

**No. 8** \_\_\_\_\_ **Public Procurement** \_\_\_\_\_ **1****(Published 20<sup>th</sup> June, 2003)****Act****No. 8 of 2003**

I assent

BAKILI MULUZI  
PRESIDENT13<sup>th</sup> June, 2003.**ARRANGEMENT OF SECTIONS****SECTION****PART I-PRELIMINARY**

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**An Act to provide for the principles and procedures to be applied in, and to regulate, the public procurement of goods, works and services; to provide for the establishment of the office of Director of Public Procurement as the main authority responsible for the monitoring and oversight of public procurement activities, and for the development of the related regulatory and legal framework and professional capacity of public procurement; and to make provision for matters connected therewith or incidental thereto**

ENACTED by the Parliament of Malawi as follows –

PART I – PRELIMINARY

1. This Act may be cited as the Public Procurement Act, 2003, and shall come into operation on such date as the Minister may appoint by notice published in the *Gazette*.

2. In this Act, unless the context otherwise requires –

“bidder” means, any participant or potential participant in procurement proceedings;

“bidding documents” means the tender solicitation documents or any other documents for solicitation of offers, proposals or quotations;

“cadre of procurement professionals” means the body of procurement professionals with a defined career path and skills requirements responsible for conducting public procurement;

“corrupt practice” means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement process or in contract execution;

“Director” means the Director of Public Procurement appointed under section 6;

“fraudulent practice” means a misrepresentation of facts in order to influence a procurement process or the execution of a contract, and includes collusive practices among bidders, whether prior to or after bid submission, designed to establish bid prices at artificial, non-competitive levels and to deprive the procuring entity of the benefits of free and open competition;

“goods” means objects of every kind and description, including raw materials, products and equipment, and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed the value of the goods themselves;

“procurement” means the acquisition by any means of goods, works or services;

“procurement contract” means a contract between the procuring entity and a supplier resulting from procurement “proceedings”;

“procuring entity” means any Ministry, department, agency or organ, of the Government or statutory body or other unit, or any subdivision thereof, engaging in procurement;

“procurement professionals” means a member of the cadre of procurement professionals;

“Public Appointments Committee” means the Public Appointments Committee of the National Assembly established under section 56(7) of the Constitution;

“public funds” means any monetary resources appropriated to procuring entities through budgetary processes, aid grants and credits put at the disposal of procuring entities by foreign donors, or revenues of procuring entities;

“services” means any object of procurement other than goods or works;

“supplier” means a physical or judicial person that provides supply of goods, contracting of works, or consultants or other services;

“works” means all work associated with the construction, rehabilitation, demolition, maintenance or renovation of a building or structure, including site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigation and similar services provided pursuant to a procurement contract, if the value of those services does not exceed the value of the construction itself.

3.- (1) This Act applies to all procurement carried out by procuring entities using public funds and, subject to sections 27(5) and 30(2), includes national defence and national security-related procurement;

- (2) This Act shall not apply to –
- (a) employment contracts with public officers; and
  - (b) subject to approval by the Director, the purchase or rental of real property.

(3) To the extent that this Act conflicts with procurement rules of a donor or funding agency, the application of which is mandatory pursuant to an obligation entered into by the Government, the requirements of those rules shall prevail; but in all other respects, the procurement shall be governed by the Act.

(4) It is not permissible to artificially divide procurement with the intention of avoiding any monetary threshold that may be prescribed in the Act or in regulations.

PART II – ESTABLISHMENT OF THE OFFICE OF DIRECTOR OF  
PUBLIC PROCUREMENT

4.- (1) There is hereby established the office of Director of Public Procurement (in this Act otherwise referred to as the “Director”) whose office shall be a public office, and who shall be responsible for the administration of the Act.

5.- (1) The Director shall be responsible for the regulation and monitoring of public procurement in Malawi, and shall be accountable to and operate under the general supervision of the President.

(2) Without prejudice to the generality of subsection (1), the functions of the Director shall be-

(a) to assist in developing and enhancing the efficiency and effectiveness of public procurement operations;

(b) to ensure the availability and the accessibility to public officials and the general public of this Act and regulations made hereunder;

(c) to develop, in consultation with concerned professional and official entities, for issuance by the relevant authorities for use throughout Malawi, standardized and unified procurement regulations, instructions, and bidding documents, which shall be binding on all Government Ministries, departments and parastatal organizations;

(d) to promote the development of a professional procurement workforce, including by organizing and conducting training programmes, and developing government-wide policies and programmes aimed at establishing procurement-related positions, career paths and performance incentives;

(e) to collect data on public procurement and monitor the performance of Government Ministries, departments and parastatal organizations, and persons conducting procurement proceedings so as to ascertain efficiency and compliance with applicable legislation, regulations and instructions;

(f) to collect data on the performance of procurement contracts in Malawi by suppliers, and to maintain and circulate lists of debarred bidders and suppliers;

(g) to provide, periodically, a quantitative and qualitative assessment of procurement activities in Malawi to the Minister, who shall lay the report before the National Assembly;

(h) to refer violations of this Act and the Regulations relating to public procurement to the relevant budgetary and law enforcement authorities;

(i) to propose improvements in public procurement procedures;

(j) to provide administrative review of bid protests in accordance with section 38;

(k) to carry out economic studies on procurement, comparisons, and future projections, so as to provide advice to the Government in respect of the mid-term policy it may formulate in public procurement matters; and

(l) to establish a data and information base concerning procurement terminology and legislation, and to set policy for, and promote the application of, modern information and communications technology to public procurement.

**6.-(1)** The Director shall be appointed by the President, on such terms and conditions as the President shall determine.

(2) The appointment and terms and conditions of service of the Director shall be subject to the approval of the Public Appointments Committee.

(3) The Director shall, subject to subsection(4), hold office for a period of four years, and shall be eligible for re-appointment for one additional term of four years.

(4) The President may, subject to the approval of the Public Appointments Committee, terminate the appointment of the Director for -

- (a) misconduct or misbehaviour; and
- (b) inability, incapacity or incompetence to perform the duties of his office.

(5) The Director shall devote full time to the duties of the office and shall not hold any office of trust or profit, other than that of Director or engage in any occupation for reward outside the office of Director.

(6) There shall be a Deputy Director of Public Procurement who shall-

- (a) be appointed by the President on such terms and conditions as the President shall determine; and
- (b) perform such functions and duties as may be assigned to him by the Director, from time to time

(7) The appointment and terms and conditions of service of the Deputy Director shall be subject to approval by the Public Appointments Committee.

(8) The Deputy Director shall -

- (a) hold office for a period of four years, and shall be eligible for re-appointment for one additional term of four years; and
- (b) be eligible to be appointed Director.

(9) Subsections (4) and (5) apply *mutates-mutandis* to the Deputy Director.

7. There shall be appointed in the public service, on terms and conditions approved by the President, other officers and staff subordinate to the Director as may be required for the proper performance of the functions of the Director, but the appointment of other officers and staff under this section shall not require confirmation of the Public Appointments Committee.

### PART III – INTERNAL PROCUREMENT COMMITTEES AND SPECIALIZED PROCUREMENT UNITS

8. – (1) There shall be established in all Ministries, departments and parastatal organizations, and other entities and authorities of public administration in Malawi, Internal Procurement Committees.

(2) Procuring entities are responsible, and Controlling Officers and other officials concerned are accountable, for procurement in accordance with this Act and any Regulations and other applicable laws, regulations, and instructions applicable in Malawi.

.....(3) The functions of the Internal Procurement Committees shall include-

- (a) ascertaining the availability of funds to pay for each procurement;
- (b) the opening of bids;
- (c) the examination, evaluation and comparison of bids, and the selection of the successful bidder; and
- (d) such other functions as may be prescribed for the Committees by the Regulations.

9. – (1) Internal Procurement Committees shall consist of the following personnel who shall be well informed concerning public procurement, trained in procurement, and whose professional qualifications meet the requirements that may be established by the head of the procuring entity, in accordance with guidelines to be issued by the Director-

the Controlling Officer, or where there is no designated Controlling Officer, the head of the procuring entity or his or her appointee, who shall chair the Internal Procurement Committee;

- (a) at least a procurement professional, an accountant or other budget professional, as well as an engineer or technician familiar with the substance of the procurement; and
- (b) in the case of procurement exceeding such threshold as may be prescribed by the Director for goods, works and consultancy services, up to three external members nominated by the Director, who shall be-
  - (i) a procurement professional;
  - (ii) a technical expert and professional in the relevant field; and
  - (iii) a neutral member from agencies such as the National Audit Office, Accountant General or Ministry of Finance.

(2) The Chairman of the Internal Procurement Committee in a Ministry, department, parastatal organization or other type of procuring entity subject to this Act, shall accept nominations of external members the Director made pursuant to subsection (1) (c), and such external members shall be in addition to the normal internal membership of the Internal Procurement Committee.

**10.** Heads of procurement agencies and heads of other public departments and organizations may establish specialized procurement units or, in the case of procurement entities with low levels of procurement, shared specialized procurement units, and assign to such units authority to conduct procurement activities in accordance with this Act and the Regulations.

**11.** The specialized procurement units established pursuant to section 10 shall be staffed with personnel trained in public procurement, and shall include at least two specialists whose professional qualifications have been certified by the Director to meet the requirements that shall have been issued by the Director.

**12.** The Director shall develop and recommend to the Minister a career development and management programme, and a system for selection, appointment and termination of appointment for the cadre of procurement professionals.

#### PAR IV – GENERAL PROCUREMENT PROVISIONS

**13. – (1)** The principles and rules in this Part apply to the ascertainment by procuring entities of the qualifications of bidders at any stage of the procurement proceedings, including pre-qualification proceedings if they take place, or at any other stage.

(2) In order to enter into a procurement contract, a bidder must qualify by meeting the criteria the procuring entity considers appropriate.



- (3) The criteria referred to in subsection(2) concern-
- (a) only professional and technical qualifications;
  - (b) legal capacity;
  - (c) financial resources and condition;
  - (d) past performance, including history of legal disputes, conviction of a bidder, or of its directors or officers, of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to its qualifications to enter into a procurement contract within a period of three years preceding the commencement of the procurement proceedings;
  - (e) debarment; and
  - (f) payment of taxes.

(4) The Procuring entity is entitled to demand from bidders documentation reflecting their qualification data at any stage of the procurement proceedings.

(5) Any requirement established pursuant to this section shall be set forth in the pre-qualification documents, if any, and in the bidding documents, and shall apply equally to all bidders without discrimination and only the criteria referred to in subsection (2) may be applied.

(6) In the case of procurement of a particularly high value or complexity, the procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to the submission of tenders, proposals or offers, bidders that are qualified.

(7) The procuring entity shall provide pre-qualification documents to all bidders responding to the invitation to pre-qualify, and the pre-qualification documents shall provide bidders with all the information required to prepare and submit applications for pre-qualification.

**14.** In order to be eligible to be awarded a procurement contract, a bidder must be registered, depending upon the nature of the contract, with the Registrar of Companies, or with the National Construction Industry Council of Malawi, or such other entity as may be prescribed by regulations, but 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.

**15.** In the preparation of bidding and pre-qualification documents, any specifications, plans, drawings and designs goods, setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking, labeling,

or conformity certification, symbols and terminology, or description of services, and any contract terms, shall be drawn up in an objective, and performance and function based manner so as to maximize competition and avoid creating obstacles to participation by bidders in the procurement proceedings, while ensuring that applicable national and international standards and the requisite quality levels are met.

**16.** Subject to other provisions of this Act, all documents, notifications, decisions and other communications referred to in this Act and in the Regulations required to be submitted by the procuring entity to a bidder or by a bidder to the procuring entity shall be in writing:

Provided that of other forms of communication may be used if a record of the content of the communications is preserved, and all other requirements set forth in this Act and Regulations are met.

**17.** The Director may devise a strategy for, and to promote, the application of modern information and technology communications technology to public procurement.

**18.** – (1) Public officials involved in requisitioning, planning, preparing, and conducting procurement proceedings, and administering the implementation of procurement contracts, shall-

- (a) discharge their duties impartially so as to assure fair competitive access to public procurement by bidders;
- (b) always act in the public interest, and in accordance with the objectives and procedures set forth in this Act and the Regulations;
- (c) at all times avoid conflicts of interest, and the appearance of impropriety, in carrying out their duties and conducting themselves, and shall not interfere in the work of Internal Procurement Committees; and
- (d) not commit or abet corrupt or fraudulent practices, including the solicitation or acceptance of improper inducements.

(2) Bidders and suppliers shall not engage in or abet-

- (a) corrupt practices, such as the offering of improper inducements;
- (b) fraudulent practices, including misrepresentation of facts in order to influence a procurement process or the execution of a contract;
- (c) collusion among bidders, prior to or after bid submission, designed to establish bid prices at artificial, non-competitive levels and to deprive the procuring entity of the benefits of free and open competition.

(3) Any information concerning the occurrence or attempt of corrupt or fraudulent practices shall be reported immediately to the head of the procuring entity, to the Director and to the relevant law-enforcement authorities.

(4) A Procuring entity shall -

- (a) reject a bid if the bidder offers, gives or agrees to give an inducement referred to in subsection (1) (d), or otherwise attempts to influence procurement decisions;
- (b) promptly notify the rejection to the bidder concerned; and
- (c) inform the Director and the relevant law-enforcement authority.

(5) All public officials shall keep confidential the information that comes into their possession relating to the procurement proceeding and to bids, including bidders' propriety information.

(6) Any person who contravenes subsection (5) shall be guilty of an offence, and shall be liable to a fine of K50,000 and to imprisonment for two years; and shall in addition be liable to disciplinary action.

(7) Every procurement officer and member of an Internal Procurement Committee shall upon the assumption of his or her functions, take an oath in the prescribed form, with specific reference to the obligation to adhere to rules of conduct set forth in this Act, the Regulations, instructions and other applicable requirements, and to execute the duties and tasks properly.

**19.-** (1) If a public official or member of an Internal Procurement Committee, acquires any pecuniary interest, direct or indirect, in any matter to be determined by the Committee he or she shall declare the interest in accordance with the procedures set forth in the Regulations, and shall recuse himself or herself from acting in any way in that matter and shall not take part in the consideration or discussion of, or vote on any question with respect to the matter.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine of K50,000 and to imprisonment for two years.

**20.** The Director may, after reasonable notice to the bidder or supplier, and after providing reasonable opportunity for that bidder or supplier to be heard and consultation with the affected procuring entities, exclude a bidder or supplier from participation in procurement for the misconduct prescribed in this Act and the Regulations, in accordance with procedures set out in the Regulations.

**21.** Procuring entities shall plan procurement with a view to achieving maximum value for public expenditures and the other objectives set forth in this Act, and in accordance with the applicable budgetary procedures.

**22.** – (1) Procuring entities are responsible for the administration of procurement contracts into which they enter, and to that end, procuring entities shall establish procedures for contract administration and provide the necessary material and human resources for their implementation.

(2) Procuring entities may agree to the submission to arbitration of disputes in the performance of procurement contracts.

**23.** A procuring entity may -

- (a) reject all bids at any time prior to the acceptance of a bid, without incurring thereby any liability to the bidders;
- (b) cancel the procurement proceedings in the public interest, without incurring thereby any liability to the bidders;
- (c) terminate a procurement contract for convenience, if it is determined to be in the public interest, and subject to payment for work satisfactorily completed, or services satisfactorily performed prior to the effective date of termination and for reimbursable expenses actually incurred, or for any goods specially manufactured under the procurement contract, and reasonable termination costs, but excluding lost profit.

**24.** A procuring entity shall, upon request of an unsuccessful bidder, communicate to the bidder the grounds for the rejection of its application to pre-qualify, or of its bid.

**25.** The manner of entry into force of procurement contract shall be indicated in the bidding documents.

**26.** A procuring entity shall promptly publish notice of all procurement contract awards when the price of the award exceeds the level set by regulation, and the notice, which shall indicate the contract price and the name and address of the successful bidder, shall be published in the *Gazette*.

**27.** – (1) A procuring entity shall maintain a record and preserve documentation of the procurement proceedings, including originals of bids received.

(2) The documentation referred to in subsection (1) shall be maintained for a period of five years from the date of a decision to cancel or terminate the procurement action, the date of contract award, or the date of contract completion, whichever comes later.

(3) Information to be included in the record referred to in subsection (1) shall, to the extent applicable, include -

- (a) a description of the object of the procurement;
- (b) a list of the participating bidders and their qualifications;
- (c) bid prices;
- (d) a summary of the evaluation of bids;
- (e) summary of any review proceedings and decisions thereon;
- (f) requests for clarification, and responses thereto;
- (g) a statement of grounds for cancellation of procurement proceedings;
- (h) a statement of grounds for choice of a procurement method other than tendering or request for proposals for services;
- (i) a statement of grounds for reduction of bid-preparation periods; and
- (j) information concerning rejection of bids pursuant to sections 18 and 23.

(4) The record referred to in subsection (1) shall, on request, be made available to any person after a bid has been accepted, unless any portion of the record is required to be disclosed at an earlier point in time pursuant to regulation, or by order of a competent court.

(5) The disclosure referred to in subsection (4) may be restricted in the case of national defence or national security related procurement to the extent that such procurement is determined to be of a sensitive nature, in accordance with the schedule of items eligible for such special treatment set forth in the Regulations.

(6) Every record under this section shall be prepared in a manner that avoids disclosure of proprietary commercial information.

**28.** - (1) It is the policy of the Government to provide maximum opportunities for small and medium-sized enterprises to participate as suppliers, contractors, consultants and subcontractors in public procurement.

(2) Heads of procuring entities are responsible for effectively implementing the small and medium-sized enterprise promotion programmes within their activities, including achieving programme goals, and shall ensure that procurement personnel maintain knowledge of small and medium-sized enterprise promotion programme requirements and take all reasonable action to increase participation in procurement by those enterprises.

**29.** - (1) Every Controlling Officer and head of a department or parastatal organization is financially responsible for the general supervision and control of stores and stores accounts in his Ministry or Department or Parastatal organization, and for ensuring that the members of the store-keeping staff perform their duties satisfactorily.

(2) In formulating and updating procedures for supply management, modern information and communications technology shall be applied to the maximum practical extent.

(3) The Minister, on the recommendation of the Director, may promulgate regulations governing -

- (a) the management of supplies during their entire life cycle;
- (b) transfer of excess supplies; and
- (c) the sale, lease or disposal of surplus supplies by public auction, tendering with sealed bids, or other appropriate method owning or disposing agency shall be entitled as of right to purchase any such supplies.

**PART V – METHODS OF PROCUREMENT AND THEIR  
CONDITIONS FOR USE**

**30.** – (1) Public procurement shall be realized by means of open tendering proceedings, subject to the exceptions provided in this section, and outlined in the Schedule.

(2) Subject to the approval of the Director, the application of subsection (1) may be waived in the case of national-defense or national-security-related procurement to the extent that such procurement is determined to be of a sensitive nature, in accordance with the schedule of items eligible for such special treatment set forth in the Regulations, but so however that items such as general stores, informs, stationary, computers, and standard vehicles may not be classified as sensitive items.

(3) Restricted tender may be held in the following cases, namely -

- (a) when the goods, works or services are only available from a limited number of suppliers, all of whom are known to the procuring entity;
- (b) when the time and cost of considering a large number of tenders is disproportionate to the value of the procurement.

(4) A tender may be held in two stages in the following cases, namely -

- (a) when it is **not feasible** at the outset of the procurement proceedings to **define fully the technical or contractual aspects** of the procurement;
- (b) when, because of the complex nature of the goods, works and services to be produced, the procuring entity wishes to consider various technical or contractual solutions, and to **negotiate** with bidders about the relative merits of those variants, **before deciding on the final technical or contractual specifications.**

(5) A tender in which the participation of foreign bidders is solicited (“international tender”) shall involve publication in the international media of the invitation to submit tenders, or to apply for pre-qualification, if such procedures take place in accordance with section 13.

- (6) An international tender shall be held in the following cases -
- (a) when the estimated value of the stated procurement exceeds the amount set by regulation;
  - (b) when the goods, works or services are not available under competitive price and other conditions from more than two suppliers in Malawi; or
  - (c) when a supplier was not identified by a national tendering proceeding.

(7) Request for proposals for services is the method to be used for the procurement of consultants’ services and other types of intellectual services.

(8) The request for quotations method may be used for the procurement of -

- (a) readily available commercially standard goods not specially manufactured to the particular specifications of the procuring entity, when the estimated value of the procurement does not exceed the amount set by regulation;
- (b) small works, when the estimated value of the procurement does not exceed the amount set by regulation;
- (c) routine services, when the estimated value of the procurement does not exceed the amount set by regulation.

(9) Local request-for-quotations proceedings shall be used when the desired goods, construction or services are ordinarily available from more than two sources in Malawi at competitive prices.

(10) Public procurement by means of the single-source procurement method is permitted only in the following circumstances, namely -

- (a) when the estimated value of the procurement does not exceed the amount set in the Regulation;
- (b) when only one supplier has the technical capability or capacity to fulfill the procurement requirement, or only one supplier has the exclusive right to realize manufacture of the goods, carry out the works, or perform the services to be procured;
- (c) when there is an emergency need for the goods, works and services, involving an imminent threat to the physical safety of the population or of damage to property, and engaging in tendering proceedings or other procurement methods would therefore be impractical; or

- (d) when the procuring entity, having procured goods, works and services from a supplier, determines that additional goods, construction or services must be procured from the same source for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology, construction or services, taking into account the effectiveness of entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question.

(11) Use of a method of procurement other than tendering or, in the case of procurement of consultants' services, a method other than request for proposals, is subject to approval by the Director; and the procuring entity shall note in the record of the procurement proceedings the grounds for the choice of the procurement method.

(12) Contracts for privately financed infrastructure projects, and related forms of private sector involvement is providing public services, shall be awarded on a competitive basis, and the procurement regulations and instructions issued pursuant to this Act shall set forth specific procedures to be followed in the application of one or more of the procurement methods set forth in this section to procurement of works and services carried out on the basis of private financing, including forms such as "build-operate-transfer".

#### PART VI – MAIN PRINCIPLES AND PROCEDURES FOR METHODS OF PROCUREMENT

**31.** – (1) An invitation to tender, or an invitation to pre-qualify, shall be published in the local press and in the Gazette and, in the case of international tendering, shall also be published in internationally recognized papers in the English language, and in other media of wide international circulation, including the internet.

(2) In addition to the publication referred to in subsection (1), the invitation to tender, or to apply for pre-qualification, shall be displayed in the head office of the procuring entity in a publicly accessible place

(3) Bidding documents -

- (a) shall be provided to all bidders responding to the invitation to tender or, in the event of pre-qualification proceedings, to all bidders that have been pre-qualified;
- (b) provide bidders with the information that they require in order to submit tenders that are responsive to the needs of the procuring entity; and
- (c) include the terms of the contract.

(4) If a fee is charged for the bidding documents, the fee may only reflect the cost of printing and distributing the documents.



(5) all bidders shall be provided the same information.

(6) The procuring entity shall respond promptly to any request by a bidder for clarification of the bidding documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders, and responses to such requests for clarification shall be circulated to all participating bidders.

(7) A tender shall be submitted in writing, signed and in a sealed envelope.

(8) The bidding documents may provide for submission of tenders electronically:

Provided that measures are in place to protect the confidentiality of tenders, and to assure their attribution and integrity.

(9) A procuring entity shall, upon request, provide to a bidder a receipt showing the date and time when its tender was received.

(10) The deadline for submission of tenders shall be set taking into account the nature of the procurement and the time required for the preparation of tenders.

(11) Tenders shall be opened at the time and place indicated in the bidding documents, and the time of opening of the tenders shall coincide with the deadline for submission of tenders.

(12) Bidders or their representatives may attend the opening of tenders, at which the names and addresses of the bidders submitting tenders, and the tender prices, shall be read out and recorded.

(13) Tenders shall be evaluated and compared only in accordance with the criteria, and their relative weight, as set forth in the bidding documents.

(14) Tenders containing non-material deviations shall be evaluated, with the deviations being quantified in the manner indicated in the bidding documents.

(15) No negotiations whatsoever may be held with bidders as to the substance or prices of their tenders.

(16) The procuring entity may seek only clarifications of tenders, and may not solicit or accept changes in the substance or prices of tenders.

(17) In the evaluation of tenders, a procuring entity may apply a margin of price preference in favour of domestic bidders in accordance with the Regulations:

Provided that the applicant of the margin of price preference in favour of domestic bidders has been disclosed in the bidding documents.

(18) The successful tender shall be the tender with the lowest price, subject to any margin of preference provided in the bidding documents; alternatively, if so stipulated in the bidding documents, the successful tender shall be the lowest evaluated tender ascertained on the basis of price, subject to any margin of preference, and non-price criteria specified in the solicitation documents.

(19) Non-price criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.

(20) Upon the entry into force of the procurement contract and, if so required, the provision by the successful bidder of a security for the performance of the contract, notice of the procurement contract shall be given to the other bidders, specifying the name and address of the bidder that has entered into the contract and the contract price.

**32.** – (1) When restricted tendering is employed on the grounds referred to in section 30 (3) (a), all suppliers capable of supplying the goods, works or services shall be solicited.

(2) When restricted tendering is employed on the grounds referred to in section 30 (3) (b), the procuring entity shall solicit tenders from a minimum number of three suppliers.

(3) The procedures for tendering proceedings set forth in section 31 and in the Regulations apply to restricted tendering proceedings, except to the extent they are modified by this section.

**33.** – (1) In the case of two-stage tendering proceedings, the bidding documents shall call upon bidders to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price, and the bidding documents may solicit proposals relating to the technical, quality or other characteristics of the goods, construction or services, as well as to contractual terms and conditions of supply, and where relevant, the professional and technical competence and qualifications of the bidders.

(2) A procuring entity may, in the first stage of the two-stage tendering proceedings, engage in negotiations with any bidder whose tender has not been rejected concerning any aspect of its tender.

(3) In the second stage of the two-stage tendering proceedings, a procuring entity shall invite bidders whose tenders have not been rejected to submit final tenders with respect to a single set of specifications.

(4) In formulating the specifications referred to in subsection (3), a procuring entity may delete or modify any aspect originally set forth in the solicitation documents, and any deletion, modification or addition regarding the technical or quality characteristics of goods, construction or services to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, shall be communicated to all bidders in the invitation to submit final tenders.

(5) A bidder not wishing to submit a final tender in accordance with subsection (4) may withdraw from the tendering proceedings without forfeiting any tender security that the bidder may have been required to provide.

(6) The procedures for tendering proceedings set forth in section 31 and in the Regulations apply to two-stage tendering proceedings, except to the extent they are modified by this section.

**34.** – (1) A procuring entity shall provide the request for proposals for services to a short list of at least three, but not more than six bidders.

(2) In order to establish the short list for purposes of subsection (1) the procuring entity may seek expressions of interest from as wide a geographic area as feasible by publishing a non-binding notice in the Gazette, as well as in a newspaper of wide circulation or in a relevant trade publication or technical or professional journal; and the procuring entity shall give first consideration to those bidders expressing interest that possess the relevant qualifications.

(3) The request for proposals for services under subsection(1) shall provide bidders with the information necessary to enable them to participate in the procurement proceedings and to submit bids that are responsive to the needs of the procuring entity.

(4) The Procuring entity shall set the deadline for submission of proposals for services so as to allow sufficient time for preparation of proposals.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in subsection (7), shall be communicated to all bidders participating in the request-for-proposals proceedings.

(6) The price of a proposal for services shall be considered by the procuring entity only after completion of the technical evaluation.

(7) Any award 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, which may, in accordance with the Regulations, include -

- (a) quality and cost based selection;
- (b) quality based selection; or
- (c) least cost selection.

(8) The successful bidder shall not be permitted to substitute key staff, unless both parties agree that undue delay in the selection process makes such changes unavoidable or that such changes are critical to meet the objectives of the assignment; and the key staff proposed for substitution shall have qualifications equal to or better than the key staff initially proposed.

(9) Any negotiations with a bidder referred to in subsection (7) in the award of a contract shall include, and may only concern, discussions of the terms of reference, the methodology, staffing, procuring entity inputs, and special conditions of the contract; and the negotiations shall not -

- (a) substantially alter the original terms of reference or the terms of the contract so as to affect the quality of the final product, its cost, and the relevance of the initial evaluation; or
- (b) reduce work inputs solely to meet the budget, and the final terms of reference and the agreed methodology shall be incorporated in the "Description of Services", which shall form part of the contract.

**35.** – (1) A procuring entity shall request quotations from at least three bidders.

(2) A request for quotations shall contain a clear statement of the requirements of the procuring entity as to quality, quantity, terms and time of delivery as well as any other special requirements.

(3) Bidders shall be given adequate time to prepare their quotations, and each bidder is permitted one quotation, which may not be altered or negotiated, and shall be submitted in written form, including facsimile or telex or in any other form that leaves a record of the content of the communication and is acceptable to the procuring entity.

(4) The procuring entity shall place a purchase order with the bidder that provided the lowest-priced responsive bid, and the successful bidder shall provide written confirmation of the purchase order.

**36.** – (1) Where a procuring entity engages in single-source procurement on the grounds referred to in section 30 (10) (a) through (d), it shall prepare a written description of its needs and any special requirements as to quality, quantity, terms and time of delivery, and may negotiate with the sole bidder.

(2) Procurement carried out on a single source basis shall be embodied in a written contract or purchase order.

#### PART V - REVIEW

**37.** – (1) Subject to subsection (2), any bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Act or the Regulations, may seek review in accordance with this Part.

(2) The following do not constitute grounds for the review under subsection (1)-

- (a) the choice of a selection procedure in request for proposals for services, in accordance with the Regulations;
- (b) a decision by the procuring entity under section 23 to reject all tenders, proposals, offers or quotations;
- (c) a refusal by the procuring entity to respond to an expression of interest in participating in requests for proposals for services under section 34 (1).

**38.-** (1) An application for a review pursuant to section 37 shall be made prior to the entry into force of a contract, in the first instance, in writing, to the head of the procuring entity.

(2) The head of the procuring entity shall not entertain an application for review unless it was submitted within ten working days of the bidder submitting the application becoming aware of the circumstances giving rise to the application, or of when that bidder should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity shall render a decision on the application within ten days of the submission of the application for review.

(4) Appeals against the decision of the head of procuring agency shall be made to the concerned Minister or, in the case of procurement whose value exceeds the threshold prescribed in the Regulations, to the Director:

Provided that the appeal is submitted within ten working days of the date of the decision of the head of the procuring entity;

(5) An application for review may be made to the Director in the following circumstances -

(a) in the form of an appeal by the complaining bidder of a decision by the head of the procuring entity:

Provided that the appeal is submitted within ten working days of the date of the decision of the head of the procuring entity;

(b) in the event that the head of the procuring entity fails to render a decision within the period specified in subsection (3):

Provided that the application for review is filed within ten working days of the expiry of the time period for the decision by the head of the procuring entity;

(c) in the case of an application for review being submitted in the first instance to the Director, if the procurement contract has already entered into force:

Provided that such an application shall not be entertained unless it is submitted to the Director within ten working days of when the bidder submitting became aware of the circumstances giving rise to the complaint, or of when that bidder should have become aware of those circumstances, whichever is earlier.

(6) For the purposes of hearing applications for review under this section, the Director shall establish a standing review committee (in this Act otherwise referred to as the "Review Committee") which shall consist of members of high integrity with experience in the different fields of procurement and procurement procedures, but with no direct or indirect personal involvement in public procurement functions during the period of their service on the Review Committee, and from the members of the Committee, the Director shall convene three-member *ad hoc* review committees to decide upon applications for review brought to the Director.

(7) The Review Committee established under subsection (6) shall render a decision under this Part within ten working days after receiving the complaint.

(8) Unless the complaint is dismissed, the remedies that may be ordered by the Review Committee may include -

(a) declaring the legal rules or principles that govern the subject-matter of the complaint, and directing the procuring entity to act or to proceed in a lawful manner or to reach a lawful decision;

(b) prohibiting the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

- (c) annulling in whole or in part an unlawful act or decision of the entity, other than any act or decision bringing the procurement contract into force;
- (d) revising an unlawful decision by the procuring entity or substituting its own decision for such a decision, other than any decision bringing the procurement contract into force;
- (e) compelling the procuring entity to pay the successful protestor its costs of preparing the submitting a bid, and prosecuting the application for review.

(9) The timely submission of a complaint in accordance with deadlines set in this section suspends the procurement proceedings for a period of ten days.

(10) When the procurement contract enters into force, the timely submission of a complaint under this section shall suspend performance of the procurement contract for a period of ten days.

(11) The head of the procuring entity or the Director may extend a suspension period provided in subsection (9) in order to preserve the rights of the bidder submitting the application for review, provided that the total period of suspension shall not exceed thirty days.

(12) The suspension provided by this section shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed, and the certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review under this Act, except judicial review.

(13) The High Court shall have jurisdiction over actions pursuant to section 37 and over petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit.

#### PART VI – AUDITING

**39.** Procurement activities shall be subject to regular auditing by the Auditor General to ensure that public funds are expended for their intended purpose, and with a view to maximizing value received by the public purchaser, ensuring that proper and accountable systems are in place and adhered to, and identifying any weaknesses in procurement.

**40.** All public entities, officials, and other participants involved in public procurement shall, in accordance with this Act and any other written law, provide full cooperation and disclosure to the Director, the Auditor General, and other authorities exercising monitoring and oversight over public procurement pursuant to the laws of Malawi.

## PART VII – MISCELLANEOUS PROVISIONS

**41.** – (1) The Director shall as soon as practicable, but not later than three months after the expiry of each financial year, submit to the Minister a report concerning his activities during that financial year.

(2) The report referred to in subsection (1) shall be in such form as the Minister shall approve, and shall include such information as the Minister may direct or as the Director may consider appropriate.

(3) The Minister shall, during the meeting of the National Assembly next following the receipt by him of the report referred to in subsection (1), lay the report before the National Assembly, and the Director shall publish the report for sale to the public.

**42.** No person shall, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omission done in good faith in the performance of duties or functions under this Act.

**43.** The Minister may, on the recommendation of the Director, make regulations for the carrying into effect of the provisions of this Act.