means such as the following according to the nature, quantity and purpose of the services to be provided—

(a) an indication of the technicians or technical bodies involved, whether or not belonging directly to the bidder, especially those responsible for quality control;

(b) a statement of the bidder's average annual manpower and the number of managerial staff for the last three years;

(c) a statement of the tools, plant or technical equipment available to the bidder for carrying out the services; and

(d) where the services to be provided are complex or exceptional, or are required for a special purpose, a check carried out by the procuring entity or on its behalf by a competent official body of the country in which the bidder is established, subject to that body's agreement, on the technical capacities of the bidder and, if necessary, on his study and research facilities and quality control measures.

(5) In the procedures for awarding public works contracts, evidence of the bidder's technical capability may be furnished by one or more means such as the following, according to the nature, quantity and purpose of the works to be provided—

(a) the bidder's educational and professional qualifications and those of the firm's managerial staff, and, in particular, those of the person or persons responsible for carrying out the works;

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works; the certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed; and where necessary, the competent authority shall submit these certificates to the procurement entity;

(c) a statement of the tools, plant and technical equipment available to the bidder for carrying out the works;

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years; and

(e) a statement of the technicians or technical divisions which the bidder can call upon for carrying out the works, whether or not they belong to the firm.

(6) The procuring entity shall specify, in the bidding documents or, if applicable, in the pre-qualification documents, which references under paragraphs (2), (3), (4) and (5) that it wishes to receive.

Selection  
followed by  
post-qualifica-  
tion  
procedure

37. In procurement proceedings that are not initiated by pre-qualification proceedings, following the evaluation of bids and the determination of the lowest priced or lowest evaluated bid, the procuring entity shall conduct a detailed examination of the qualification data submitted by the bidder that submitted that bid, prior to issuance of the notice of acceptance of the bid.

Subcontractor  
qualifications

38. A procuring entity may require bidders to provide qualification information and documentation in accordance with the Act and these Regulations for any subcontractor to be involved in the performance of the procurement contract, and where the procuring entity, in view of the circumstances of the case and because of the particularly critical nature of a subcontractor's role in the implementation of the procurement contract, decides that it is in the public interest to do so, the procuring entity may directly determine the suitability of the qualifications of a subcontractor, in accordance with the qualification criteria set forth in the Act.

False and  
deficient  
qualification  
information

39.—(1) The procuring entity shall disqualify a bidder if it finds at any time that the information submitted concerning the qualifications of the bidder was false.

(2) The procuring entity may disqualify a bidder if it finds at any time that the information submitted concerning the qualifications of the bidder was materially inaccurate or materially incomplete.

(3) Other than in a case to which paragraphs (1) and (2) apply, the procuring entity may not disqualify a bidder on the ground that information submitted concerning the qualifications of the bidder was inaccurate or incomplete in a non-material respect, but the bidder may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

#### *Division II—Pre-qualification Proceedings*

Purpose of  
pre-qualifica-  
tion  
proceedings

40.—(1) Pre-qualification shall be based entirely on the capacity and resources of potential bidders to successfully perform the contract and all pre-qualified bidders shall be invited to bid; and sufficient time shall be given for applicants to obtain the pre-qualification documents and prepare and submit their applications

(2) Pre-qualification proceedings should be utilized in particular in the case of open invitations to participate in proceedings for the procurement of complex or high-value goods or works, or in any other circumstances in which the high costs of preparing detailed bids, proposals or offers could discourage competition, such as custom-designed equipment, industrial plant, specialized services, and contracts to be let under turnkey, design and build or management contracting, or for the purpose of establishing short lists for two-stage tendering.

(3) For pre-qualification for groups of contracts to be awarded over a period of time, a limit for the number or total value of awards to any one supplier may be made on the basis of the supplier's resources, and the

conditions to be satisfied by suppliers, the methods according to which satisfaction of each of those conditions is to be verified, the period of validity of a pre-qualification for a group of contracts, and the procedures for entry and for renewal of the pre-qualification shall be generally and regularly publicized, at least on an annual basis, in a manner to bring them to the attention of suppliers.

(4) Every pre-qualification is subject to annual renewal, and bidders shall be required to update the information on an annual basis as a precondition for renewal of their continued pre-qualification, and shall be informed of their removal from pre-qualified status if they are judged to no longer have the required resources or capability.

41.—(1) Pre-qualification documents shall include, at a minimum, the following information—

Contents of  
pre-qualification  
documents

(a) instructions for preparing and submitting pre-qualification applications;

(b) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(c) any documentary evidence or other information that must be submitted by suppliers to demonstrate their qualifications;

(d) the manner and place for the submission of applications to pre-qualify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(e) any other requirements that may be established by the procuring entity in conformity with the Act and these Regulations relating to the preparation and submission of applications to pre-qualify and to the pre-qualification proceedings; and

(f) the information required to be specified in the announcement by regulation 59 (1) (a) to (d), (f) and (g).

(2) The procuring entity shall respond to any request by a supplier for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to pre-qualify.

(3) The response by the procuring entity under paragraph (2) shall be given within a reasonable time so as to enable the supplier to make a timely submission of its application to pre-qualify and a response to any request shall, without identifying the source of the request, be communicated to all suppliers to which the procuring entity provided the pre-qualification documents.

42.—(1) Prior to the award of the procurement contract, the procuring entity may require the bidder submitting the bid that has been found to be the successful bid to demonstrate again its qualifications and the criteria and procedures to be used for such further demonstration shall be the same as those set forth in the pre-qualification documents.

Confirmation  
of qualification  
information

(2) If the bidder submitting the successful bid is requested to demonstrate again its qualifications in accordance with paragraph (1) but fails to do so, the procuring entity shall reject that bid and shall select a successful

bidder, in accordance with the criteria set forth in the bidding documents, from among the remaining bids, subject to the right of the procuring entity, in accordance with section 23 of the Act, to reject all remaining bids.

*Division III—Database and Classification of Suppliers*

Registration  
and  
classification  
of suppliers

43.—(1) Bidders seeking inclusion in the database or lists of qualified suppliers that may be established by procuring entities or other entities in Malawi may be required to provide the following—

(a) completed registration application;  
(b) copy of the currently valid licence and commercial registration for the activity practiced;

(c) copy of currently valid registration certificate from the bidder's chamber of trade and commerce or equivalent body;

(d) copies of contracts relating to agency, brokering and distribution arrangements;

(e) copy of last approved annual statement of accounts and budget.

(2) Requests to be entered in the database or list shall be receivable at any time from any interested bidder and shall be acted upon within fourteen days.

(3) Entry in the database or list shall be subject to no qualification or eligibility criterion more stringent than those set forth in regulation 33 (1) and (2).

(4) The existence of the database or list, the conditions to be satisfied by bidders to be entered in the database or list, the methods according to which satisfaction of each of those conditions is to be verified, the period of validity of an entry in the database or list and the procedures for entry and for renewal of the entry shall be generally and regularly publicized in a manner to bring them to the attention of bidders.

(5) The classification of the suppliers in the various types of works shall be made within the classes or grades according to the administrative technical and financial qualifications, equipment and experience in the execution of works pursuant to the instructions issued by the National Construction Industry Council of Malawi which define the classification requirements, conditions and classes.

(6) The sole absence of an application for entry in the registry or classification system is not ground for exclusion of a bidder from participation in procurement proceedings, but registration may be required as a condition for award of a contract.

(7) Inscription in the database or list shall be available at any time and shall be subject to periodic renewal after one year, and prompt notice shall be given to a bidder of his inscription on or removal from the database or list.

PART V—PROCUREMENT METHODS

*Division I—General Provisions*

Notice of  
procurement  
method to  
be used

44. The procuring entity shall include in the invitation to tender or to apply for pre-qualification, or in any other document used to solicit an offer, proposal or quotation, an indication of the procurement method being used in the procurement proceeding.

45. The price that the procuring entity may charge for the bidding documents shall reflect only administrative costs, namely, the cost of printing and providing them to bidders.

Price of  
bidding  
documents

46.—(1) A bidder may request a clarification of the bidding documents from the procuring entity, and the procuring entity shall respond to any request by a bidder for clarification of the bidding documents that is received by the procuring entity at least fourteen days prior to the deadline for submission of bids.

Clarification  
and  
modification  
of bidding  
documents

(2) The procuring entity shall respond to a request under paragraph (1) so as to enable the bidder to make a timely submission of its bid and shall, without identifying the source of the request, communicate the clarification to all bidders to which the procuring entity has provided the bidding documents.

(3) At any time prior to the deadline for submission of bids, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a bidder, modify the bidding documents by issuing an addendum, and the addendum shall be communicated promptly to all bidders to which the procuring entity has provided the procuring entity documents and shall be binding on those bidders.

47.—(1) All time-limits for the receipt of bids and requests to participate fixed by the procuring entities shall be at least twenty-eight days to give interested parties reasonable time appropriate to the contract to draw up and submit their bids, and when fixing the time-limits, procuring entities shall take particular account of the complexity of the contract and the time required for drawing up bids.

Deadline  
for  
submission  
of bids

(2) Subject to paragraph (3), deadlines for submission of bids shall be set in accordance with the following minimum periods—

(a) in the case of international competitive bidding, not less than forty-five days from the date of publication of the invitation to tender;

(b) in the case of national competitive bidding, not less than thirty days from the date of publication of the invitation to tender;

(c) in the case of local shopping (request for quotations) not less than five days from the date of delivery of the letter of solicitation for quotations;

(d) in the case of restricted tendering, not less than twenty-one days from the dispatch of the invitation to tender; and

(e) in the case of emergency procurement, not less than twenty-four hours from the time of dispatch of the invitation letter.

(3) Factors to be considered in determining the period of time to be allowed for preparation of bids include—

(a) the nature and complexity of the object of the procurement;

(b) whether the item to be procured is readily available commercially or must be produced to the unique specifications of the procuring entity;

(c) the time period when the procuring entity needs to have its requirement fulfilled;

(d) whether it is anticipated that foreign bidders will participate; and

(e) the amount of time required for distribution of invitations to tender and bidding documents.



(4) The procuring entity may extend the deadline for submission of bids if, following a clarification or modification of the bidding documents, or the late issuance of minutes of a conference of bidders or a site visit, such an extension is necessary to allow bidders sufficient time to take the clarification, modification or other added information into account in preparing their bids, and notice of any extension of the deadline shall be given promptly to each bidder to which the procuring entity provided the bidding documents.

Reception  
and security  
of bids

48.—(1) The procuring entity shall ensure that all bids it receives are kept in a secure manner that does not permit the bids to be open or viewed.

(2) For the purpose of paragraph (1), the procuring entity shall maintain a securely-locked tender box into which bidders may deposit their bids, and if the offer envelopes are so big which makes it impossible to place them in the box, they shall be handed over to the Internal Procurement Committee's Secretary, who should ensure that the bids are kept in a safe, in secure area and manner, and handed over to the Internal Procurement Committee at the bid opening.

(3) In addition to direct deposit in the tender box, bids may be submitted by registered mail, courier or any other means that may be permitted by the bidding documents, and bids received in such a manner shall be promptly placed in the tender box.

(4) Any sample bids that are submitted should be handled in a confidential and secure manner that does not lead to the disclosure of their characteristics prior to the opening of bids.

Rejection  
of late bids

49.—(1) A bid received by the procuring entity after the deadline for the submission of bids shall not be opened and shall be returned to the bidder that submitted it.

(2) The date and time of arrival of a late bid shall be noted in the record of the procurement proceedings.

Bid validity  
period

50.—(1) The bidding documents shall set a bid validity period that is of a sufficient length to enable the procuring entity to complete the evaluation and comparison of bids and to obtain all the necessary approvals so that the procurement contract can be awarded within that period.

(2) If, prior to the expiry of the validity period of bids, the procuring entity requests bidders to extend the validity period of their bids, it should only address such a request to those bidders that in the judgment of the procuring entity have a reasonable chance of being selected.

(3) A refusal to extend the bid-validity period shall not result in forfeiture of the bid security; extension of the bid-validity period shall, however, be subject to extension of the bid security if security was required in the first place and without such an extension of the bid security, a bid shall be deemed not extended.

Evaluation  
of bids in  
different  
currencies

51. When bid prices are expressed in two or more currencies, the bid prices of all bids shall be converted to the same currency, and according to the rate specified in the bidding documents, for the purpose of evaluating and comparing bids.

Prompt  
payment  
discounts

52. A prompt payment discount included in a bid shall become a term of the procurement contract if that bid is accepted, and shall be utilized by the procuring entity if payment is made in accordance with the terms of the discount, but so however that prompt payment discount shall not be considered in the evaluation and comparison of bids.

53.—(1) If, for a given contract, bids appear to be unrealistically low in relation to the goods, works or services, the procuring entity shall, before it may reject those bids, request in writing details of the constituent elements of the bid which it considers relevant and shall verify, after due hearing of the parties, those constituent elements taking account of the explanations received.

Unrealistically low bids

(2) The procuring entity shall take into consideration explanations relating to—

(a) the economics of the manufacturing process, of the services provided or of the construction method;

(b) the technical solutions chosen and the exceptionally favourable conditions available to the bidder for the supply of the goods or services, or the execution of the work; and

(c) the originality of the supplies, services or work proposed by the bidder.

54. Information relating to the examination, clarification, evaluation and comparison of bids shall not be disclosed to bidders or to any other person not involved officially in the examination, evaluation or comparison of bids or in the decision on which bids should be accepted, except as provided in the Act and these Regulations.

Confidentiality of bid evaluation

55. The procuring entity shall not accept a bid—

Rejection of bids

(a) if the bidder that submitted the bid is not qualified, including bidders that are debarred or suspended;

(b) if the bidder that submitted the bid has submitted, or participated in, another bid for the procurement in question, in which case both bids shall be rejected;

(c) if the bidder that submitted the bid does not accept a correction of an arithmetical error made pursuant to regulation 79,

(d) if the bid is not responsive;

(e) for which a bid security was not provided, if such a security was required by the bidding documents; or

(f) in the circumstances referred to in section 18 (4) (a) of the Act.

56. Notice of the rejection of all bids, or of cancellation of the procurement proceedings, shall be given promptly to all bidders that submitted bids, and the notice shall state the grounds for the rejection of all bids, or for the cancellation of the procurement proceedings.

Notice requirement for rejection of all bids; cancellation of procurement proceedings

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

Notice to other bidders

58.—(1) Any required samples that have not been destroyed in testing shall be returned to the respective bidders at their written request and expense; and in all cases, the bidder loses the right of claiming return of samples sixty days following the date of notification of the award.

Return of samples

(2) The samples approved in relation to the successful tender shall, after being signed by the Internal Procurement Committee, be kept by the procuring entity for the purpose of comparison with the delivered supplies.

*Division II—Procedures for Tendering Proceedings*

Contents  
of invitation  
to tender  
and invitation  
to pre-qualify

59.—(1) An invitation to tender shall contain, at a minimum, the following information—

(a) the address of the procuring entity;

(b) the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the works to be effected, or the nature of the services and the location where the services are to be provided;

(c) the desired or required time for the supply of the goods or for the completion of the works;

(d) the criteria and procedures to be used for evaluating the qualifications and eligibility of bidders in conformity with sections 13 and 14 of the Act;

(e) the means of obtaining the bidding documents and the place from which they may be obtained;

(f) the price, if any, charged by the procuring entity for the bidding documents;

(g) the currency and means of payment for the bidding documents;

(h) the language or languages in which the bidding documents are available; and

(i) the place and deadline for the submission of bids.

(2) An invitation to pre-qualify shall contain, at a minimum, the information referred to in paragraph (1), as well as the following—

(a) the means of obtaining the pre-qualification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the pre-qualification documents;

(c) the currency and terms of payment for the pre-qualification documents;

(d) the language or languages in which the pre-qualification documents are available;

(e) the place and deadline for the submission of applications to pre-qualify.

Publication  
of invitation  
to tender

60.—(1) An invitation to tender or to apply for pre-qualification shall be published at a minimum in the *Gazette*.

(2) In the case of solicitation of international participation, publication shall in addition to publication in the *Gazette*, be made in publications of wide international circulation, specialized trade journals, or international newspapers, and using other appropriate media such as the internet and, pursuant to section 30 (6) (a) of the Act, international participation shall be solicited when the estimated value of the procurement exceeds the thresholds set by the Director of Public Procurement.

(3) The invitations referred to in paragraph (1), shall be published within seven days of receipt by the Government Press.

(4) The procuring entity shall not publish an invitation to tender or to pre-qualify for a procurement proceeding in a newspaper or other media prior to publication of the announcement in the *Gazette*.

(5) In no case shall a publication of an announcement in the public media be deemed a substitute for publication of the announcement in the *Gazette* and minimum periods of time shall be counted from the date of publication in the *Gazette*.

(6) Every chairman of an Internal Procurement Committee shall, prior to the issuance of an invitation to tender of any tender, ascertain the following—

(a) compliance with the requirements in the Act and these Regulations; and the chairman of the Committee shall request the rectification of any errors or omissions and the concerned procurement unit shall do so;

(b) availability of a sufficient number of copies of the bidding documents.

61.—(1) Where procuring entities do not offer free direct access to the entire bidding documents and any supporting documents by electronic means, and where, in restricted tendering procedures the invitation to tender is not accompanied by such documents, the bidding documents shall be sent to bidders within five days of receipt of the request to participate, provided that the request is made in good time before the deadline for submission of bids.

Provision  
of bidding  
documents

(2) Bidders interested in the tendering proceedings may preview the bidding documents at the office of the procuring entity indicated in the invitation to tender.

62. Preparation of the bidding documents is the responsibility of the Procurement Unit, if one has been established, in consultation with the requisitioning unit that seeks to submit a requisition for procurement, and the bidding documents should be prepared in English.

Preparation  
of bidding  
documents

63. The bidding documents shall include, at a minimum, the following information—

Contents  
of bidding  
documents

(a) instructions for preparing bids, including—

(i) any descriptive literature bidders are required to submit with their bids;

(ii) any requirement that bidders provide samples, and the number and type of such samples;

(iii) any requirement that bidders view samples to which supplies must conform, and the circumstances under which such requirements would be waived;

(iv) any requirement that bidders submit a table of spare parts recommended by the manufacturer along with the manufacturer's stock number for each item, the quantity, unit price, and an

indication of any escalation of prices for spare parts after the contractually guaranteed period for spare parts prices;

(v) any requirement that the bidder should state in the bid the country of origin of the supplies, the name of the manufacturer, the brand name, model and catalogue number;

(b) the criteria and procedures, in conformity with section 13 (3) of the Act and Part IV of these Regulations, relative to the evaluation of these qualifications of bidders and relative to the further demonstration of qualifications pursuant to regulation 42;

(c) the requirements as to documentary evidence or other information that must be submitted by bidders to demonstrate their qualifications;

(d) the nature and required technical and quality characteristics, in conformity with section 15 of the Act, of the goods, works or services to be procured, including, but not limited to—

(i) technical specifications, plans, drawings and designs as appropriate; and the quantity of the goods;

(ii) any incidental services to be performed;

(iii) the location where the works are to be effected or the services are to be provided, and the desired or required time, if any, when the goods are to be delivered, the works are to be effected or the services are to be provided;

(iv) any warranty and maintenance requirements;

(v) the tests, standards and methods to be employed to judge the conformity of goods or works with technical specifications provided in solicitation documents; and

(vi) any requirement that supplies, materials, spare parts should be and be new and original.

(e) the criteria to be used by the procuring entity in determining the successful bidder, including any margin of preference and any criteria other than price to be used pursuant to regulation 44, 45, and 46 and the relative weight of each criteria;

(f) the terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form to be employed by the parties;

(g) if it relates to the characteristics of the goods, works, services, or services to be procured, the conditions and other requirements set forth in the solicitation documents are permitted to be amended to that effect, and a statement of the manner in which the alternative bids are to be evaluated and awarded;

(h) if bidders are permitted to submit bids for only a portion of the goods, works or services to be procured, a description of the portion of the goods, works or services as may be submitted;

(i) the manner in which the bid price is to be formulated and expressed, including a statement as to whether the price is to cover

elements other than the cost of the goods, works or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes; and whether the prices are fixed or adjustable and, if so, the formula thereof;

(j) the currency or currencies in which the bid price is to be formulated and expressed; in respect of local bids, the price shall be expressed in Malawi Kwacha and any convertible currency for international bids;

(k) the language or languages in which bids are to be prepared;

(l) any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any bid security to be provided by bidders submitting bids; and any such requirements for any security for the performance of the procurement contract to be provided by the bidder that enters into the procurement contract, including securities such as labour and materials bonds;

(m) when a bid security is required, an indication that withdrawal or modification of the bid following the deadline for submission of bids will result in forfeiture of the bid security amount; and that a bidder may withdraw its bid prior to the deadline for the submission of bids without forfeiting its bid security;

(n) the manner, place and deadline for the submission of bids, in conformity with regulation 47;

(o) the means by which, pursuant to section 31 (6) of the Act and regulation 46, bidders may seek clarifications of the bidding documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of bidders;

(p) the period of time during which bids shall be valid, in conformity with regulation 50;

(q) the place, date and time for the opening of bids, in conformity with section 31 (11) of the Act;

(r) the procedures to be followed for opening and examining bids;

(s) the currency that will be used for the purpose of evaluating and comparing bids pursuant to regulation 51 and either the exchange rate that will be used for the conversion of bids into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) references to the Act, these Regulations and other laws and regulations directly pertinent to the procurement proceedings; but so however, that the omission of any such reference shall not constitute grounds for review under section 37 of the Act or give rise to liability on the part of the procuring entity;

(u) the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from bidders in connexion with the procurement proceedings, without the intervention of an intermediary;

(v) any commitments such as the transfer of technology to be made by the bidder under the procurement contract;

(w) notice of the right provided under section 37 of the Act to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) a statement to the effect that the procuring entity reserves the right to reject all bids pursuant to section 23 of the Act;

(y) any formalities that will be required once a bid has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to regulation 123; and

(z) any other requirements established by the procuring entity in conformity with the Act and these Regulations relating to the preparation and submission of bids and to other aspects of the procurement proceedings.

Formulation  
of technical  
evaluation  
criteria

64. —(1) The criteria used to assess the technical merit of bids shall be formulated in as clear, precise, and objective a manner as possible.

(2) Technical bid evaluation criteria, other than price, which should be quantified in monetary terms in that the criteria shall be applied in the comparison of bids with respect to various performance factors by way of deductions from or additions to bid prices; such deductions and additions shall be only for the purposes of comparison of bids, and shall not affect actual bid prices; and evaluation criteria may also be expressed in the form of pass or fail requirements.

(3) Bid evaluation criteria may identify an acceptable range of performance and an acceptable range of delivery and payment terms.

(4) Bid evaluation criteria shall be formulated in such a manner that does not permit the procuring entity to award the procurement contract to a bidder whose bid exceeds the requirements referred to in paragraph (2), unless that bidder also has the bid price evaluated lowest in accordance with the evaluation criteria set forth in the bidding documents.

Technical  
specifications  
for  
procurement  
of goods

65. Technical specifications for procurement of goods may, among others, contain the following elements and descriptions of requirements—

(a) listing of the goods to be procured, including the required performance characteristics, quantity, delivery times and incidental services, such as operating or descriptive manuals, training of procuring entity's personnel, installation, supplier's on-site personnel required, after sale service;

(b) required availability of spare parts and service during life of goods;

(c) descriptive literature or samples to be provided with the bid;

(d) description of any required performance or quality guarantee;

(e) technical configurations;

(f) inspection and quality testing to be conducted, including pre-shipment testing and pre-shipment inspection;

(g) environmental impact and safety standards to be met by the goods; and

(h) criteria and performance tests or inspections for final acceptance.

66. Elements to be addressed in technical specifications for procurement of works may contain the following elements and descriptions of requirements –

Technical specifications for procurement of works

(a) general description of the scope and purpose of the works;

(b) precise description of scope of work to be carried out, including, elements such as design, construction, erection, any manufacturing, installation of equipment;

(c) physical nature and conditions of construction site;

(d) detailed listing of any equipment and components to be supplied;

(e) detailed design and drawings of work to be performed, to the extent that those are to be supplied by the procuring entity under the contracting arrangement in question;

(f) description of the works in terms of design details or performance characteristics, including specific technical descriptions and standards as to items such as plumbing, and electrical installations;

(g) environmental impact and safety standards to be met;

(h) description of performance and quality guarantees required;

(i) inspection and testing to be conducted at various stages of construction;

(j) completion tests;

(k) technical documentation, drawings, operating manuals to be provided by suppliers;

(l) type and quantity of training and supervision to be provided by suppliers, to the extent applicable;

(m) inspection and performance tests to be passed for acceptance; and

(n) a schedule for starting and completion of construction time.

67.—(1) Bidding documents for unit-priced works contract shall require bidders to quote their prices for the items listed on the bill of quantities included in the bidding documents, and the bills of quantities shall set forth the procuring entity's estimate of the quantities of materials, labour and the other inputs required to be provided by the supplier in order to carry out the works.

Bills of quantities and activity schedules

(2) Bidding documents for lump-sum-priced contracts shall require bidders to submit a priced activity schedule, on which the bidder breaks down the lump-sum price according to the main activities involved in the progressive implementation of the procurement contract.



Technical specifications for procurement of services other than consultants' services

68. Technical specifications for procurement of services, other than consultants' services, shall contain the following elements and description of requirements—

- (a) general description of the scope and purpose of the service;
- (b) description of the service to be supplied and the tasks to be performed by the supplier, as much as possible as performance requirements;
- (c) conditions under which the service is to be performed;
- (d) descriptive literature or samples to be provided with the bid;
- (e) inspection and quality testing to be conducted;
- (f) criteria and methods by which the procuring entity intends to judge the performed services;
- (g) description of performance and quality guarantees required; and
- (h) type and quality of training and supervision to be provided by supplier

Pre-bid conference

69.—(1) The procuring entity may organize a conference for the purpose of briefing bidders and taking their questions on the bidding documents, including the technical specifications and other requirements; and any such conference should take place at an early point following the distribution of the bidding documents, so as to allow bidders to take the information they obtain at the conference into account in preparing their bids; clarification at the conference of defects or ambiguities in the bidding documents does not relieve the procuring entity in such cases of the obligation to amend the bidding documents.

(2) If the procuring entity convenes a meeting of bidders, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the bidding documents, and its responses to those requests, without identifying the sources of the requests; and the minutes shall be provided promptly to all bidders to which the procuring entity provided the bidding documents, so as to enable those bidders to take the minutes into account in preparing their bids.

Site visits

70. The procuring entity shall arrange for site visits during or after the pre-bid conference, where such site visits would facilitate the submission of bids that are responsive to the needs of the procuring entity.

Submission of signed bid in single envelope

71.—(1) A bidder shall submit the bid signed, in the required number of copies and in a tightly closed and sealed envelope; and a copy marked as the "original" shall be amongst them.

(2) The procuring entity shall, on request, provide to the bidder a receipt showing the date and time when its bid was received and proceed in accordance with regulation 48.

(3) A bidder shall be required to submit its bid in a single sealed envelope.

72.—(1) As a general guideline, bid securities shall be required in the following types of cases—

Requirements  
applicable  
to bid  
securities

- (a) procurement whose value exceeds the amount prescribed, from time to time, by the Director of Public Procurement;
- (b) procurement of technologically complex equipment or works;
- (c) procurement where time is of the essence;
- (d) procurement in which a performance or other type of security is required to support fulfilment of the resultant procurement contract.

(2) Taking due account of the factors in paragraph (1), the procuring entity may waive a bid security requirement in the interest of economy and efficiency and with a view to reducing obstacles to participation by small- and medium-sized enterprises, and any such waiver shall be noted in the record of the procurement proceedings.

(3) The amount of the bid security should be set in the bidding documents, at between 1 per cent and 3 per cent of the estimated value of the procurement; and the required amount of the security shall be stated as an amount rather than as a percentage of the bid price of each bidder.

(4) Where the procuring entity requires bidders submitting bids to provide a bid security the requirement shall apply to all such bidders.

(5) Prior to submitting a bid, a bidder may request the procuring entity to confirm the acceptability of a proposed issuer of a bid security, or of a proposed confirmer, if required; and the procuring entity shall respond promptly to such a request;

(6) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer pursuant to paragraph (5) does not preclude the procuring entity from rejecting the bid security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(7) A bid security shall be subject to a demand for payment in the following cases—

(a) withdrawal or modification of the bid after the deadline for submission of bid;

(b) failure to sign the procurement contract if required by the procuring entity to do so;

(c) failure to provide a required security for the performance of the contract after the bid has been accepted or failure to comply with any other condition precedent to signing the procurement contract specified in the bidding documents.

(8) The procuring entity shall make no claim to the amount of the bid security, and shall promptly return, or procure the return of, the bid security document, after whichever of the following that occurs earliest—

- (a) the expiry of validity period of the bid security;

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the bidding documents;

(c) the termination of the tendering proceedings without the entry into force of a procurement contract;

(d) the withdrawal of the bid prior to the deadline for the submission of bids, unless the bidding documents stipulate that no such withdrawal is permitted.

Required  
validity  
period of  
bid security

73.—(1) The bidding documents shall require that the bid securities provided by bidders should have a validity period extending for a period of four weeks beyond the expiry of the validity period of bids, in order to allow the procuring entity sufficient time to make a demand for payment under the bid security in accordance with regulation 72 (7).

(2) Bid securities shall be returned to unsuccessful bidders once it is determined that their bids will not be selected.

Modification  
or withdrawal  
of bids

74. A modification or notice of withdrawal of a bid is effective and not subject to forfeiture of the tender security only if it is received by the procuring entity prior to the deadline for the submission of bids.

Opening  
of bids

75.—(1) Bids shall be opened in a session open to the public, including bidders or their representatives, at the time and place indicated in the bidding documents; and the time of bid opening shall coincide with the deadline for submission of bids.

(2) The name and address of each bidder whose bid is opened and the bid price, and the price of any alternative bids if they have been solicited or permitted, shall be announced to those persons present at the opening of bids, communicated on request to bidders that have submitted bids but that are not present or represented at the opening of bids, and recorded immediately in the record of the tendering proceedings required by section 27 of the Act.

Timeframe  
for  
evaluation  
of bids

76. The process of evaluation of bids shall be carried out in an efficient manner, taking particular account of the validity period of the bids; and the actual period of time required may vary depending on the nature or urgency of the tendering proceeding.

Purpose and  
scope of  
preliminary  
screening

77.—(1) After the initial opening of bids in accordance with section 31 (11) of the Act, a preliminary screening of bids shall be carried out to determine whether bids comply with the procuring entity's requirements as to the bids themselves and the accompanying documents, and this involves examining—

(a) whether all the required documents, including any standard forms supplied with the bidding documents, have been submitted fully completed;

(b) whether the bidder has met the eligibility requirements, including the requirements applicable by virtue of the involvement of a financing institution;

(c) whether the bid complies with bid validity period requirements set forth in the bidding documents;

(d) whether the bid substantially conforms with the contractual terms and technical requirements set out in the invitation to tender and instructions to bidders such as with respect to scope of work, delivery schedule, lack of a price quotation for a substantial portion of the work, or non-compliance with key technical requirements;

(e) whether the bid is conditional, thus compromising the bidder's ability to accept an award;

(f) whether the bid has been signed by an authorized representative of the bidder; and

(g) whether a bid security, if required, has been provided.

(2) At the preliminary screening, bids shall be checked for arithmetical errors or clerical errors that may appear on their face, and bidders that have submitted bids that appear to contain such errors shall be contacted and given an opportunity to correct them, or to accept a correction made by the procuring entity in accordance with regulations 55 (c) and 79.

(3) At the stage of preliminary screening, bids may be classified according to whether they contain deviations from the technical specifications and contractual terms set forth in the bidding documents in the following categories—

(a) those bids that do not contain deviations or reservations;

(b) those bids that contain material deviations or reservations or qualifications and are therefore to be rejected as non-responsive in accordance with regulation 55 (d);

(c) those bids that contain minor deviations or reservations, but that may be considered responsive, provided that the deviations or reservations are quantified and taken into account in the detailed evaluation and comparison of bids.

78.—(1) Following the preliminary screening of bids, the procuring entity shall proceed to the detailed evaluation and comparison of the bids that have not been rejected in the preliminary screening.

Detailed  
evaluation  
of bids

(2) In the detailed evaluation of bids, the procuring entity shall examine and compare bids in detail with respect to the following—

(a) commercial terms, including aspects such as—

(i) validity period and amount of bid securities;

(ii) payment terms;

(iii) liquidated damages,

and any minor deviations with respect to commercial terms shall be identified and listed and any financial adjustments to bids that necessitated as a result of minor deviations shall be identified;

(b) technical requirements, including aspects such as—

- (i) scope of supply of goods or of works;
- (ii) delivery or work schedule;
- (iii) major technical specifications for all key items being procured (e.g. technical capacity of plant) and operating and performance characteristics such as fuel utilization;

(iv) duration of warranty period,  
and any minor deviations with respect to technical requirements shall be identified and listed and any financial adjustments to bids that are necessitated as a result of minor deviations shall be identified;

(c) financial evaluation of bids which involves—

(i) adjustment of bid prices to reflect permissible deviations with respect to commercial terms of bids which affect the prices of bids, including in particular, payment terms, delivery or completion schedules;

(ii) adjustment of bid prices with respect to minor deviations from technical requirements which affect the prices of bids, including in particular, the completeness of the scope of the goods, works or services, compliance with technical requirements;

(iii) adjustment of bid prices with respect to technical evaluation criteria, to the extent of those identified in the bidding documents as relevant to the evaluation and comparison of bids, such as life-cycle operating costs, performance factors;

(iv) adjustment of bid prices with respect to cost of inland transportation to project site or delivery point, and cost of local handling if required to be in, but omitted from, bid prices.

(3) The detailed evaluation of bids for civil works shall be conducted in general along the lines mentioned in paragraph (2) with particular attention being paid to the aspects specific to the civil works context, including—

(a) consistency of work plans and schedules with the requirements in the bidding documents, including with respect to aspects such as timing of mobilization and construction methodology;

(b) examination and analysis of reasonableness and reliability of unit rates quoted for items listed in the bill of quantities; and

(c) identification of unbalanced bids, in which unusually high prices are quoted for items of works to be performed at an early stage in the implementation of the contract (“frontloading”), or for items that the contractor believes were underestimated in the bill of quantities.

Correction  
of errors on  
face of bids

79.—(1) The Internal Procurement Committee shall correct any arithmetical errors appearing on the face of the bid, and inform the bidder in question of the correction, and the bid shall be rejected if the bidder refuses the correction, and the bid security is thereby subject to forfeiture.

(2) If there is a discrepancy between the unit price and the total price, or the line item total, that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected, unless in the opinion of the procuring entity there is an obviously gross misplacement of

the decimal point in the unit rate or a similarly obvious gross mathematical error, in which case the line item total, or total price, as the case may be, as quoted will govern and the unit rate will be corrected.

(3) Where there is a discrepancy between the amounts in figures and in words, the amount in words will govern.

(4) Where there is a discrepancy in the information contained in the submitted copies of the bid, the copy marked as the "original" shall prevail.

80.—(1) The procuring entity shall evaluate and compare the bids that have been received in order to ascertain the successful bid, in accordance with paragraph (3) and the procedures and criteria set forth in the bidding documents, and no criterion shall be used that has not been set forth, in the bidding documents;

Application  
of evaluation  
criteria

(2) The successful bid shall be the lowest evaluated bid responsive to the requirements set forth in the bidding documents, determined on the basis of the criteria set forth in the bidding documents.

(3) In determining the lowest evaluated bid in accordance with paragraph (2), the procuring entity may consider only the following—

(a) the bid price, subject to any margin of preference applied pursuant to paragraph (4);

(b) any other criteria stipulated in the bidding documents, which shall, to the extent practicable, be objective and quantified in monetary terms, so as to enable the application of adjustments to bid prices for the purposes of detailed evaluation and comparison of bids in accordance with regulation 78, and only criteria such as the following may be utilized—

(i) the cost of operating, maintaining and repairing the goods or works, the time for delivery of the goods, completion of works or provision of the services, the functional characteristics of the goods or works, the terms of payment and of guarantees in respect of the goods, works or services;

(ii) the effect that acceptance of a bid would have on the environment, the extent of local content, including local manufacture, labour and materials, in goods, works or services being offered by suppliers, the transfer of technology and the development of managerial, scientific and operational skills.

(4) In evaluating and comparing bids the procuring entity may grant a margin of preference for the benefit of bids for works by domestic suppliers or for the benefit of bids for domestically produced goods or for the benefit of domestic suppliers, and the margin of preference may be applied in such cases and in accordance with procedures described in regulations 82 to 84; and this shall be reflected in the record of the procurement proceedings.

81. The procuring entity may regard a bid as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the bidding documents, or if it contains errors or oversights that are capable of

Assessing  
responsive-  
ness of bids

being corrected without touching on the substance of the tender, and any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of bids, by way of adjustments to bid prices that are for purposes only of comparing bids and that are not to be reflected in the price of the procurement contract.

When domestic  
price  
preference  
may be  
applied

82.—(1) A domestic price preference may be accorded in the following cases—

(a) if the bidder establishes to the satisfaction of the procuring entity that—

(i) labour, raw material and components from within Malawi will account for more than thirty per cent of the ex-works price offered; and

(ii) the production facility in which those goods will be manufactured or assembled has been engaged in manufacturing or assembling such goods at least since the time of bids submission;

(b) as regards construction services by local suppliers, if they provide as part of data for qualification, such information, including details of ownership, as shall be required to determine whether a particular supplier or group of suppliers qualifies for domestic preference,

and the bidding documents shall clearly indicate the preference and the method that will be followed in the evaluation and comparison of bids to give effect to such preference;

(2) For purposes of evaluation and comparison of bids, a domestic price preference as prescribed by the Director of Public Procurement shall apply to prices of bids received from qualifying domestic bidders, provided that the required level of quality is assured.

Procedure for  
application  
price  
preference for  
domestically  
manufactured  
goods

83.—(1) If the procuring entity intends to grant a margin of preference in the evaluation of bids in tendering proceedings to bids offering certain goods manufactured in Malawi, the bidding documents shall clearly indicate any preference to be granted to domestically manufactured goods and the information required to establish the eligibility of a bid for such preference; the nationality of the manufacturer or supplier is not a condition for such eligibility; and the methods and stages set forth in the bidding documents shall be followed in the evaluation and comparison of bids.

(2) For the purposes of comparison, responsive bids received pursuant to paragraph (1) shall be classified in one of the following three groups—

(a) Group A, namely, bids offering goods manufactured in Malawi if the bidder establishes to the satisfaction of the procuring entity that—

(i) labour, raw material and components from within Malawi will account for more than thirty per cent of the ex-works price of the product offered; and

(ii) the production facility in which those goods will be manufactured or assembled has been engaged in manufacturing or assembling such goods at least since the time of bid submission;

(b) Group B, namely, all other bids offering goods from within Malawi; and

(c) Group C, namely, bids offering the goods from abroad and to be directly imported.

(3) The ex-works price quoted by a Group A bidder shall include all duties and taxes paid or payable on the basic materials or components purchased in the domestic market or imported.

(4) Prices quoted by Group B bidders shall include all duties and taxes on components and raw materials.

(5) The price quoted by a Groups A and B bidder shall exclude the sales and similar taxes on the finished product.

(6) The price quoted by a Group C bidder shall be on Cost Freight and Insurance (CIF) or Carriage and Insurance Paid (CIP) to border point or other destination, exclusive of customs duties and other import taxes.

(7) In the first step, all evaluated bids in each group shall be compared to determine the lowest evaluated bid in each, and such lowest evaluated bids shall then be compared with each other and if, as a result of this comparison, a bid from Group A or Group B is the lowest, it shall be selected for the award.

(8) If, as a result of the comparison under paragraph (7), the lowest evaluated bid is a bid from Group C, all Group C bids shall be further compared with the lowest evaluated bid from Group A after adding to the evaluated bid price of the imported goods offered in each Group C bid, for the purpose of this further comparison only, an amount equal to—

(a) the amount of duties and other related import charges which a non-exempt importer would have to pay for the importation of the goods offered in such Group C bid; or

(b) twenty per cent of the CIF or CIP bid price of such goods if said duties and charges exceed twenty per cent of such price.

(9) If the Group A bid in such further comparison mentioned in paragraph (8) is the lowest, it shall be selected for the award; if not, the lowest evaluated bid from Group C, as determined from the comparison under paragraph (7), shall be selected.

(10) In the case of single responsibility supply and installation or turnkey contracts in which a number of discrete items of equipment is grouped into one contract package (and if customs duties are excluded from the bid prices, and the price of imported goods quoted is on a CIF or CIP basis), the preference margin shall not be applied to the whole package, but only to the locally-manufactured equipment within the package; and equipment offered from abroad shall be quoted CIF or CIP and equipment offered locally ex-works (free of sales and similar taxes); all other components, such as design, works, installation, and supervision, shall be quoted separately.

(11) Where the provisions of paragraph (1) apply, bids should not be classified into groups A, B, or C and in the comparison of bids, only the CIF or CIP price in each bid of the equipment offered from outside Malawi shall be increased by the applicable duty and other taxes payable by a non-exempt importer or twenty per cent whichever is less; if duties vary from item to item within a package, the appropriate tariff for each piece of equipment shall



apply and no preference shall be applied for any associated services or works included in the package.

Price  
preference  
for domestic  
suppliers  
of works

84.—(1) For contracts for works to be awarded on the basis of tendering, procuring entities may grant a margin of preference of up to ten per cent to domestic suppliers of works, in accordance with, and subject to, the following provisions—

(a) suppliers of works applying for such preference shall be required to provide, as part of the data for qualification at the pre-qualification stage or at the bidding stage, such information, including details of ownership, as shall be required to determine whether a particular supplier or group of suppliers qualifies for a domestic preference, and the bidding documents shall clearly indicate the preference and the method that will be followed in the evaluation and comparison of bids to give effect to such preference; and suitable recognition in the preference scheme shall be given to joint ventures between foreign and domestic suppliers;

(b) after bids have been received and reviewed by the procuring entity, responsive bids shall be classified into the following groups—

(i) Group A, namely, bids offered by domestic suppliers eligible for the preference.

(ii) Group B, namely, bids offered by other suppliers.

(2) For the purpose of evaluation and comparison of bids received pursuant to paragraph (1), an amount equal to ten per cent of the bid amount shall be added to bids received from suppliers in Group B.

Conditions  
for use of  
tendering for  
commodities

85. Where tendering is used for procurement of raw materials and other commodities whose prices are quoted in established commodity markets, the following conditions shall apply if set forth in the bidding documents—

(a) bidders shall be invited to quote prices linked to the market price at the time of, or prior to, the shipment;

(b) bid validity periods shall be kept as short as possible; and

(c) the bidding documents may permit faxed or telexed bids, if there is no requirement for a bid security or if standing bid securities valid over a specified period of time have been provided by pre-qualified bidders.

Procedures  
for restricted  
tendering

86.—(1) Where the restricted form of tendering is to be utilized on the grounds referred to in section 30 (3) (a) of the Act, the procuring entity shall publish in the *Gazette* and local press and, at the discretion of the Director of Public Procurement, in internationally recognized papers in the English language and in other media of wide international circulation, including the internet, a notice concerning the upcoming restricted tendering proceeding.

(2) The notice referred to in paragraph (1) shall indicate the grounds for the limited solicitation, identify the suppliers intended to be invited, and invite any interested suppliers to express their interest in participating, and if all suppliers that respond to the notice will not necessarily be permitted to submit bids, the notice shall state the criteria to be utilized for establishing the short list, and the information to be provided by bidders to demonstrate that they meet those criteria.

(3) As a general guideline, restricted tendering shall not be utilized on the grounds referred to in section 30 (3) (b) of the Act, when the estimated value of the procurement exceeds the threshold set and issued by the Director of Public Procurement.

(4) When the limited form of tendering is utilized on the grounds referred to in section 30 (3) (b) of the Act, the procuring entity shall invite a sufficient number of suppliers to ensure effective competition, but at least three.

(5) Regulations 59 to 85 shall apply to limited tendering proceedings, except to the extent derogated from in this regulation.

87.—(1) During any negotiation, which may take place in the first stage in accordance with section 33 (2) of the Act, the procuring entity shall ensure equality of treatment among all suppliers; and in particular, the procuring entity shall not provide information in a discriminatory manner which may give some suppliers an advantage over others.

Procedure  
for two-stage  
tendering

(2) The procuring entity may not reveal to the other participants solutions proposed or other confidential information communicated by a supplier participating in the dialogue without the agreement of that supplier.

(3) In the first stage, the procuring entity shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

(4) Regulations 59 to 85 shall apply to two-stage tendering proceedings, except to the extent derogated from in this regulation.

### *Division III—Procedures for Procurement of Consultants' Services*

88. The procuring entity shall set, and disclose in the request for proposals, the minimum quality rating that proposals must attain in order to be considered for award for consultancy services.

Minimum  
quality  
rating

89.—(1) The procuring entity shall seek expressions of interest for consultancy services in accordance with section 34 (2) of the Act for the purposes of creating the short list in the following cases—

Preparation  
of short list

(a) when the procuring entity does not have information in its possession concerning a sufficient number of consultants in order to provide effective competition for the procurement contract and, at a minimum, to comply with the requirement in section 34 (1) of the Act;

(b) when the assignment for which the consultant is sought is complex or its estimated value exceeds the threshold set by the Director of Public Procurement.

(2) The information requested pursuant to paragraph (1) shall be the minimum required to make a judgment on the firm's suitability, and not be so complex as to discourage consultants from expressing interest.

(3) The notice seeking expressions of interest pursuant to paragraph (1) shall include the following information—

(a) identification and general description of the assignment or project in question, including any project identification codes;

(b) date of issuance of the notice, and closing date for submission of expressions of interest;

(c) the funding source;

(d) location where the services are to be performed;

(e) the projected time period for implementation and completion of the assignment;

(f) the qualification criteria to be met by short-listed consultants;

(g) an invitation to interested consultants to submit expressions of interest;

(h) in order to determine the capability and experience of consulting firms seeking to be short-listed, the information submitted shall include the following—

(i) a profile of the company, its organization and staffing; and in the case of associations between two or more firms, or the name, address and profile of the participating firm(s), and the lead firm must be clearly identified;

(ii) details of experience or similar assignments undertaken in the previous five years, including their locations; focus on the firms' role in similar assignments in the region or elsewhere;

(iii) curriculum vitae of staff who could be available to work on the assignment;

(i) in the case of individual consultants, the information referred to in sub-paragraph (h) (ii) and a curriculum vitae shall be solicited;

(j) a statement that short-listed consultants will be invited to submit proposals; and

(k) the number of copies of the requested information to be submitted, and the address to which submission is to be made, and from which additional information may be obtained.

(4) Sufficient time, not less than fourteen days from the date of publication of the notice, shall be provided for responses, before preparation of the short list.

(5) Bidders that expressed interest, as well as any member of the general public that specifically so requests, shall be provided the final short list of firms.

Issuance  
of request  
for proposals

90. The procuring entity shall provide the request for proposals to a short list of consultants containing at least three, but not more than six bidders, in accordance with section 34 (1) of the Act.

Avoidance  
of conflict  
of interest

91.—(1) Consultants shall provide professional, objective, and impartial advice and at all times hold the client's interests paramount, without any consideration for future work, and strictly avoid conflicts with other assignments or their own corporate interests.

(2) Consultants shall not be hired for any assignment that would, by its nature, be in conflict with their prior or current obligations to other clients, or that may place them in a position of not being able to carry out the assignment

in the best interest of the procuring entity; for example, consultants hired to prepare engineering design for an infrastructure project shall not be engaged to prepare an independent environmental assessment for the same project, and consultants assisting a client in the privatization of public assets shall not purchase, nor advise purchasers of, such assets.

(3) Without limitation on the generality of the provisions of paragraphs (2) and (3), consultants shall not be hired under the circumstances set forth below—

(a) a firm which has been engaged by the procuring entity to provide goods or works for a project, and any of its affiliates, shall be disqualified from providing consulting services for the same project;

(b) conversely, a firm hired to provide consulting services for the preparation or implementation of a project, and any of its affiliates, shall be disqualified from subsequently providing goods or works or services related to the initial assignment, other than in the case when, subject to satisfactory performance of the initial assignment, it is essential for continuity that there be a continuation of the firm's earlier consulting services for the same project.

(4) This regulation does not apply to the various firms (consultants, contractors, or suppliers) that together are performing the supplier's obligations under a turnkey or design-and-build contract.

92. The request for proposals for consultancy services, which is to be provided to consultants on the short list, shall include—

Contents  
of request  
for proposals  
for services

(a) the terms of reference, including the following information—

(i) the objectives, goals, and scope of the assignment and providing background information (including a list of existing relevant studies and basic data) to facilitate the consultants' preparation of their proposals;

(ii) outline of any transfer of knowledge or training that is required, including details of number of staff to be trained;

(iii) the services and surveys necessary to carry out the assignment and the expected outputs such as reports, data, maps, surveys;

(iv) the location where the services are to be provided and the desired or required time, if any, when the services are to be provided, and the anticipated date on which the selected bidder shall be expected to commence the assignment;

(v) details of the services, facilities, equipment, and staff to be provided by the procuring entity;

(b) an indication that bidders may propose their own methodology and staffing, and may comment on the terms of reference in their proposals;

(c) details of the selection procedure to be followed, including—

(i) in the case of a quality and cost-based selection procedure, a description of the two-stage process;

(ii) where applicable, the details of the financial evaluation, including the relative weights for quality and cost; the weight for cost shall normally be in the range of ten per cent to twenty per cent, but in no case shall exceed 30 per cent out of a total score of 100;

(iii) the minimum pass score for quality; and

(iv) where applicable, the details on the public opening of financial proposals.

(d) an estimate of the level of key staff inputs (in staff-months) required of the consultants;

(e) requirement that bidders identify the proposed key personnel that will carry out the assignment and that bidders provide the curriculum vitae of each proposed key person, which must be accurate, complete, and signed by an authorized official of the bidder and the individual proposed;

(f) an indication of minimum experience, academic achievement, expected of key staff;

(g) standard formats for the technical and, if applicable, financial proposals;

(h) the manner in which the proposal shall be submitted, including, in the case of quality and cost-based selection, the requirement that the technical proposals and price proposals be sealed and submitted separately in a manner that shall ensure that the technical evaluation is not influenced by price;

(i) a request that the invited firm—

(i) acknowledges receipt of the request for proposals; and

(ii) informs the procuring entity whether or not it will be submitting a proposal;

(j) the short list of bidders being invited to submit proposals, and whether or not associations between short-listed consultants are acceptable;

(k) the period for which the bidders' proposals shall be held valid (normally 60–90 days) and during which the bidders shall undertake to maintain, without change, the proposed key staff, and shall hold to both the rates and, in the case of quality and cost-based selection, the total price proposed; and in case of extension of the proposal validity period, the right of the consultants not to maintain their proposal;

(l) a statement that the firm and any of its affiliates shall be disqualified from providing downstream goods, works, or services under the project if, in the procuring entity's judgment, such activities constitute a conflict of interest with the services provided under the assignment;

(m) a statement indicating whether or not the consultant's contract and personnel shall be tax-free or not; and if not, what the likely tax burden will be or where this information can be obtained; and a statement requiring that the consultant should include in its financial proposal a separate amount clearly identified to cover taxes;

(n) phasing of the assignment if appropriate, and the likelihood of follow-up assignments; and

(o) any conditions for subcontracting part of the assignment.

93.—(1) The procuring entity shall use one of the following procedures for selection of the winning proposal for consultancy services, in accordance with the notice provided to bidders in the request for proposals—

Choice of  
selection  
procedures

(a) Quality and Cost-Based Selection, which takes into account both the quality and the cost aspects in selecting the winning proposal;

(b) Quality-Based Selection, which focuses primarily on quality in selecting the winning proposal; and

(c) Least Cost Selection, in which the contract is awarded to the lowest priced proposal among those that have attained the minimum technical score.

(2) Subject to regulation 92 (o) the Quality and Cost-Based Selection method shall be utilized.

(3) Use of the Quality and Cost-Based Selection method is appropriate for the following types of assignments—

(a) complex or highly specialized assignments for which it is difficult to define precise terms of reference and the required input from the consultants, and for which the client expects the consultants to demonstrate innovation in their proposals such as country economic or sector studies, multi-sectoral feasibility studies, design of a hazardous waste remediation plant or of an urban master plan, financial sector reforms;

(b) assignments that have a high downstream impact and in which the objective is to have the best experts such as feasibility and structural engineering design of such major infrastructure as large dams, policy studies of national significance, management studies of large government agencies; and

(c) assignments that can be carried out in substantially different ways, such that proposals will not be comparable such as management advice, and sector and policy studies in which the value of the services depends on the quality of the analysis.

(4) Use of the Least Cost Selection method is more appropriate for selection of consultants for assignments of a standard or routine nature such as audits, engineering design of noncomplex works, and so forth, where well-established practices and standards exist and in which the contract amount is small.

(5) The procuring entity shall include in the record required under section 27 of the Act a statement of the grounds and circumstances on which it relied to justify the use of a selection procedure pursuant to this regulation.

94.—(1) In the case of Quality and Cost-Based Selection—

Submission  
of proposals

(a) the technical and financial proposals shall be submitted at the same time, in separate sealed envelopes; and

(b) the technical envelopes shall be opened in the first stage and the financial proposals shall remain sealed until the first stage is completed.

(2) In the case of Quality-Based Selection, bidders may be required to submit technical and financial proposals at the same time, in separate sealed envelopes or, at the option of the procuring entity, bidders may be requested to submit at the outset of the proceedings, only technical proposals.

(3) In the case of Least Cost Selection, bidders shall be required to submit technical and financial proposals at the same time.

(4) The procuring entity shall set the deadline for submission of proposals not less than thirty days from the date of the issuance of the request for proposals.

Evaluation  
and selection

95.—(1) Any award for consultancy services by the procuring entity shall be made to the bidder whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals and final selection procedures set forth in the request for proposals.

(2) A record of the evaluation of each proposal and the comparison between them shall be maintained by the procuring entity.

Evaluation  
of proposals  
in quality-  
and-cost-based  
selection

96.—(1) The evaluation of the proposals in Quality and Cost-Based Selection shall be carried out in two stages; the first stage of the evaluation shall concern only the quality and technical aspects of proposals; and evaluators of technical proposals shall not have access to the financial proposals until the technical evaluation is concluded.

(2) Financial proposals shall be opened after the evaluation of technical proposals and the evaluation shall be carried out in full conformity with the provisions of the request for proposals.

Criteria for  
evaluation  
of quality

97.—(1) Each technical proposal shall be evaluated using the following criteria—

- (a) the bidder's relevant experience for the assignment;
- (b) the quality of the methodology proposed;
- (c) the qualifications of the key staff proposed;
- (d) transfer of knowledge; and
- (e) the extent of participation by nationals among key staff in the performance of the assignment.

(2) Each of the criteria shall be assigned a weight, and the following weights are indicative, and may be adjusted for specific circumstances; the proposed weights shall be disclosed in the request for proposals, and shall be formulated taking into account the following general guidelines—

Consultant's specific experience	0 to 10 per cent of score
Methodology . . . .	20 to 50 per cent of score
Key personnel: . . . .	30 to 60 per cent of score
Transfer of knowledge . .	0 to 10 per cent of score
Participation by nationals: . .	20 to 25 per cent of score
TOTAL . . . .	100 per cent of score

(3) The criteria and sub-criteria referred to in this regulation are indicative only and must be formulated taking into account the specific circumstances of each particular procurement of consultants' services.

(4) Use of sub-criteria of the general criteria in this regulation should be limited to what is essential to conduct the evaluation.

98.—(1) The weight given to experience can be relatively modest, since this criterion has already been taken into account when short-listing the bidder. Relative weighing of criteria

(2) More weight shall be given to the methodology in the case of more complex assignments such as multidisciplinary feasibility or management studies.

(3) More weight shall be assigned to the qualifications and experience of key personnel if the proposed assignment is complex.

(4) When the assignment depends critically on the performance of key staff such as a project manager in a large team of specified individuals, it may be desirable to conduct interviews.

99. The key personnel of the bidders shall be rated according to the following sub-criteria, as relevant to the task— Sub-criteria for evaluation of key personnel

(a) general qualifications, including general education and training, length of experience, positions held, time with the consulting firm as staff, and experience in developing countries;

(b) adequacy for the assignment, including education, training, and experience in the specific sector, field, subject, relevant to the particular assignment; and

(c) experience in the region, knowledge of the local language, culture, administrative system, government organization.

100. After conducting the technical and quality evaluation of the proposals in accordance with the criteria, other than price, and their relative weight as set out in the request for proposals, the procuring entity shall rate each proposal and identify those proposals that meet or surpass the minimum quality and technical threshold set forth in the request for proposals. Technical and quality rating of proposals

101. Following evaluation and rating of proposals, the procuring entity shall reject proposals that are unresponsive to important aspects of the terms of reference or that fail to achieve the minimum threshold score as specified in the request for proposals. Rejection of unresponsive proposals

102.—(1) After the evaluation of quality is completed, the procuring entity shall notify those bidders whose proposals did not attain the minimum qualifying score or were considered non-responsive, indicating that their financial proposals will be returned unopened after completion of the selection process. Notification of results of first stage quality evaluation

(2) The procuring entity shall simultaneously notify the bidders that have secured the minimum qualifying mark, and indicate the date and time set for opening the financial proposals; and the opening date shall not be sooner than fourteen days after the notification date.



Quality  
evaluation  
report and  
retention of  
evaluation  
records

103.—(1) The procuring entity shall prepare an evaluation report on the quality of the proposals, and the report shall substantiate the results of the evaluation and describe the relative strengths and weaknesses of the proposals.

(2) All records relating to the evaluation, such as individual mark sheets, shall be retained until completion of the project and its audit, subject to the requirements of regulations 172 and 173.

Opening of  
financial  
proposals

104.—(1) The financial proposals shall be opened publicly in the presence of representatives of the bidders who choose to attend.

(2) The name of the bidder, the quality scores, and the proposed prices shall be read aloud and recorded when the financial proposals are opened.

(3) The procuring entity shall prepare the minutes of the public opening, which shall form part of the record of the procurement proceedings.

Evaluation  
of financial  
proposals

105.—(1) For the purpose of evaluation of financial proposals, "cost" shall include Malawian taxes, unless otherwise specified, and shall also include other reimbursable expenses, such as travel, translation, report printing, or secretarial expenses.

(2) The proposal with the lowest cost may be given a financial score of one hundred and other proposals given financial scores that are inversely proportional to their prices; alternatively, a directly proportional or other methodology may be used in allocating the marks for the cost; and the methodology to be used shall be described in the request for proposals.

Selection  
of successful  
financial  
proposals  
Combined  
quality  
and financial  
evaluation

106. Following the evaluation of the quality and the financial proposals, the successful proposal shall be determined on the basis of the selection procedure indicated in the request for proposals.

107.—(1) If the successful proposal is selected on the basis of a combined evaluation of quality and price aspects, the total score shall be obtained by weighting the quality and cost scores and adding them; and award shall be made to the proposal with the best combined score, in accordance with the criteria and weighing disclosed in the request for proposals.

(2) The weight for the cost shall be chosen taking into account the complexity of the assignment and the relative importance of quality, and level at which the minimum quality threshold is set in accordance with regulation 88.

(3) The weight for cost shall normally be in the range of ten to twenty per cent, but in no case shall exceed thirty per cent out of a total score of one hundred.

(4) Only the weighting disclosed to bidders in the request for proposals may be used.

Negotiations  
and award  
of contract

108.—(1) The bidder submitting the proposal determined to be successful in accordance with regulation 106 shall be invited for technical discussions aimed at finalization of the contract.

(2) The negotiations may include discussions of the terms of reference, the methodology, staffing, the procuring entity's inputs, and special

conditions of the contract, but the discussions shall not substantially alter the original terms of reference or the terms of the contract.

(3) Financial negotiations may include clarification of the consultants' tax liability, if any, and how this tax liability has been or would be reflected in the contract.

(4) Proposed unit rates for staff-months and reimbursables shall not be negotiated, so as not to alter the cost structure that has resulted in the ranking of the proposals and major reductions in work inputs shall not be made solely to meet the budget.

(5) The final terms of reference and the agreed methodology shall form part of the contract.

(6) The selected bidder shall not be allowed to substitute key staff, unless both parties agree that undue delay in the selection process makes such substitution unavoidable or that such changes are critical to meet the objectives of the assignment; if this is not the case and if it is established that key staff were offered in the proposal without confirming their availability, the bidder may be disqualified and the process continued with the next ranked bidder.

(7) The key staff proposed for substitution shall have qualifications equal to or better than the key staff initially proposed.

(8) Financial negotiations shall include clarification of the bidder's tax liability in Malawi, if any, and how this tax liability has been or would be reflected in the contract; and when the selection method includes price as a component (Quality and Cost-Based Selection or Least Cost Selection) proposed unit rates for staff-months and reimbursables shall not be negotiated, since these have already been a factor of selection in the cost of the proposal, unless there are exceptional reasons, for example staff rates offered are much higher than rates typically charged by consultants for similar contracts.

109.—(1) If the discussions with the first selected bidder fail to result in an acceptable contract, the procuring entity shall, by letter addressed to that bidder, terminate the discussions and invite the next ranked firm for discussions.

Failure to reach agreement with successful bidder

(2) The bidder with whom discussions are being terminated shall be informed of the reasons for the termination; and once discussions are commenced with the next ranked firm, the procuring entity shall not reopen the earlier discussions.

(3) After discussions are successfully completed, the procuring entity shall promptly notify other bidders on the short list that they were unsuccessful.

110. Without prejudice to the right of the procuring entity to cancel the procurement proceedings in accordance with regulations 6 and 7, the procuring entity will be justified in rejecting all proposals only if all proposals are non-responsive and unsuitable either because they present major deficiencies in complying with the terms of reference, or because they involve costs substantially higher than the original estimate.

Rejection of all proposals

Selection  
procedure  
based on  
quality

111.—(1) Where the procuring entity, in accordance with section 34 (7) of the Act, uses the selection procedure based on quality, it shall engage in negotiations with bidders in accordance with the following procedure—

- (a) establish a threshold in accordance with regulation 88;
- (b) invite for negotiations on the price of its proposal the bidder that has attained the best rating in accordance with regulation 100;
- (c) inform the bidders that attained ratings above the threshold that they may be considered for negotiation if the negotiations with the bidders with better ratings do not result in a procurement contract;
- (d) inform the other bidders that they did not attain the required threshold; and
- (e) if it becomes apparent to the procuring entity that the negotiations with the bidder invited pursuant to paragraph (b) will not result in a procurement contract, inform that bidder that it is terminating the negotiations, and the procuring entity shall then invite for negotiations the bidder that attained the second best rating; if the negotiations with that bidder do not result in a procurement contract, the procuring entity shall invite the other bidders for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(2) The selection process under paragraph (1) shall be identical to that applied in the quality and cost-based selection procedure, except as otherwise specified in this regulation; if, however, consultants were requested to provide financial proposals initially together with the technical proposals, safeguards shall be built in accordance with regulation 96, to ensure that the price envelope of only the selected proposal is opened and the rest returned unopened, after the negotiations are successfully concluded.

Selection  
based on  
least cost

112. If, in accordance with the request for proposals, the Least-Cost Selection method is to be used for determining the successful proposals—

- (a) the envelopes containing the technical and administrative bids are opened and evaluated, and the proposals meeting the minimum technical score are identified; and
- (b) the envelopes containing the financial bids of the bidders that have attained the minimum technical score are opened, and the bidder whose financial bid is the lowest is invited for technical and cost clarifications and negotiations with a view to conclusion of a procurement contract.

Design contests

113.—(1) In appropriate cases, such as the procurement of architectural designs or urban planning designs, the procuring entity may conduct a design contest for the purposes of selecting a design.

(2) The procedures to be followed in conducting a design contest are set forth in Schedule B.

Schedule B

Procedures for  
award of  
public service  
concessions  
and contracts  
for procure-  
ment of  
infrastructure  
on basis of  
private  
investment

114.—(1) Contracts for privately financed infrastructure projects, and related forms of private sector involvement in providing public services, including concessions, shall be awarded on a competitive basis.

(2) Contracts for the procurement of public infrastructure on the basis of private investment, and concessions for the operation of public infrastructure, and for the provision of public services shall be awarded in accordance with the principles and objectives of the Act, including competition and transparency.

(3) Procedures for the implementation of paragraphs (1) and (2) are set out in Schedule C.

*Schedule C*

(4) The procedures referred to in paragraph (3) shall—

(a) include pre-qualification of prospective providers as a precondition for participation in procedures leading to award of contracts referred to in paragraphs (1) and (2);

(b) accommodate the participation of consortia;

(c) provide special procedures for solicitation of proposals, including a choice between single and two-stage solicitation procedures;

(d) identify special technical and financial evaluation criteria tailored to the contexts referred to in paragraphs (1) and (2);

(e) establish procedures and parameters designed to promote transparency when negotiations are utilized in the award procedure;

(f) identify the exceptional situations in which contracts may be awarded without competition; and

(g) establish procedures for dealing with unsolicited proposals, so as to encourage private initiative, while safeguarding competition and transparency.

#### *Division IV—Request for Quotations Procedure*

115.—(1) In procurement of goods, works, and services, whose estimated threshold shall be set and issued by the Director of Public Procurement, from time to time, the request for quotations procedure referred to in section 35 of the Act may be applied.

Conditions  
for use of  
request for  
quotations  
procedure

(2) The request for quotations shall indicate—

(a) specific aspects of any special requirements, such as installation;

(b) all the required components of the price, including the required shipping terms;

(c) that the quoted rates are to remain applicable for the duration of the contract;

(d) the required validity period of the quotation;

(e) where more than one type of item is being procured, whether a quotation referring to more than one item is to be evaluated for all the items together, or separately for each item;

(f) that, if applicable, the estimated cost of inland transportation and insurance, if any, will be added to the bid price;

(g) that for the purposes of price comparison, prices will be converted to local currency at the exchange rate prevailing on the date of opening of quotations;

(h) the deadline for submission of quotations;

(i) the requirement that the quotations should be properly signed.

Quotation  
and  
acceptance  
procedures

116.—(1) The procuring entity's purchase order constitutes an acceptance of the winning bidder's quotation and forms a legally binding contract; and the successful bidder shall confirm the purchase order within three days of receipt of the order.

(2) Any terms or conditions in the bidder's confirmation of a purchase order which change or alter the terms of the order shall be valid only if approved in writing by the procuring entity.

#### *Division V—Single-source Procurement*

General policy  
of diligence

117.—(1) Prior to awarding the procurement contract on single-source procurement basis, the procuring entity shall ascertain that—

(a) the provider possesses the qualifications required to perform the procurement contract;

(b) that the quality and technical aspects of the provider's proposal meet the procuring entity's requirements;

(c) the price to be paid to the provider is reasonable.

(2) When single-source procurement is employed, the procuring entity shall conduct price analysis so as to ensure that the price to be paid is fair and reasonable, and the analysis shall—

(a) to the extent practicable, be based on market price supported by market research, including a comparison of the proposed price with satisfactory prices paid in previous procurement, prices for similar items, and independent cost estimates;

(b) be performed with respect to prices appearing in catalogues, advertisements and price lists.

Low-value  
procurement  
without  
competition

118.—(1) The monetary limit on the use of single source procurement on the grounds of very low value, referred to in section 30 (10) (a) of the Act shall be per transaction, and shall set and issued by the Director of Public Procurement, from time to time.

(2) The Director of Public Procurement may establish a threshold on procurement on the grounds of section 30 (10) (a) of the Act.

(3) Low-value items procured on a recurrent basis, or items that are likely to be required on short notice shall to the extent feasible be procured through framework agreements awarded on a competitive basis in accordance with the Act and these Regulations.

(4) Procurement using imprest funds is subject to the applicable Treasury Instructions.

119. Single-source procurement may not be justified on the grounds that only one bidder has the capacity or the exclusive right to manufacture or deliver goods, works or services if functionally equivalent goods, works or services from other bidders would meet the needs of the procuring entity. Procurement of functionally equivalent goods
- 120.—(1) Emergency procurement shall be conducted by the Internal Procurement Committee in the concerned Ministry, in accordance with procedures set forth in the Act and these Regulations. Single-source procurement on the grounds of urgency
- (2) In the case of single-source procurement on the grounds of urgency referred to in section 30 (10) (c) of the Act, the procuring entity shall limit the procurement to the quantity and duration needed to deal with the urgent circumstances.
- (3) Procurement on the grounds of emergency does not relieve the procuring entity from seeking competition to the extent practicable, negotiating a fair and reasonable price and documenting the procurement in accordance with section 27 of the Act.
- 121.—(1) In accordance with section 36 (1) of the Act, single-source procurement shall be initiated on the basis of the preparation by the procuring entity of a written description of its needs and any special requirements as to quality, quantity, terms and time of delivery. Documentation of single-source procurement
- (2) Notwithstanding paragraph (1), in case of single-source procurement on grounds of urgency, in accordance with section 30 (10) (c) of the Act, an initial oral solicitation may be utilized when the processing and use of a written solicitation would cause an unacceptable delay in the procurement process to the detriment of the public interest, but the oral solicitation shall be followed promptly by a written confirmation in accordance with paragraph (1).
- (3) In case of single-source procurement on grounds of urgency, in accordance with section 30 (10) (c) of the Act, the procuring entity may enter into a "letter" contract, namely, a written preliminary contractual instrument, when the public interest demands that the fulfillment of a procurement requirement start immediately and negotiating a definitive contract is not possible in sufficient time to meet this demand.
- (4) Procuring entities shall comply with section 27 of the Act, and regulation 168 with respect to the preparation of a record of the procurement proceeding, to the extent applicable.
- (5) The procuring entity shall, within 72 hours, place in the contract file a written justification for conducting single-source procurement on grounds of urgency including the following information—
- (a) the specific threat to the public health, safety, or welfare;
  - (b) the unforeseen nature of the threat;
  - (c) the basis for the need for immediate action, as opposed to filling the requirement through normal procedures; and
  - (d) the steps taken to obtain competition on the procurement even with the emergency situation in existence.

Publication  
of prior  
notice

122.—(1) Publication in the *Gazette* of a notice of the holding of single-source procurement proceedings is required when the procuring entity intended to carry out a single-source procurement on the grounds referred to in section 30 (10) (b) of the Act, and the notice shall describe the nature of the procurement and identify the supplier to whom it proposes to award the procurement contract and shall state the grounds for the proposed single-source procurement.

(2) The requirement in paragraph (1) shall not apply to single-source procurement conducted on the grounds of urgency, in accordance with section 30 (10) (c) of the Act.

#### PART IV—CONTRACT FORMATION

Acceptance  
and entry  
into force  
of contract

123.—(1) Notice of acceptance of a bid shall be given promptly to the bidder submitting the successful bid, and the notice of acceptance shall not be sent until all the necessary approvals have been obtained.

(2) Unless the bidding documents indicate that a procurement contract is required to be signed, a procurement contract in accordance with the terms and conditions of the accepted bid enters into force when that notice is dispatched to the bidder that submitted the winning bid, provided that it is dispatched while the bid is still valid, and for purpose of this paragraph the notice is dispatched when it is properly addressed or otherwise directed and transmitted to the bidder.

(3) When a procurement contract is required to be signed, the bidder shall do so within a reasonable period of time after the notice referred to in paragraph (1) is dispatched to the bidder; and between the time when the notice referred to in paragraph (1) is dispatched to the bidder and the entry into force of the procurement contract, neither the procuring entity nor the bidder shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(4) In the event of a failure of the bidder whose bid has been accepted to sign a written procurement contract in accordance with the bidding documents, if required to do so, or to provide any required security for the performance of the contract, the procuring entity shall select a successful bid in accordance with the evaluation criteria set forth in the bidding documents from among the remaining bids that are in force.

(5) Procuring entities shall not request or require the successful bidder to sign a contract at variance with the terms and conditions set forth in the bidding documents.

Security for  
performance  
of the contract

124. If required to do so by the bidding documents, the successful bidder must submit the performance guarantee within time following the date of the notification of acceptance of the bid.

Form of  
performance  
security

125.—(1) Procuring entities may solicit and accept as security for the performance of the procurement contract such arrangements as guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange, or conditional performance securities such as surety or performance bonds.

(2) When the performance security takes the form of an independent guarantee or stand-by letter, the amount shall be set at a minimum of ten per cent of the value of the procurement contract, or, in the case of an indefinite quantity contract, ten per cent of the value estimated by the procuring entity.

126. Unless otherwise stipulated in the procurement contract, the validity period of the performance security shall extend at least one month beyond the latest of the time of delivery, or handing over, or beyond the warranty or defects liability period, as the case may be, under the procurement contract.

Validity  
period  
performance  
security

#### PART VII—CONTRACT ADMINISTRATION

127.—(1) Procuring entities shall make available for contract administration the support operations and staffing necessary for effective contract administration which shall include, but are not necessarily limited to, the following—

Support  
operations  
for contract  
administra-  
tion

(a) engineering and design services, providing design and monitoring functions for preparation and implementation of procurement contracts;

(b) financial control and payment services;

(c) management information systems for coordinated processing and communication of and access to relevant information by all parties involved in contract administration, including document control services, for establishing and maintaining filing systems for correspondence and other paperwork and records relating to procurement contracts; and

(d) legal services.

(2) The main elements of contract administration include—

(a) holding post-award conferences with the successful bidder, and devising a specific contract administration plan;

(b) where appropriate, composing a contract administration team;

(c) development of contract implementation work plan and schedule;

(d) monitoring progress in implementation of the procurement contract, including determination of extent of performance accomplished periodically according to the work plan, and inspection and testing of quality aspects;

(e) management of variation orders, contract suspension and termination, price revisions, application of contract remedies, and dispute settlement procedures;

(f) management of financial aspects of contract implementation, including payments to suppliers, and budgetary and cost accounting aspects; and

(g) organization and management of documentation files related to contract implementation, and preparing periodic reports on the implementation of contracts.



(3) Procuring entities shall make available to the Director of Public Procurement, the Auditor-General, and other authorized organs documentation, reports, and other information required by those bodies for the purposes of monitoring contract administration.

(4) Without prejudice to the rights of the parties under the procurement contract, the procuring entity, and any supervising party that it involves in the implementation of the procurement contract, shall comply with the execution of works according to the layouts, specifications and conditions set forth in the bidding documents; and any provision providing for any work in any document constituting the bid shall be considered sufficient to prove the necessity of executing such work.

Contents of  
procurement  
contract

128. The following items shall be addressed in the procurement contract, subject to the standard forms of contract that procuring entities may be required to utilize pursuant to section 5 (2) (c) of the Act and to the circumstances of the particular procurement proceeding—

- (a) complete name and address of the parties to the contract;
- (b) the listing by order of priority of contract documents;
- (c) specifications of the goods, works or services;
- (d) quantity or number of the goods or amount of the works or services;
- (e) the price of the goods, works or services, or how the price will be determined, and the payment method;
- (f) the procuring entity's right of inspection;
- (g) the location, conditions of delivery, delivery schedule and acceptance procedures;
- (h) required securities or bank guarantee, if applicable;
- (i) methods for termination of the contract;
- (j) other issues describing the obligations of the parties and clarifying the transaction, including price revision, if applicable, warranties, contract modification, subcontracting, insurance obligations, remedies for delay and non-performance, and acceptance;
- (k) the unforeseen events (*force majeure*) with respect to responsibilities for delay in fulfilling the obligations or termination of the contract; and
- (l) dispute settlement clause.

Basic pricing  
approaches

129.—(1) The price of a procurement contract shall set either, on the basis of a unit price applied to the quantities actually delivered, or services or work actually performed, or on a lump-sum basis, applied to the entirety or to a part of the contract, irrespective of the actual quantity delivered.

(2) Use of a unit-price contract is appropriate when there is uncertainty at the time of conclusion of the contract as to the extent of the deliveries required or work or services to be performed.

(3) Use of a lump-sum contract is appropriate when it is feasible to make accurate estimates of costs and time of performance, and the supplier or contractor is willing to assume the risk that the price quoted in the bid may turn out to have underestimated the bidder's actual costs in fulfilling the contract.

(4) Procurement contracts shall be concluded on the basis of an initial definite price, but in exceptional circumstances, to be noted in the record of the procurement proceeding, a procurement contract may be concluded on the basis of a provisional price.

(5) Procurement contracts may include incentive clauses linked to delivery periods, improved quality, and production-cost reduction.

130.—(1) A works contract based on unit price is awarded based on unit prices in the winning bid for estimated quantities of defined items of works and materials that are required in order to carry out the works, and total payment is based on the units of works actually done and measured in the field. Unit-price  
works  
contracts

(2) Bidders must consider the following points for the type of contract mentioned in paragraph (1)—

(a) list of the quantities of labour and other inputs listed in the bill of quantities in the bidding documents, for which bidders give their unit prices in their bids; and

(b) list of quantities of works with total prices.

131.—(1) In lump-sum contracts, the contractor agrees to perform the specified work for a fixed sum of money and it is the contractor's responsibility and risk to remain on budget, since the procuring entity is liable only for the lump-sum price of the contract, subject to changes ordered by the procuring entity. Lump-sum  
works  
contracts

(2) Lump-sum pricing shall be used in preference to unit pricing except when—

(a) large quantities of work such as grading, paving, building outside utilities, or site preparation are involved;

(b) quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum offer without a substantial contingency;

(c) estimated quantities of work required may change significantly during construction; or

(d) bidders would have to expend unusual effort to develop adequate estimates.

132.—(1) Unless otherwise provided in the procurement contract, the price of a procurement contract is considered to be a fixed price when the price may not be modified in response to changes in economic or commercial conditions. Price  
adjustment

(2) The procurement contract may provide for the possibility of price adjustment to take into account changes in economic circumstances, but price adjustment may only be made if provided for in the procurement contract.

(3) If the procurement contract provides for the possibility of price adjustment, it shall stipulate the conditions, such as increases in the cost of materials, labour, and energy, in which price adjustment would be permitted, the formulas and indices to be referred to in order to determine whether

economic conditions have altered to a significant enough degree to justify a price adjustment and to identify the amount of increase, the frequency with which price adjustments may be implemented, and the procedures to be followed.

Shipment  
terms

133. In the import procurement of goods, transfer of title, and allocation of responsibility with regard to risk of loss, delivery, transport-related insurance, and export and import formalities shall be addressed in the procurement contract, making appropriate reference to internationally recognized trade terms.

After-sale  
services

134. Unless technical or commercial factors dictate otherwise, the bidding documents should require a supplier to provide workshops and spare parts for supplies that require such after-sale services and the period of the supplier's commitment in this regard should correspond to the average operating life of the supplies in question.

Insurance  
requirements

135.—(1) The bidding documents used to solicit bids, proposals, offers or quotations and the procurement contract shall indicate the amount and essential terms of the insurance that the successful bidder may be required to obtain, depending upon the nature of the contract, including insurance of goods in transit, professional liability insurance of consultants, accident insurance for construction sites, vehicle insurance for supplier's or consultants' vehicles used for implementation of the contract.

(2) The procurement contract may require the bidder to cause any of its subcontractors to take out and maintain insurance in accordance with the requirements of the procurement contract.

(3) The procuring entity reserves the right to reject insurance coverage that is not in the public interest.

Return of  
performance  
security

136. Where a procurement contract in respect of which a performance security was given has been satisfactorily performed, or terminated for a reason that is not attributable to any fault of the bidder, and the procuring entity has no claim against the supplier arising out of the contract or relating in any manner whatsoever to the contract, the performance security shall be returned to the bidder.

Maintenance  
guarantee

137.—(1) The procurement contract may require the supplier to provide a maintenance guarantee in the form of a bank guarantee, or other form stipulated in the contract, and the value of the guarantee shall be not less than ten per cent of the value of the guaranteed performance; if the supplier fails to provide the required maintenance, the procuring entity should be entitled to confiscate the warranty value and conduct the maintenance at the cost of the supplier.

(2) The validity period of the maintenance warranty guarantee shall extend at least ninety days beyond the expiry of the warranty period.

(3) In supply and installation contracts, unless otherwise provided by contract, the maintenance period shall, in the event that the procuring entity has not requested installation to be started at an earlier time, be deemed to begin one hundred and twenty days after the receipt of the equipment or machinery.

138. The procurement contract shall set forth the supplier's warranty obligations, and normally the supplier shall be obligated, during a warranty period of at least one year, to replace, at its own expense, defective goods within a specified period of time; and in the event of a breach of warranty, the procuring entity shall be entitled to claim the entire value of the warranted goods and additional charge of fifteen per cent of the value of the defective goods. Manufacturer's warranty
139. The acceptance of each subcontractor and the agreement of the procuring entity to the conditions of payment should be requested in the following manner— Subcontracting
- (a) when the request for subcontracting arises at the time of bid submission, the bidder should state in the bid—
    - (i) the nature of the goods, works or services for which subcontracting is envisaged;
    - (ii) the name and address of the proposed subcontractor;
    - (iii) the amounts expected to be paid directly to the subcontractor;
    - (iv) the manner of payment;
    - (v) the conditions of payment foreseen in the draft subcontract and, if applicable, price revision;
    - (vi) a declaration to the effect that the proposed subcontractor is not barred from participating in procurement proceedings pursuant to section 13 of the Act.
  - (b) when the request for subcontracting is submitted after the conclusion of the procurement contract, the supplier shall submit the request, containing the information mentioned in paragraph (a), to the procuring entity in a manner that provides a record of the submission and receipt of the request;
  - (c) when the request for subcontracting is presented in the bid, the notice of acceptance of the bid shall include the acceptance of the subcontractor and of the conditions of payment.
140. The prime supplier is responsible for administering its subcontractors, and the procuring entity's review of subcontracts is normally limited to evaluating the prime supplier's management of the subcontracts, unless— Administration of subcontracts
- (a) the procuring entity would otherwise incur undue cost;
  - (b) the successful completion of the prime contract is threatened;
  - (c) certain high risk or critical subsystems in major systems acquisition require special surveillance.
- 141.—(1) The procuring entity shall take such steps as are deemed necessary to ascertain or verify that goods, services or works items procured conform to the technical requirements set forth in the procurement contracts, and in performing that duty, the procuring entity may establish inspection and testing facilities, employ inspection personnel, enter into arrangements for the joint or co-operative use of laboratories and inspection and testing facilities, and contract with others for inspection or testing work as needed. Quality assurance, inspection, and testing

(2) The Director of Public Procurement may allocate authority for inspection and testing as may be deemed appropriate.

Stipulation  
of inspection  
requirements

142. The inspection requirements and procedures to be applied in the implementation of the procurement contract shall be stipulated in the bidding documents as well as in the procurement contract.

Inspection  
of goods

143.—(1) The procuring entity is entitled to carry out acceptance inspections and to observe and inspect the manufacture of the goods, and observe the supplier's own quality assurance procedures, at the supplier's premises during regular working hours.

(2) The supplier shall at its own expense place at the procuring entity's disposal any premises, facilities and personnel needed for normal inspections, and the supplier and the procuring entity shall each bear the expenses for the attendance of their respective representatives at the inspection.

(3) Any deficiencies and omissions detected during inspection of goods shall be remedied by and at the expense of the supplier.

(4) The procuring entity has no obligation to pay for any goods or accessories that have become unserviceable or lost value in the course of a normal inspection.

(5) If an item or consignment of goods inspected does not meet the requirements set for it, the supplier shall bear all the expenses that renewed inspection, handling or transport may involve.

(6) The observation and inspection of the manufacture of the goods effected by the procuring entity shall not in any way limit the supplier's responsibilities and liabilities.

(7) If the supplier has been permitted to employ the services of a subcontractor, he shall in his contract with the subcontractor reserve to the procuring entity the rights referred to in this regulation.

Pre-shipment  
inspection  
services

144.—(1) The Director of Public Procurement may appoint a procuring entity to engage an external agent for the purposes of conducting pre-shipment inspection of goods being purchased by procuring entities.

(2) Contracts with firms to conduct pre-shipment inspection of goods shall be awarded by way of competitive procedures pursuant to the Act and these Regulations.

Examination  
and receipt  
of goods

145.—(1) The procuring entity shall establish appropriate procedures and mechanisms for inspecting and examining supplied goods and shall determine the precise form and designate the officials or bodies to be involved, in accordance with applicable regulations and instructions.

(2) The inspecting official or organ shall inspect and examine the supplied items comparing them with the stamped and approved samples and other specialities, putting aside the rejected goods to be returned to the supplier and shall examine varying percentages to be determined depending on the importance of the item.

(3) The inspecting official or organ shall prepare an examination report indicating acceptance or rejection of the goods, and the examination report shall indicate the percentage which the inspecting official or organ has examined, the names, specifications, results of testing, and shall be included in the record of the procurement proceeding.

(4) In the event of a dispute between the supplier and the inspecting official or organ, the matter shall be submitted to dispute settlement procedures under the procurement contract.

146.—(1) Acceptance by the procuring entity of the performance of a procurement contract shall be properly documented, and a receiving report shall be prepared containing the following information—

Receiving  
report

(a) contract reference number;

(b) description of the item or service received;

(c) date(s) of delivery and acceptance;

(d) signature in written form, or in electronic form when that form is acceptable to the procuring entity and provides the requisite security, subject to compliance with guidelines that may be issued by the Director of Public Procurement.

(2) With a view to preventing delays in payment, the receiving report shall be transmitted promptly to the appropriate disbursement authorities, in accordance with applicable procedures.

147. The procurement contract shall specify remedies available to the procuring entity in the event of breach of the procurement contract by the supplier, and such remedies include, but are not limited to—

Remedies  
for breach  
of contract

(a) rejection of defective performance;

(b) prompt removal and replacement of defective goods;

(c) liquidated damages for delay, in accordance with a rate set for each week or other unit of time, or part thereof, of delay;

(d) termination of the contract and purchase of replacement performance, at the expense of the defaulting party;

(e) such other remedies as may be available pursuant to the contract or to applicable law;

148.—(1) In the event it is decided to reject goods provided under the procurement contract, the procuring entity shall notify the supplier, by registered mail or courier with a return receipt, of the rejection and its reasons in order to cause the supplier to withdraw those materials from the stores and supply replacements of the rejected goods within the specified duration.

Rejection  
of goods

(2) In case the supplier refuses to take delivery of the rejected goods, he shall be liable for storage and other related expenses at the rate to be specified in the procurement contract, beyond that, the procuring entity is entitled to sell the goods by public auction and recover all expenses and fines from the sale value, and the balance remaining shall be returned to the supplier.

Payment on  
submission  
of invoice

149.—(1) Subject to the terms of the procurement contract, payment to the supplier shall be made on the basis of the submission of a proper invoice, and to be considered proper, an invoice shall set forth the following information—

- (a) date of invoice;
- (b) identification of the supplier;
- (c) reference to the underlying contract;
- (d) description of the goods, works or services provided, and its quantity and price;
- (e) shipment and payment terms;
- (f) supporting documentation required by the procurement contract to be submitted with the invoice; and
- (g) payment instructions, including contact information for the payee.

(2) Upon receipt of an invoice, the procuring entity shall notify the supplier within seven days in the event that the invoice is not deemed proper, stating the grounds for that determination.

(3) The procurement contract shall define the manner and timing of payment.

(4) In the case of procurement of goods, the invoice shall be accompanied by any shipping or other required documents, in the prescribed form which may be obtained from the procuring entity, in accordance with the instructions given in the purchase order, letter of acceptance of tender or procurement contract, as the case may be; and in the procurement of goods, payment shall normally not be effected before receipt of the goods.

(5) Prior to effecting payment, the officer responsible for payment shall establish the availability of the appropriate supporting documents, including payment vouchers attached to relevant invoices, local purchase orders, and cross-references to local purchase order or tender numbers.

Prompt  
payment

150. Payments that become due to the supplier shall be made in accordance with the deadlines set forth in the procurement contract, failing which, the supplier shall be compensated by payment of interest in accordance with the provisions of the procurement contract.

Retention

151. Notwithstanding regulation 149 (1), where progress payments are made, the procurement contract may provide that a percentage of amounts due to the bidder may be withheld until performance of the procurement contract is completed.

Advance  
payments

152.—(1) The procurement contract may provide for advance payments to the bidder.

(2) The total amount of advance payment made under the procurement contract shall not exceed the percentage of the initial contract price as indicated in the applicable standard bidding documents promulgated pursuant to section 27 (3) (c) of the Act, and any advance payment in excess of fifty per cent of the value of goods, works or services to be supplied shall be approved by the Director of Public Procurement.

(3) Unless otherwise stipulated in the procurement contract, an advance payment shall not be made unless and until the bidder furnishes an advance payment guarantee covering the amount of the advance payment.

(4) Unless otherwise authorized by the procuring entity or its representative, the supplier, and any of its subcontractors, shall utilize materials, equipment and personnel that are the subject of advance payment only for supply of goods, completion of works, or provision of services related to the procurement contract and where a works contract is involved, the supplier shall commit such materials, equipment and personnel exclusively to sites related to the works covered by the procurement contract.

(5) Advance payments are not in the nature of final payments, but are subject to final accounting and deduction from progress or other payments that may become due to the supplier.

153.—(1) The procurement contract may provide for the making of progress payments, based on progress in the fulfillment of the procurement contract, measured as a percentage of the performance due under the contract that has been completed, or in accordance with performance milestones identified in the contract and having been achieved. Progress payment

(2) Progress payments may be issued to the supplier in accordance with the progress of performance of the procurement contract, upon presentation and acceptance of such documentation as required by the procurement contract to evidence the progress in performance.

154.—(1) Final payment shall be implemented once performance of the procurement contract has been completed and accepted by the procuring entity. Final payment

(2) The procurement contract may mandate that the supplier provide to the procuring entity a release from claims related to the contract as a condition for final payment, subject to exceptions including—

(a) specified claims;

(b) supplier's liability to third parties stemming from performance of the procurement;

(c) claims for reimbursement of costs based on liability incurred to third parties in performance of the procurement contract, provided the claims are not known to the supplier as at the date of signature of the release; and

(d) costs related to indemnification of the procuring entity against patent liability.

155.—(1) An increase in quantities which exceeds the maximum variations allowed in the procurement contract requires a formal modification of the contract. Contract modifications

(2) Contract modifications shall not result in an alteration of the basic nature or scope of the contract.



(3) An increase in quantities which exceeds fifteen per cent of the contract sum requires either a new procurement proceeding or justification, if appropriate, as a single-source procurement in accordance with section 36 of the Act.

Agreement  
to submit  
disputes to  
arbitration

156. The parties to a procurement contract may agree in the procurement contract, or by a separate agreement, to submit disputes arising under the procurement contract to settlement by arbitration.

Liquidated  
damages  
for delay

157.—(1) The procurement contract may provide that the supplier is liable for payment of an agreed sum for delay in the performance due under the contract.

(2) If a clause of the type referred to in paragraph (1) is included in the procurement contract, it shall specify—

(a) the agreed sum to be paid per time-unit of delay (day, week or month);

(b) the maximum amount due under the liquidated damages clause;

(c) that the supplier is not relieved of its liability for performance of the procurement contract by virtue of payment under the liquidated damages clause;

(d) that if the procuring entity terminates the contract for default, the supplier will be liable for liquidated damages accruing until the procuring entity reasonably obtains delivery or performance of similar services, and that those liquidated damages are in addition to liability for the excess costs of re-procurement; and

(e) that the supplier will not be charged with liquidated damages when the delay in delivery or performance is beyond the control and without the fault or negligence of the contractor.

Contract  
termination

158. The procurement contract shall refer to grounds on which the procurement contract, in accordance with its provisions, may be terminated, and such grounds shall include, in particular—

(a) termination by the procuring entity on the grounds of default of the supplier in the performance of the contract;

(b) termination by the procuring entity for convenience, when that is determined by the procuring entity to be in the public interest;

(c) termination pursuant to the *force majeure* clause in the contract; and

(d) termination for the convenience of the procuring entity.

Termination  
for  
convenience

159.—(1) If the contract is terminated for convenience, the procuring entity shall authorize payment for the value of the work done, materials ordered, or goods or services supplied, the reasonable cost of removal of equipment, repatriation of the supplier's personnel employed solely on the works, and the supplier's costs of protecting and securing the works, if applicable, and less advance payments received up to the date of the certificate; and no payment shall be made of unearned profits.

(2) Notwithstanding paragraph (1), goods that are complete and ready for shipment within forty days after the supplier's receipt of notice of termination

shall be accepted by the procuring entity at the contract terms and prices, and for the remaining goods, the procuring entity may elect—

(a) to have any portion completed and delivered at the contract terms and prices; or

(b) to cancel the remainder and pay to the supplier an agreed amount for partially completed goods and services and for materials and parts previously procured by the supplier.

#### PART VIII—INFORMATION AND COMMUNICATIONS TECHNOLOGY FOR PUBLIC PROCUREMENT

160. The use of electronic media, including acceptance of electronic signatures, may be authorized consistent with the applicable statutory, regulatory or other rules for use of such media, so long as such rules provide for—

Use of electronic media in the procurement process

(a) appropriate security to prevent unauthorized access to the bidding, approval and award processes; and

(b) accurate retrieval or conversion of electronic forms of such information into a medium which permits inspection and copying.

161.—(1) The use of information and communications technology shall be introduced in a gradual but steady manner, as the readiness of procuring entities to apply such measures progresses.

Introduction of information and communications technology

(2) Pursuant to the mandate set forth in section 17 of the Act, the Director of Public Procurement shall examine and recommend ways of introducing in public procurement, at appropriate stages, the use of information and communications technology, and other technical innovations.

(3) Procuring entities are encouraged to devise and implement measures aimed at employing information and communications technology in the procurement process and proposals shall be submitted to the Director of Public Procurement for approval prior to implementation; and issuance of approvals by the Director of Public Procurement shall be predicated on a finding that the proposed measure promotes the objectives of economy and efficiency, competition and openness of the procurement system to wider participation, transparency, and accountability.

(4) The guiding principles for identifying and developing applications of information and communications technology to procurement shall include—

(a) communication and information exchange shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of bids and of all information supplied by economic operators are preserved, and that the procuring entities only examine the content of bids after the time-limit set for submitting them has expired;

(b) if bids are submitted by electronic means, bidders shall undertake to submit the documents, certificates, attestations and declarations relating to qualifications that may still have to be transmitted in paper form by any appropriate means by the day before the opening of bids;

(c) standardization and inter-operability of key aspects of information and communications systems for procurement throughout public administration, so as to facilitate internal sharing of information, and participation by bidders throughout the procurement market

(5) Possible elements to be explored for a procurement system utilizing information and communications technology in the procurement process include—

(a) easy access to standard bidding documents and use of standard formats;

(b) establishment of a website dedicated to procurement activities and systems in Malawi, containing information such as—

(i) information relevant to the standard procurement specifications for goods and services;

(ii) information concerning procurement opportunities;

(iii) direct access to bidding documents;

(iv) information about vendors, including information from the centralized master bidders list and vendor performance information;

(v) information about products, including product testing results;

(vi) historical purchasing information, qualified purchase lists, and trends;

(vii) information about the availability of surplus property;

(c) automated linkages between acquisition systems and other relevant systems, in particular supply and materials management systems and payment systems;

(d) bidder registration systems for the purposes of electronic procurement procedures;

(e) where appropriate, the development of special electronic procurement methods for conducting purchasing activity electronically such as use of purchase cards for small purchases, catalogue shopping for standard goods;

(f) electronic payment, involving, for example, electronic issuance of invoices, if invoices are necessary, or the automatic generation of payment upon report of the receipt of the procured object;

(g) appropriate security to prevent unauthorized access to the bidding, approval, and award processes; and

(h) accurate retrieval or conversion of electronic forms of information into a medium which permits inspection and copying.

#### PART IX.—PARTICIPATION BY SMALL ENTERPRISES

162. For purposes of this Part—

(a) “small-enterprise” means an enterprise, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts, and qualified as a small-enterprise under the criteria and size standards in the relevant instruments of the National Construction Industry Council of Malawi and the Ministry of Commerce and Industry, and an enterprise is “not

dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged; and

(b) "set-aside" means the reserving of an acquisition exclusively for participation by small-enterprises.

163. The Director of Public Procurement, in consultation and co-operation with concerned Ministries, other organs of Government and representative bodies of small enterprise, shall devise programmes and measures to promote and to facilitate the participation of small- and medium-sized enterprises in public procurement.

General  
policy  
regarding  
small- and  
medium-sized  
enterprises

164. The Director of Public Procurement shall issue guidelines concerning implementation of the regulation 163 and measures to promote and facilitate participation by small- and medium-sized enterprises in procurement may include—

Measures  
to promote  
small- and  
medium-sized  
enterprise  
participation

(a) simplification and transparency in procurement rules;

(b) promoting clarity in bidding documents, contract clauses, and in performance standards;

(c) use of a commercial approach to technical requirements, which widens the possibility of competition and participation by more small- and medium-sized enterprises;

(d) promptness in payment of invoices, including progress payments and undisputed change orders, and introduction of electronic payment;

(e) facilitating access to financing of Government receivables;

(f) facilitating access to third party security instruments such as bank guarantees, stand-by letters of credit, surety bonds;

(g) access to technical data that the Government is entitled to release for re-procurement purposes;

(h) encouraging small-business subcontracting opportunities;

(i) where feasible, and in accordance with section 28 (2) of the Act, dividing proposed acquisitions into reasonably small lots to permit offers on quantities less than the total requirement;

(j) establishing small-enterprise set-asides which are total, partial, or limited to a particular region;

(k) in the event of equal low bids, making awards first to small- and medium-sized enterprises;

(l) allowing the maximum amount of time practicable for the submission of offer;

(m) training of public procurement officials in facilitating participation by small- and medium-sized enterprises, and training of both public and private sectors in application of procurement procedures, including use of various payment mechanisms, and use of contractual instruments such as INCOTERMS;

- (n) avoiding excessive regulatory burdens;
- (o) in collection and reporting of data, accurately measuring the extent of small business participation in procurement;
- (p) publication of indicative notices of planned procurement;
- (q) development of more effective means of disseminating information about procurement opportunities, in particular in rural areas, such as by publication of notices of procurement proceedings in publications of associations of small- and medium-sized enterprises; and
- (r) holding regular consultations with representatives of small- and medium-sized enterprises.

Small-enter-  
prises  
set-asides

165.—(1) The purpose of small-enterprise set-asides is to award certain acquisitions exclusively to small-enterprises.

(2) A small-enterprise set-aside may be open to all small-enterprises.

(3) A small-enterprise set-aside of a single acquisition or a class of acquisitions may be total or partial.

(4) Eligibility of enterprises for designation as small-enterprises, so as to be eligible for set-asides, shall be determined in accordance with rules issued by the concerned organs of Government in Malawi, and referred to in an instruction from the Director of Public Procurement.

(5) The Director of Public Procurement shall determine and recommend to the Government the types of contracts, and their maximum monetary value, that shall be subject to set-aside for small-enterprises, and in the event that the procuring entity finds in a given case that the set-aside is inappropriate, it shall document its finding and forward it to the Director of Public Procurement.

Representations  
by small-  
enterprises

166.—(1) To be eligible for award as a small-enterprise, a bidder must represent by way of information that is in line with the applicable eligibility requirements that it is a small-enterprise at the time of its written representation.

(2) A bidder may represent that it is a small-enterprise in connexion with a specific solicitation if it meets the definition of a small-enterprise applicable to the solicitation and has not been determined by the Director of Public Procurement, or other authority designated by the Government, to be other than a small-enterprise.

(3) The procuring entity shall accept a bidder's representation in a specific bid or proposal that it is a small-enterprise unless -

(a) another bidder or interested party challenges the concern's small enterprise representation; or

(b) the procuring entity has a reason to question the representation.

(4) Challenges of and questions concerning a specific representation shall be referred to the Director of Public Procurement, not later than five business days after bid opening.

(5) The Director of Public Procurement shall promptly furnish to the enterprise whose representation is being protested a copy of the protest.

(6) Within three business days after receiving a copy of the protest, the challenged bidder must file with the Director of Public Procurement a statement answering the allegations in the protest, and furnish evidence to support its position.

(7) Within ten business days after receiving a protest, the challenged bidder's response, and other pertinent information, the Director of Public Procurement shall determine the size status of the challenged concern and notify the procuring entity, the protester, and the challenged bidder of its decision by certified mail, return receipt requested.

(8) The procuring entity may, any time after bids are opened, question the small-enterprise's representation of any bidder in a specific offer.

167. When the participation of the procurement requisitioning unit or beneficiary community may result in enhancing the economy, quality or sustainability of the services to be procured, such requisitioning unit or community may participate in the delivery of services under procedures to be defined by the Director of Public Procurement.

Requisitioning unit and community participation

## PART X—ACCOUNTABILITY AND TRANSPARENCY IN PUBLIC PROCUREMENT

### *Division I—Measures to Promote Transparency*

168. The record of the procurement proceedings, required pursuant to section 27 of the Act, shall contain the following information—

Record of public procurement proceedings

(a) a brief description of the goods, works or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) the names and titles of the members of the Internal Procurement Committee;

(c) the names and addresses of bidders that submitted bids and the name and address of the supplier with whom the procurement contract is entered into and the contract price, and the date and time of arrival of each late bid;

(d) the share of the contract that the successful bidder intends to subcontract if that is known;

(e) information relative to the qualifications, or lack thereof, of suppliers that submitted bids;

(f) the price, or the basis for determining the price, and a summary of the other principal terms and conditions of each bid and of the procurement contract, where the procurement proceedings have resulted in a procurement contract; and a copy of the procurement contract resulting from the procurement proceedings;

(g) a summary of the evaluation and comparison of bids, including the application of any margin of preference pursuant to regulations 82 to 84;

(h) if all bids were rejected or the procurement proceedings were cancelled pursuant to section 23 of the Act, a statement to that effect and the grounds thereof;

(i) if a bid was rejected in the circumstances referred to in section 18 (4) (a) of the Act, information concerning the episode in question; information on conflict of interest declarations and requests for members of the Internal Procurement Committee, employees or consultants of the procuring entity to be recused from the procurement proceedings pursuant to section 19 (1) of the Act and regulation 176; and information on contingent fee arrangements, disclosed pursuant to regulation 179.

(j) in procurement proceedings involving the use of a procurement method pursuant to section 30 (3), (4), (8), or (10) of the Act, the statement of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(k) in the procurement of services by means of request for proposals for services, a statement of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;

(l) in procurement proceedings in which the procuring entity, limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(m) a summary of any requests for clarification of the pre-qualification or bidding documents, the responses thereto, as well as a summary of any modification of those documents; and

(n) if a successful bidder in tendering proceedings fails to enter into a procurement contract, a statement of the grounds thereof.

#### Disclosure

169. In disclosure of the record of the procurement proceedings, and in debriefing of bidders, and in other contexts, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose—

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of bids other than the summary referred to in regulation 168 (g).

#### Availability of record for oversight organs

170. The record of the procurement proceeding, as well as all other documents generated in planning and conducting procurement proceedings, and implementing procurement contracts, shall be made available for inspection upon demand by the Director of Public Procurement, the Auditor-General, and other oversight organs authorized pursuant to any written law.

#### Record keeping and reporting requirements

171 —(1) Each Internal Procurement Committee shall prepare an annual register of the procurement proceedings that have been issued for every year in serial numbers.

(2) Each Internal Procurement Committee shall open a special file for every procurement proceeding and all the information and documentation relating to the proceeding such as the invitation to tender, decision of award, work take-over certificate and any other information on the method of the supplier's completion of his commitment shall be kept in the file.

172.—(1) The procuring entity shall retain all documents and records generated in conducting procurement proceedings in accordance with section 27 (1) of the Act.

Retention of  
documenta-  
tion

(2) Each procuring entity shall open a special file for every procurement proceeding and in accordance with section 27 (1) of the Act, all the documentation relating to the procurement proceeding, including the tender invitation, decision of award, work take-over certificate and any other information on the method of the contractor's completion of his commitment shall be kept in the file; and a contract file index shall be established for each contract file.

(3) Contract files shall include, at a minimum, the following documentation—

- (a) contract file index;
- (b) invitation to bid;
- (c) invitation to apply for pre-qualification, if applicable;
- (d) bidding documents;
- (e) requests for clarification and responses thereto, and record of circulation of responses to all participating bidders;
- (f) qualification assessment reports for each bidder whose qualifications were assessed in the course of the procurement proceeding;
- (g) list of pre-qualified bidders;
- (h) minutes of pre-bid meeting with bidders, if applicable;
- (i) minutes of bid opening;
- (j) originals of bids;
- (k) documentation of requests for and responses to clarifications of bids;
- (l) minutes of any negotiations;
- (m) copies of notice of acceptance sent to winning bidder;
- (n) copy of notice sent to unsuccessful bidders;
- (o) copy of published notice of contract award;
- (p) procurement contract;
- (q) documentation related to contract implementation, including progress reports, invoices and other documents such as inspection reports and any supporting documentation;
- (r) documentation related to change orders and contract modification;
- (s) documentation related to inspections, acceptance and receiving, including any exercise of the procuring entity's right to reject defective performance;



(t) copies of all correspondence with the supplier; and

(u) requests to subcontract and responses thereto; evaluation reports; and the record of the procurement proceedings, as well as all of the documentation referred to therein.

Notice of  
procurement  
contract  
award

173.—(1) In the case of procurement contracts of goods, works and services whose threshold values shall be set and issued by the Director of Public Procurement, the procuring entity shall cause a notice of the procurement contract to be published in the *Gazette* within seven days of the award.

(2) The notice referred to in paragraph (1) shall refer to the announcement of the procurement published in the *Gazette* at the commencement of the procurement proceedings pursuant to section 31 (1) of the Act, the subject matter of the procurement, the name and address of the successful bidder and the contract price.

#### *Division II—Accountability*

Liability  
for defective  
design

174. Damage caused by unsuitable designing are the responsibility of the designer who must compensate that.

Declaration  
and disclosure  
requirements  
restrictions on  
bidding by  
public officials

175.—(1) All members of an Internal Procurement Committee shall, prior to commencing evaluation and comparison of bids, sign a declaration to the effect that they have no relationship with bidders of the following types—

(a) a marital or direct birth relationship with a bidder participating in the procurement proceedings, with its legal practitioner or with its officers;

(b) during last three years has been employee or officer of a bidder participating in the procurement proceedings, or has held a financial interest in a bidder;

(c) is negotiating or has an arrangement concerning prospective employment in a bidder involved in the procurement proceedings.

(2) A member of an Internal Procurement Committee, and any employee or consultant of the procuring entity who becomes aware that it has a relationship with a bidder referred to in paragraph (1), shall immediately report that fact to the head of the procuring entity and request exclusion from the procurement proceeding, including from any activities referred to in regulation 176, and any such report and request for exclusion shall be made a part of the record of the procurement proceedings.

(3) Public officials are forbidden to bid, or to participate in, bids for procurement contracts with respect to procurement proceedings of the entities by which they are employed.

Identification  
of activities  
on behalf of  
the procuring  
entity subject  
to conflict  
of interest  
restrictions

176. Procurement-related activities on behalf of the procuring entity that are subject to the conflict of interest restrictions referred to in section 18 (1) (c) of the Act include the following—

(a) procurement planning, including preparation, review or approval of specifications or a statement of work for particular procurement proceedings;

(b) assessment of requirements to be fulfilled by a procurement action;

(c) preparation of procurement documents, including for solicitation of participation in procurement proceedings;

(d) evaluation and comparison of bids, proposals, offers or quotations, including membership in Internal Procurement Committees;

(e) conduct of technical discussions or negotiations;

(f) selection or approval of selection of bidder; and

(g) administration of the procurement contract.

177.—(1) Individuals who served as procurement officers or who exercised some other authority referred to regulation 176 with respect to a procurement shall not—

Post-employment  
restrictions  
on public  
procurement  
officials

(a) participate in any manner, as an officer, employee, agent or representative of a supplier, in any negotiations or technical discussions leading to the award, modification, or extension of a contract for such procurement; or

(b) participate personally or substantially on behalf of a supplier in the performance of such contract.

(2) The restriction referred to in paragraph (1) shall remain in effect for the duration of the procurement proceedings and contract, if any, in question.

178.—(1) Activities prohibited pursuant to section 18 of the Act also include the retention of any person, including former public employees, on a contingent fee basis for the purposes of influencing the selection process in procurement proceedings, except when that person is acting as a *bona fide* commercial selling agent for the purpose of securing business.

Contingent  
fee  
arrangements

(2) The bidding documents shall require bidders to disclose any contingent fee arrangements entered into for the purposes of securing the procurement contract, and such information shall be made a part of the record of the procurement proceedings.

179. Notice shall be given conspicuously in the bidding and contract documents that bidders are not permitted to—

Conspicuous  
notice of  
prohibitions

(a) enter into contingent fee arrangements prohibited by regulation 178;

(b) directly or indirectly offer, give or agree to give inducements of the type referred to in section 18 (2) (a) of the Act,

and that rejection of the tender, offer or quotation results from a violation of that rule.

180. It is strictly forbidden to solicit any improper inducement of the type referred to in section 18 (2) (a) of the Act.

Prohibition  
of solicitation  
of improper  
inducements

181. Any public official who is offered an inducement in contravention of section 18 (2) (a) of the Act shall report such offer to the head of the procuring entity, to the Director of Public Procurement and to the relevant law enforcement authority.

Disclosure  
of offer of  
inducement

Prohibition  
award to  
consultant-  
affiliated  
bidder

182. The procuring entity shall not sign a procurement of contract with a bidder associated as a parent company or branch, with a consultant who is responsible for preparing the specifications or bidding documents for the procurement contract or supervising the execution of the procurement contract; but so however that this provision shall not apply to the various firms (consultants, contractors or suppliers), which together are performing the supplier's obligations under a turnkey or design and build contract.

Confidentiality  
of procurement  
information

183.—(1) Subject to applicable oversight, auditing or other laws, or to the order of a competent court, public officials are not permitted to disclose to any third party, whether for personal gain or for any other motive, confidential or proprietary commercial information obtained by virtue of their involvement in, or contact with officials involved in, procurement proceedings or the planning of procurement.

(2) All information relating to the examination, clarification, evaluation and comparison of bids shall not be disclosed to bidders or to any other person not involved officially in the examination, evaluation or comparison of bids or in the decision on which bid should be accepted, except as provided in regulation 168 (g).

Confidentiality  
obligations  
of third parties

184.—(1) The requirement of confidentiality, imposed on procuring entities by section 18 (5) of the Act and by regulation 183, extends also to those acting on behalf of procuring entities in procurement proceedings.

(2) The requirement of confidentiality referred to in paragraph (1) is subject to the provisions in the Act, applicable legislation and these Regulations relating to oversight and auditing of the activities of procuring entities.

Dissemination  
of applicable  
conflict of  
interest and  
conduct rules  
to public  
employees

185.—(1) The Director of Public Procurement and the heads of all public authorities shall ensure that each public employee is provided with a copy of the portions of the Act and these Regulations dealing with conflicts of interest, including specific notice of the prohibitions and requirements set forth in section 18 of the Act and in Part X, Division II of these Regulations.

(2) After having been furnished with the text of the provisions referred to in paragraph (1), each public employee shall be required to take note of its contents through a circular to be issued by the Secretary for Human Resource Management and Development, and all members of the Internal Procurement Committees shall sign on that form to the effect that they are familiar with its content.

Remedies  
against breach  
of conduct  
standards by  
public officials

186.—(1) In addition to any other applicable civil and administrative remedies, and sanctions under the penal law, the Director of Public Procurement may recommend to the relevant authorities the imposition of one or more of the following sanctions for breach of conduct standards—

- (a) written warnings or reprimands;
- (b) suspension or interdiction with or without pay for specified periods of time;
- (c) withdrawal of procurement-officer certification; and
- (d) termination of employment.

(2) All procedures under this regulation shall be in accordance with due process requirements and existing law including notice and opportunity for a hearing prior to imposition of any suspension or interdiction or other sanction.

187. The value of anything transferred or received in breach of the standards of conduct set forth in the Act or in regulations promulgated hereunder, and any additional costs to the procuring entity, resulting from the breach, may be recovered both from any public employees and non-employees involved.

Recovery  
in case of  
breach of  
conduct  
standards

188.—(1) All staff involved in purchasing shall be subject to supervision to ensure that staff are performing to meet standards and in accordance with procedures and guidelines in force.

Supervision  
and checking

(2) All transactions relating to public procurement shall be checked from time to time by the Director of Public Procurement and checking officers shall be alert to any indication that public procurement procedures have been breached or fraud committed.

189.—(1) In the event of violation or circumvention of the Act or these Regulations, especially when it has financial consequences, the Director of Public Procurement shall report the matter to the Secretary to Treasury who may, in accordance with his powers as provided by the Public Finance Management Act, 2003, take appropriate action on the procuring entity that does not apply specific procedures, or that engages in procurement in circumvention of the Act or these Regulations, or recommend other appropriate administrative action.

Reporting  
of violations  
by procuring  
entities

(2) Where any misconduct involving an officer in a procuring entity is criminal in nature the Director of Public Procurement shall, in liaison with the Controlling Officer, report the matter to Police and Treasury with a copy to Auditor General, and in the event of official misconduct, or breach of official duties, the Director shall recommend possible disciplinary action or other administrative, civil or criminal action to the relevant authorities.

### *Division III—Debarment of Suppliers and Bidders*

190.—(1) The Director of Public Procurement may, after reasonable notice to the supplier or bidder involved, reasonable opportunity for that supplier or bidder to be heard, and consultation with the affected procuring entities, exclude a supplier or bidder from participation in public procurement.

Authority  
to debar  
suppliers  
and bidders

(2) A decision to exclude a supplier or bidder from participation in public procurement may be taken only on the grounds referred to in regulation 191 and in accordance with the procedures set forth in regulation 192, but such decision may be preceded by a suspension of the right to participate in public procurement proceedings.

191.—(1) A supplier or bidder may be excluded from participation in public procurement on the following grounds—

Grounds  
for exclusion

(a) refusal by a successful bidder to sign a procurement contract in accordance with the terms of the bidding documents if required to do so, or to furnish a performance security in accordance with the terms of the bidding documents, for a maximum period of two years;

(b) false information supplied in the process of submitting a bid, for a maximum period of two years;

(c) collusion between the bidder and a public official concerning the formulation of terms of reference or the bidding documents, or connivance to interfere with the participation of competing bidders in a site visit, for a maximum period of two years;

(d) misconduct relating to the submission of bids, such as corruption, collusion, price fixing, a pattern of under-pricing of bids (with a view to recouping costs and profit by way of variations), and breach of confidentiality, for a maximum period of two years;

(e) breach of contractual obligations under a procurement contract deemed serious enough to warrant debarment, provided that the breach was not due to circumstances beyond the control of the supplier for a maximum period of one year;

(f) conviction of a criminal offence related to obtaining or attempting to obtain a contract or subcontract; for a maximum period of two years; and

(g) conviction for an economic crime for a maximum period of two years.

Procedure  
for exclusion  
from  
participation  
in public  
procurement

192.—(1) A decision by the Director of Public Procurement to exclude a supplier from participation in procurement proceedings may only be taken after written notice to the supplier or bidder of the proposed exclusion and of the grounds therefor, and a copy of the notice shall be provided by the Director of Public Procurement to the procuring entity or other entity or official that brought the exclusion petition to the Director of Public Procurement.

(2) The notice referred to in paragraph (1) shall inform the supplier or bidder of its right to a hearing prior to any decision to exclude and the time and place of the hearing, provided that the request for a hearing is received by the procuring entity within ten days of receipt of the notice.

(3) The exclusion hearing shall be placed before a three-member committee whose members shall be appointed by the Director of Public Procurement, drawing from the standing Review Committee established pursuant to section 38 (6) of the Act, which shall reach a decision on the petition.

(4) The following procedures shall apply to hearings under this regulation—

(a) the supplier or bidder has the right to be represented by a legal practitioner;

(b) the hearing shall be recorded and all evidence presented shall be preserved; and

(c) witnesses must testify under oath and may be cross-examined.

(5) The notice referred to in paragraph (1) shall also inform the supplier or bidder if a determination has been made to suspend the supplier or bidder for the period of time that it takes to complete an investigation into possible exclusion.

(6) The supplier or bidder has a right to a hearing to challenge the suspension and a hearing shall be held promptly in accordance with the procedures referred to in paragraph (4).

(7) A suspension under this regulation takes effect upon issuance of a written decision to suspend after the supplier or bidder has had an opportunity to request and obtain the hearing referred to in paragraph (2), and during the suspension, bids, proposals or quotations shall not be solicited from the supplier or bidder.

(8) A suspension under this regulation ends upon the expiry of two years of the issuance of a exclusion decision, or upon notice from the procuring entity, whichever comes first.

(9) An exclusion decision takes effect upon issuance of the written decision, and stays in effect until overturned on appeal to the Minister or by a court, or until the expiry date of the exclusion period.

(10) The three-member committee shall promptly notify its decision to the concerned supplier or bidder, the Director of Public Procurement and the procuring entity or other entity or official that brought the petition.

(11) A supplier or bidder that has been excluded from public procurement may appeal to the Minister.

(12) The Director of Public Procurement shall maintain and circulate to procuring entities a list of excluded suppliers and bidders.

#### *Division II—Review Procedures*

193.—(1) A document is filed on a particular day when it is received by the procuring entity or by the Director of Public Procurement, as the case may be, by close of business on that day.

Review  
procedures  
relating to  
award of  
procurement  
contract

(2) A document may be filed by hand delivery, mail, or commercial carrier; and parties may use facsimile transmission or other electronic means.

194. Any damages payable pursuant to the right of review under these Regulations shall be limited to the cost of preparing and submitting a tender, and shall not include loss of profit, and may only be awarded to a bidder that would have been awarded the contract but for the complained of action or omission.

Compensation  
for  
aggrieved  
bidder

195. Any decision by the procuring entity, the Review Committee or by the court pursuant to section 37 of the Act and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

Recording of  
dispositions

196. Further details of the review procedure are provided in Schedule D.

Detailed  
review  
procedures  
Schedule D

## SCHEDULE A

(reg. 8)

Types of defence-related items eligible for special treatment in accordance with sections 27 (5) and 30 (2) of the Act.

1. Ammunitions
2. Rifles
3. Riot equipment
4. Armed public order vehicles
5. Military hardware and equipment
6. Police dogs
7. Police uniform
8. Military uniform
9. Petrol bomb equipment
10. Bomb X-ray machines
11. Military version vehicles
12. Forensic science equipment
13. Construction of magazine houses
14. Communication equipment
15. Finger print identification equipment

## SCHEDULE B

(reg. 113)

## PROCEDURES FOR DESIGN CONTESTS

## PART I—GENERAL PROVISIONS

1. *Scope and purpose*

(1) This Annex provides detailed rules and procedures related to the conduct of design contests, with a view to fulfilling the objectives and implementing the provisions of the Act.

(2) For the purposes of this Annex “design contests” means those procedures that enable the procuring entity to acquire, mainly in the fields of area planning, town planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.

(3) In accordance with regulations, procuring entities may conduct design contests, with or without prizes, to acquire the required plans and projects relating to architecture, landscaping, engineering, urban design projects, urban and regional planning, and fine arts.

(4) The rules and procedures for the organization of a design contest shall be in conformity with the requirements of this Annex and shall be consistent with the Act.

2. *Valuation of design contests*

For the purposes of valuation of design contests and the application to design contests of monetary thresholds referred to in the Act and these Regulations—

(a) in the case of design contests organized as part of a procedure leading to the award of a contract for consultant’s services, the estimated value net of surtax of the services shall be used; and

(b) in the case of design contests with prizes, all contest awards and other amounts payable to the participants in the design contest shall be used.

## PART II—DESIGN CONTEST JURY

### 3. *Establishment of jury*

(1) The designs submitted by contestants shall be evaluated by a jury composed exclusively of members who are natural persons and are independent from the participants in the contest.

(2) The jury shall be established prior to the opening of the contest.

(3) The members of the jury shall be appointed and dismissed by the procuring entity.

### 4. *Composition of jury*

If certain professional qualifications are required from participants in a design contest, at least one-third of the members of the jury of the contest must have the same or similar qualifications.

### 5. *Jury procedures*

(1) At its first meeting, the jury shall elect a chairperson and a rapporteur.

(2) The decisions of the jury shall be taken by a majority vote, with a separate vote on each design, and if the vote is equally divided, the chairperson shall have the decisive vote, and all decisions of the jury shall be final.

(3) A report of the meetings, including explanations of the decisions of the jury with respect to each plan or design submitted, shall be drawn up by the rapporteur and signed by the chairperson and all members of the jury.

(4) The report of the jury shall be made public.

## PART III—PARTICIPATION IN DESIGN CONTESTS

### 6. *Contest notice*

(1) Procuring entities who wish to carry out a design contest shall make known their intention by means of a contest notice.

(2) In addition to publication in the *Gazette* and local press, the notice shall be published in technical journals and reviews relevant to the subject matter of the design contest.

(3) Notices of design contests shall be published not less than thirty days prior to the date for the receipt of designs.

### 7. *Contents of contest notice*

The design contest notice shall contain at least the following information –

(a) the name, address, fax number and electronic address of the procuring entity and, if different, of the service from which additional information may be obtained;

(b) project description, including the subject and characteristics of the design contest;

(c) the requirements for participation in the design contest, including any qualification criteria and proof of compliance therewith to be submitted by participants;

(d) nature of the contest, namely, open or restricted;

(e) in the case of open contests, the final date for receipt of plans or designs;



(f) in the case of restricted contests—

- (i) the number of participants envisaged;
- (ii) where applicable, names of participants already selected;
- (iii) criteria for the selection of participants; and
- (iv) final date for receipt of requests to participate;

(g) where applicable, indication of whether participation is reserved to a particular profession;

(h) criteria to be applied in the evaluation of plans and designs;

(i) the place from which and the manner in which candidates may obtain the contest documents, including the deposit, if any, to be paid for the documents;

(j) the names of the members of the jury;

(k) indication of whether the prize winners are permitted any follow-up contracts;

(l) where applicable, the number and value of prizes;

(m) where applicable, details of payments to all participants; and

(n) date of publication of the notice.

#### 8. *Extent of participation*

(1) Where design contests are restricted to a limited number of participants, the procuring entity shall state in the notice clear and non-discriminatory selection criteria, and the procuring entity may restrict participation only on the basis of those criteria.

(2) In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

#### 9. *Subvention of participation*

(1) In restricted competitions, provision may be made for payment of a certain sum to each of the participants invited to take part, without prejudice to the regular award of prizes.

(2) In contests consisting of two stages, a reasonable sum may be paid to all participants admitted to the final contest, and such sum is distinct from the prizes awarded upon the conclusion of the final contest.

#### 10. *Non-discrimination*

The conditions and contest documents of a contest shall be identical for all participants.

### PART IV—CONTEST DOCUMENTS

#### 11. *Provision of contest documents*

The procuring entity shall supply participants with all the documentation necessary for drawing up their designs, and if there is a deposit to be paid for the documentation, the deposit shall be refunded to the candidates that in fact participate in the contest.

#### 12. *Contents of contest documents*

(1) In addition to restating the information contained in the design contest notice referred in paragraph 7 of this Schedule, the contest documents shall contain the following—

- (a) the detailed nature of the problem;

- (b) the actual conditions to be fulfilled in the preparation of the design;
- (c) the number, nature, scale and dimensions of the documents or models required in two or three dimensions;
- (d) the conditions of receipt, acceptance and return of such documents or models;
- (e) the requirements as to data to be supplied by participants so as to enable the costs of execution of designs to be estimated in accordance with uniform standards;
- (f) the method of allocation of prizes;
- (g) whether the prize is to be the sole remuneration received by the prize-winner;
- (h) the exact use to which the procuring entity intends to put the prize-winning design;
- (i) the point in time when execution of the design is slated to commence;
- (j) the date of the public exhibition of the designs submitted in the contest; and
- (k) the name, functional title, address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from participants in connexion with the procurement proceedings, without the intervention of an intermediary.

(2) A clear distinction shall be made in the contest documents, between conditions that are compulsory and those that leave participants freedom in interpretation, which should be as wide as possible

(3) The contest documents shall indicate that, in principle, the procuring entity shall use the meter as the scale for designs and plans; in cases where this is not done, a metric equivalent shall be given in the contest documents.

(4) The procuring entity shall endeavour to reduce to a minimum, in all cases, the number and size of the documents and drawings required to be submitted.

(5) The procuring entity shall give, on an equal basis, to all participants in the second stage of a two-stage contest all of the supplementary information necessary for drawing up designs and plans to be submitted in the second stage.

### 13. *Registration and admission of participants*

Upon obtaining the contest documents, candidates intending to participate in the contest shall register that intent with the procuring entity, and registration implies acceptance of the conditions of the competition.

## PART V—SUBMISSION AND EVALUATION OF DESIGNS AND PLANS

### 14. *Submission of designs and plans*

The designs and plans submitted by participants for consideration by the jury shall be presented to the procuring entity for transmission to the jury in such a manner as to ensure their anonymity before and during the evaluation, comparison and award stages.

### 15. *One or two stage contests*

(1) Contests may be held in one or two stages.

(2) In contests that consist of two stages, only those competitors who are successful in the first part shall be admitted to the final contest.

(3) Designs and plans submitted in the first stage shall be kept confidential until the results of the second stage have been announced.

(4) The list of participants admitted to the final contest shall be drawn up and published in alphabetical order.

(5) Participants admitted to the second stage of contests shall receive from the procuring entity all the supplementary information necessary for drawing up designs and plans to be entered in the final contest.

#### 16. *Evaluation and comparison of designs*

(1) Decisions and opinions concerning the designs and plans shall be made only on the basis of the criteria and conditions set forth in the notice announcing the design contest and in the contest documents.

(2) All drawings, photographs, models or documents, other than those specified in the programme, shall be excluded from consideration, and shall be eliminated before examination of the plan.

(3) The jury shall disqualify any plan not in conformity with the conditions set forth in the contest documents.

#### 17. *Selection of the winning design*

The winning design or plan shall be selected exclusively on the basis of criteria and conditions set forth in the contest notice and documents.

#### 18. *Notice of results*

(1) Procuring entities who have held a design contest shall send a notice of the results of the award procedure and must be able to prove the date of dispatch.

(2) The notice referred to in paragraph (1) shall contain the following information—

- (a) name, address, fax number and electronic address of the procuring entity;
- (b) project description;
- (c) number of participants, including the number of foreign participants;
- (d) winner(s) of the contest;
- (e) where applicable, the prizes;
- (f) reference number of the design contest notice; and
- (g) date of dispatch of the notice.

(3) The notice shall be published in the same publications utilized for publication of the design contest notice.

### PART VI—ALLOCATION OF PRIZES, AWARDS AND COMPENSATION

#### 19. *Amount of prizes*

The amount of the prizes shall be proportional to the size of the project, the work involved and the expenses incurred by participants.

#### 20. *Distribution of prizes*

Prizes shall be distributed within ten days of the announcement of the results of the contest.

### 21. *Use of designs*

(1) The winning design may not be put to any use other than that expressly stated in the contest documents.

(2) No other design, whether or not it is awarded a prize, may be used in whole or in part by the procuring entity except by special agreement with the respective participant.

(3) In cases where the procuring entity wishes to use a prize-winning design for other purposes, or to modify it, a fresh agreement to that effect shall be concluded between the procuring entity and the author of the design or plan.

### 22. *Copyright and ownership issues*

(1) The author of any design shall retain the artistic copyright in his work; and no alterations may be made without his formal consent.

(2) The design winning the first prize shall become the property of the procuring entity.

(3) Unless otherwise specified in the contest documents, the procuring entity's ownership in the winning design shall cover only one execution thereof.

(4) Unless otherwise specified in the contest documents, the author of any design shall retain the right of reproduction.

## PART VII—MISCELLANEOUS PROVISIONS

### 23. *Exhibition of designs*

(1) Following the conclusion of the deliberations of the jury, the designs submitted in the contest shall be publicly exhibited, and in addition to the designs themselves, all documents and drawings, as well as the report and decisions of the jury bearing the signatures of the chairman and of all members shall be exhibited.

(2) The procuring entity shall notify the participants at least seven days prior to the date of the exhibit of the date and place of the exhibition, and the procuring entity shall also arrange for the publication of the date and place of the exhibition in the *Gazette* and local press and in the technical journals and reviews in which the design contest notice was published.

### 24. *Standards of conduct*

(1) The members of the jury shall undertake not to be guided in their work by any consideration other than their own conscience, the interests of the contest and the public interest.

(2) No member of the jury shall take part, either directly or indirectly, in the contest, nor be entrusted, either directly or indirectly, with work connected with the execution of the winning design.

(3) The communication and information exchange involved in design contests shall be carried out in such a way as to ensure that the integrity and confidentiality of all information supplied by participants are preserved, and that the content of plans and designs may only be examined, by the jury, after the time-limit set for submitting those has expired.

(4) In their conduct, the members of the jury and participants in the contest are subject to the conduct and ethics principles set forth in the Act and in these Regulations.

## 25. *Cancellation of contest*

(1) The procuring entity retains the right to cancel the contest at any stage prior to the announcement of a winning design, and in the event of a cancellation, the procuring entity shall refrain from the utilization of any designs that may have been submitted.

(2) In the event of the cancellation of a contest for which participants have been officially registered, the procuring entity shall compensate the participants for work actually carried out in connection therewith, in accordance with conditions set forth in the contest documents.

## 26. *Record of the contest*

The procuring entity shall prepare a record of the design contest containing at least the following information—

- (a) the name, address and other details of the procuring entity;
- (b) the subject and characteristics of the design contest;
- (c) the names and addresses of the participants in the design contest;
- (d) the name and address of the person who submitted the award-winning project;
- (e) information concerning the qualifications required of the participants in the design contest or confirming the lack thereof;
- (f) the total value of the design contest awards and other amounts payable to the participants in the contest;
- (g) a summary of the evaluation and comparison of the designs or plans; and
- (h) the report of the jury, signed by the chairperson and the members, summarizing and explaining the deliberations and decisions of the jury with respect to the evaluation and comparison of the designs submitted in the contest, and stating the grounds for the selection of the winning design.

## 27. *Review*

Part V of the Act and Division II of Part X of these Regulations shall apply to the resolution of complaints from participants concerning the conduct of design contests.

# SCHEDULE C

(reg. 114 (3))

Procedures for award of public service concession and contracts for procurement of infrastructure on basis of private investment.

## A. RULES GOVERNING THE PROCUREMENT PROCEEDINGS

The selection of the supplier shall be conducted in accordance with the Act and these Regulations, subject to sections B to F of this Annex.

## B. PRE-QUALIFICATION OF BIDDERS

### 1. *Purpose and procedure of pre-qualification*

(1) The procuring entity shall engage in pre-qualification proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged project, and the invitation to participate in the pre-qualification proceedings shall be published in accordance with section 31 (1) of the Act.

(2) The invitation to participate in the pre-qualification proceedings shall include at least the following—

- (a) a description of the infrastructure facility;
- (b) an indication of other essential elements of the project, such as the services to be delivered by the supplier, the financial arrangements envisaged by the procuring entity such as whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the supplier;
- (c) where already known, a summary of the main required terms of the contract to be entered into;
- (d) the manner and place for the submission of applications for pre-qualification and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and
- (e) the manner and place for obtaining the pre-qualification documents.

(3) To the extent not already required by regulation, the pre-qualification documents shall include at least the following information—

- (a) the pre-qualification criteria in accordance with paragraph 2;
- (b) whether the procuring entity intends to waive the limitations on the participation of consortia set forth in paragraph 3;
- (c) whether the procuring entity intends to request only a limited number of pre-qualified bidders to submit proposals upon completion of the pre-qualification proceedings in accordance with paragraph 4, and if applicable, the manner in which this selection will be carried out;
- (d) whether the procuring entity intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of Malawi.

## 2. *Pre-qualification criteria*

In order to be pre-qualified, interested bidders must meet objectively justifiable criteria that the procuring entity considers appropriate in the particular proceedings, as stated in the pre-qualification documents; and the criteria shall be confined to the types of criteria referred to in section 13 (3) of the Act, and shall encompass the following—

- (a) adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;
- (b) sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;
- (c) appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

### 3. *Participation of consortia*

(1) The procuring entity, when first inviting the participation of bidders in the procurement proceedings, shall allow them to form bidding consortia, and the information required from members of bidding consortia to demonstrate their qualifications in accordance with paragraph 2 shall relate to the consortium as a whole as well as to its individual participants.

(2) Unless otherwise stated in the pre-qualification documents, each member of a consortium may participate, either directly or indirectly, in only one consortium at the same time; contravention of this requirement shall cause the disqualification of the consortium and of the individual members.

(3) When considering the qualifications of bidding consortia, the procuring entity shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

### 4. *Short list*

If the procuring entity reserves in the pre-qualification documents the right to request proposals upon completion of the pre-qualification proceedings only from a limited number of bidders that best meet the pre-qualification criteria, the procuring entity shall rate the bidders that meet the pre-qualification criteria on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-qualification proceedings, and in drawing up the list, the procuring entity shall apply only the manner of rating that is set forth in the pre-qualification documents.

## C. PROCEDURE FOR REQUESTING PROPOSALS

### 1. *Single-stage and two-stage procedures for requesting proposals*

(1) The procuring entity shall provide a set of the request for proposals and related documents issued in accordance with paragraph 2 to each pre-qualified bidder that pays the price, if any, charged for those documents.

(2) Notwithstanding paragraph (1), the procuring entity may use a two-stage procedure to request proposals from pre-qualified bidders when the procuring entity does not deem it to be feasible to describe in the request for proposals the characteristics of the project such as project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

(3) Where a two-stage procedure is used, the following provisions apply—

(a) the initial request for proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the procuring entity;

(b) the procuring entity may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders, and the procuring entity shall prepare minutes of any such meeting or discussion containing the questions raised and the clarifications provided by the procuring entity;

(c) following examination of the proposals received, the procuring entity may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it, and the procuring entity shall indicate in the record of the procurement proceedings to be kept pursuant to section 27 of the Act, the justification for any revision to the request for proposals; any such revision, modification or addition shall be communicated in the invitation to submit final proposals;

(d) in the second stage of the proceedings, the procuring entity shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with paragraphs 2 to 6.

## 2. *Content of the request for proposals*

To the extent not already required by regulation 92, the request for proposals shall include at least the following information—

(a) general information as may be required by the bidders in order to prepare and submit their proposals;

(b) project specifications and performance indicators, as appropriate, including the procuring entity's requirements regarding safety and security standards and environmental protection;

(c) the contractual terms proposed by the procuring entity, including an indication of which terms are deemed to be non-negotiable; and

(d) the criteria for evaluating proposals and the thresholds, if any, set by the procuring entity for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

## 3. *Bid securities*

(1) The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of any required bid security.

(2) A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases referred to in regulation 72 (7), and in case of—

(a) failure to enter into final negotiations with the procuring entity pursuant to paragraph 6 (1);

(b) failure to submit its best and final offer within the time limit prescribed by the procuring entity pursuant to paragraph 6 (2);

(c) failure to provide required security for the fulfilment of the contract after the proposal has been accepted or to comply with any other condition prior to signing the contract specified in the request for proposals.

## 4. *Evaluation criteria*

(1) The criteria for the evaluation and comparison of the technical proposals shall include at least the following—



- (a) technical soundness;
- (b) compliance with environmental standards;
- (c) operational feasibility; and
- (d) quality of services and measures to ensure their continuity.

(2) The criteria for the evaluation and comparison of the financial and commercial proposals shall include, as appropriate—

- (a) the present value of the proposed tolls, unit prices and other charges over the operational period;
- (b) the present value of the proposed direct payments by the procuring entity, if any;
- (c) the costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;
- (d) the extent of financial support, if any, expected from a public authority of Malawi;
- (e) soundness of the proposed financial arrangements;
- (f) the extent of acceptance of the negotiable contractual terms proposed by the procuring entity in the request for proposals; and
- (g) the social and economic development potential offered by the proposals.

#### *5. Comparison and evaluation of proposals*

(1) The procuring entity shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set forth in the request for proposals.

(2) For the purposes of paragraph (1), the procuring entity may establish thresholds with respect to quality, technical, financial and commercial aspects, and proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procurement proceeding.

#### *6. Final negotiations*

(1) The procuring entity shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the procurement contract the bidder that has attained the best rating; and final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals.

(2) If it becomes apparent to the procuring entity that the negotiations with the bidder invited will not result in a contract, the procuring entity shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer.

(3) If the procuring entity does not find that proposal acceptable, it shall terminate the negotiations with the bidder concerned, and the procuring entity shall then invite for negotiations the other bidders in the order of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(4) The procuring entity shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

## D. NEGOTIATION OF CONTRACTS WITHOUT COMPETITIVE PROCEDURES

### 1. *Circumstances authorizing award without competitive procedures*

(1) Subject to approval by the Director of Public Procurement, the procuring entity is authorized to negotiate a procurement contract without using the procedure set forth in sections B and C in the following cases—

(a) when there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in sections B and C would be impractical: Provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(b) where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(c) in cases of unsolicited proposals falling under section E 4 of this Schedule; and

(d) when an invitation to the pre-qualification proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals and if, in the judgment of the procuring entity, issuing a new invitation to the pre-qualification proceedings and a new request for proposals would be unlikely to result in a project award within a required time frame.

(2) The procedure for the request for proposals shall be as follows—

(a) requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible;

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

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

(a) the relative managerial and technical competence of the supplier or contractor;

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

(c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

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

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

(b) a description of the procurement need, including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement

of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;

(c) the criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(4) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (2), shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

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

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

(a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) subject to regulation 170, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party; and

(c) the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

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

(8) The procuring entity shall employ the following procedures in the evaluation of proposals—

(a) only the criteria referred to in paragraph (2) as set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) the price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

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

## 2. *Procedures for negotiation of a contract*

Where a procurement contract is negotiated without using the procedures set forth in sections B and C of this Schedule, the procuring entity shall cause a notice of its intention to commence negotiations in respect of a contract to be published in the *Gazette*.

## E. UNSOLICITED PROPOSALS

### 1. *Admissibility of unsolicited proposals*

Subject to approval by the Director of Public Procurement, the procuring entity is authorized to consider unsolicited proposals pursuant to the procedures set forth in paragraphs 2 to 4: Provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

### 2. *Procedures for determining the admissibility of unsolicited proposals*

(1) Following receipt and preliminary examination of an unsolicited proposal, the procuring entity shall promptly inform the proponent whether or not the project is considered to be potentially in the public interest, taking into account factors including appropriateness of the contractual arrangements and the reasonableness of the proposed project risks.

(2) If the project is considered to be potentially in the public interest under paragraph (1), the procuring entity shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the procuring entity to make a proper evaluation of the proponent's qualifications and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the procuring entity, and for this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

(3) In considering an unsolicited proposal, the procuring entity shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. The procuring entity shall not make use of information provided by or on behalf of the proponent in connexion with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the procuring entity shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

### 3. *Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights*

(1) Except in the circumstances set forth in section D 1, the procuring entity shall, if it decides to implement the project, initiate a procurement proceeding in accordance with sections B and C if the procuring entity considers that—

(a) the envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and

(b) the proposed concept or technology is not truly unique or new.

(2) The proponent shall be invited to participate in the procurement proceedings initiated by the procuring entity pursuant to paragraph (1) and may be given an incentive or a similar benefit in a manner described by the procuring entity in the request for proposals in consideration for the development and submission of the proposal.

4. *Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights*

(1) If the procuring entity determines that the conditions of paragraph 3 (1) are not met, it shall not be required to carry out a procurement procedure pursuant to sections B and C. However, the procuring entity may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs (2) to (4).

(2) Where the procuring entity intends to obtain elements of comparison for the unsolicited proposal, the procuring entity shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within fourteen days.

(3) If no proposals in response to an invitation issued pursuant to paragraph (2) are received within fourteen days, the procuring entity may engage in negotiations with the original proponent.

(4) If the procuring entity receives proposals in response to an invitation issued pursuant to paragraph (2), the procuring entity shall invite the proponents to negotiations in accordance with the provisions set forth in section D 2. In the event that the procuring entity receives a sufficiently large number of proposals, which appear *prima facie* to meet its infrastructure needs, the procuring entity shall request the submission of proposals pursuant to section C, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with paragraph 3 (2).

#### F. MISCELLANEOUS PROVISIONS

##### 1. *Confidentiality*

The procuring entity shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussions, communications and negotiations between the procuring entity and a bidder pursuant to sections C 1 (3) and 6, D 1 and 2, and E 4 (3) and (4) shall be confidential in accordance with section 18 (5) of the Act. Unless required by law or by a court order or permitted by the request for proposals, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

##### 2. *Notice of contract award*

The procuring entity shall cause a notice of the contract award to be published in accordance with section 26 of the Act.

#### SCHEDULE D

(reg. 196)

#### REVIEW PROCEDURES

##### 1. *Required contents of application for review*

(1) An application for review under Part VI of the Act shall be in writing and signed by the applicant or its representative and shall—

(a) include the name, address, and telephone and facsimile numbers of the applicant;

(b) identify the procuring entity and the solicitation or contract number;

(c) set forth a detailed statement of the legal and factual grounds of the application for review including copies of relevant documents;

(d) set forth all information establishing that the applicant is, for the purpose of filing an application for review, an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or by the failure to award a contract;

(e) set forth all information establishing the timeliness of the application for review; and

(f) specifically request a ruling and state the form of relief requested;

(2) An application for review under Part VI of the Act may in addition—

(a) request special measures for handling proprietary commercial or other confidential information;

(b) request specific documents, explaining the relevance of the documents to the grounds underlying the application for review; and

(c) request a hearing, explaining the reasons that a hearing is needed to resolve the application for review

(3) In the event that the application for review is filed in the first instance with the Director of Public Procurement, the applicant shall furnish a complete copy of the application for review, including all attachments, to the procuring entity not later than one day after the application for review is filed.

(4) If the applicant believes that the application for review contains information which should be withheld from the public, a statement advising of this fact must be on the front page of the submission, and wherever the information appears, and the applicant shall file a redacted copy of the application for review which omits the information with the procuring entity within one day after the filing of its application for review.

## 2. *Time periods and deciding applications for review*

(1) An application for review based upon alleged improprieties in a solicitation which are apparent prior to bid opening shall be filed prior to bid opening.

(2) Applications for review other than those covered by paragraph (1) shall be filed within ten days after the basis of application for review is known or should have been known, whichever is earlier.

(3) If a timely application for review was previously filed, any subsequent application for review filed within seven days of actual or constructive knowledge of initial adverse action by the head of the procuring entity shall be considered.

(4) The head of the procuring entity shall render a decision within fourteen days of the submission of the application for review.

## 3. *Review by the standing Review Committee*

An application for review may be submitted to the Director of Public Procurement, for disposition in by an *ad hoc* Review Committee constituted from among the members of the standing Review Committee in accordance with section 38 (4) and (5) of the Act.

## 4. *Notice of application for review*

(1) The procuring entity shall immediately give notice of the application for review to all bidders with the nature of the allegations set forth in the application for review.

(2) In the event of the filing with the Director of Public Procurement of an application for review by an *ad hoc* Review Committee constituted from among the members of the

standing Review Committee, that office shall notify the procuring entity by telephone within one day after the filing of an application and, unless the application for review is dismissed, shall promptly send a written confirmation to the procuring entity and an acknowledgement to the applicant.

#### 5. *Dismissal of application for review*

An application for review may be dismissed for—

(a) failure to comply with any of the requirements set out in this Schedule, except for the provisions of paragraph 1 (2) and (3), and paragraph 2 where the procuring entity has actual knowledge of the basis of the application for review, or the procuring entity is not prejudiced by the protester's non-compliance.

(b) setting forth only allegations that do not state a valid basis for an application for review, or that do not set forth a detailed legal and factual statement,

(c) having been filed in an untimely manner;

(d) not being properly submitted before the procuring entity or an *ad hoc* Review Committee;

(e) concerning contract administration rather than contract award; and

(f) challenging an affirmative determination of qualifications.

#### 6. *Comments by procuring entity on application for review by the standing Review Committee*

(1) When an application is filed with the Director of Public Procurement for review by the standing Review Committee, the procuring entity, in consultation with the Internal Procurement Committee, shall provide comments on the application within seven days after the telephone notice of the filing of the application for review with the Director of Public Procurement. The comments of the procuring entity shall include a statement of the relevant facts, including a best estimate of the contract value, an assessment of the allegations in the application for review memorandum of law, and a list of all documents relevant to the procurement proceedings.

(2) The procuring entity, if it feels that there are grounds thereof, may file a request for dismissal before filing a report required under paragraph (1).

(3) Subject to special measures issued in the application for review, the procuring entity shall simultaneously furnish a copy of its comments on the application for review to the applicant and any intervenors within one day of the submission of the comments to the *ad hoc* Review Committee.

(4) The applicant shall be given an opportunity to comment on the comments of the procuring organization on the application for review by the *ad hoc* Review Committee.

(5) The applicant for review may submit to the *ad hoc* Review Committee comments on the procuring entity's comments on the application for review within two days after receipt by the applicant of the procuring entity's comments, with a copy provided to the procuring entity and other participating parties.

#### 7. *Disclosure by procuring entity*

(1) The procuring entity shall promptly make available to the *ad hoc* Review Committee any information and documentation that the *ad hoc* Review Committee may request, including but limited to—

- (a) the bid submitted by the applicant;
- (b) the bid of the bidder that is being considered for award, or whose bid or proposal is being reviewed;
- (c) all qualification assessment and bid evaluation documents;
- (d) the solicitation, including the specifications;
- (e) the abstract of bids or offers;
- (f) requests for clarification of the bidding documents and responses thereto; and
- (g) any other relevant documents.

(2) In appropriate cases, the procuring entity may request that the applicant produce relevant documents, or portions of documents, that are not in the procuring entity's possession.

(3) Upon receipt of the procuring entity's comments, the applicant may request the procuring entity to provide documents required by the applicant effectively to prosecute its application for review.

(4) Where, under a special measure to protect confidential information pursuant to paragraph 1 (2) (a), or pursuant to the obligation of the procuring entity to protect the confidential information of competing bidders, documents are withheld from the applicant in accordance with these Regulations, the procuring entity shall provide documents adequate to inform the applicant of the basis of the procuring entity's position.

(5) The procuring entity shall respond promptly to a request pursuant to paragraph (2) and shall provide a list of the documents that the procuring entity has released to the applicant, and of the documents that the procuring organization intends to withhold from the applicant and the reasons for the proposed withholding and a copy of that list shall be provided promptly to the applicant; any objection to the scope of the procuring entity's proposed disclosure or non-disclosure of documents must be filed within two days of receipt of the list.

(6) Upon the request of the applicant, the *ad hoc* Review Committee shall decide whether the procuring entity must provide any withheld documents, or portions of documents, and whether this should be done under a special measure to protect confidentiality.

(7) The *ad hoc* Review Committee may request or permit the submission of additional statements by the parties and by other parties not participating in the application for review as may be necessary for the fair resolution of the application for review.

#### 8. *Expeditious delivery of communications*

All communications related to the application for review communications shall be sent by means reasonably calculated to effect expeditious delivery.



### 9. *Special measures for confidentiality*

(1) At the request of a party or on its own initiative, the *ad hoc* Review Committee may apply special measures controlling the treatment of proprietary, confidential, or other information the release of which could result in a competitive advantage to one or more firms. It is the responsibility of applicant's legal practitioner to request that a special measure be applied and to apply in a timely fashion for access to information in a controlled fashion under the special measures.

(2) If no special measures have been applied, the procuring entity may withhold from the parties those portions of its report which would ordinarily be subject to special measures. The *ad hoc* Review Committee shall review in camera all information not released to the parties.

(3) Any violation of the terms of a special measure may result in the imposition of such sanctions as the *ad hoc* Review Committee deems appropriate, including referral to appropriate professional disciplinary bodies.

### 10. *Hearings*

(1) At the request of a party or on its own initiative, the *ad hoc* Review Committee may conduct a hearing in connexion with an application for review.

(2) Hearings generally will be conducted as soon as practicable after receipt by the parties of the procuring organization comments and relevant documents.

(3) All parties participating in the application for review shall be invited to attend the hearing.

(4) Hearings shall normally be recorded or transcribed. If a recording or transcript is made, any party may obtain copies at its own expense.

### 11. *Remedies*

In determining the appropriate remedies pursuant to section 38 (8) of the Act, the *ad hoc* Review Committee shall consider all circumstances surrounding the procurement or proposed procurement, including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the remedies on the procuring entity's mission.

### 12. *Notice to the Director of Public Procurement of action taken*

The procuring entity shall promptly notify the Director of Public Procurement of the action taken by the procuring organization in response to the decision of the *ad hoc* Review Committee.

### 13. *Distribution of decisions*

(1) Unless it contains information subject to special measures, a copy of a decision by the *ad hoc* Review Committee shall be provided to the applicant, any intervenors, and the head and to the senior procurement officer of the procuring entity.

(2) A copy of a decision containing information subject to special measures shall be provided only to the procuring entity and to individuals granted access to the information pursuant to the special measures.

(3) A public version of the decision omitting the information subject to special measures shall be prepared wherever possible.

(4) Decisions shall be made available from the Director of Public Procurement.

Made this 7th day of September, 2004.

DR. BINGU WA MUTHARIKA  
*President of Malawi and Minister  
responsible for Public Procurement*

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