

LEGAL FRAMEWORK

**Edition I
August 2008**

**For Procurement of Public Works,
Goods and Services
by the Government
in Mozambique**



Produced by:



Ministério das Finanças
Direcção Nacional do Património do Estado
Unidade Funcional de Supervisão das Aquisições



Contents

1. *INTRODUCTION*
2. *GLOSSARY OF TERMS*
3. *BACKGROUND TO PROCUREMENT IN MOZAMBIQUE*
 - 3.1 *PROCUREMENT LEGISLATION*
 - 3.2 *OTHER RELEVANT LEGISLATION*
 - 3.2.1 *ANTI-CORRUPTION*
 - 3.2.2 *CONSTRUCTION & PUBLIC WORKS*
4. *GENERAL REQUIREMENTS*
 - 4.1 *IN RESPECT OF THE PUBLIC SECTOR*
 - 4.1.1 *PREPARATION OF TENDER DOCUMENTS*
 - 4.1.2 *SELECTION OF TENDER COMMITTEE*
 - 4.1.3 *PUBLICATION & NOTIFICATION*
 - 4.1.4 *EVALUATION & DECISION-MAKING*
 - 4.1.5 *CONTRACTING*
 - 4.1.6 *RECEIPT OF GOODS, WORKS OR SERVICES*
 - 4.2 *IN RESPECT OF THE PRIVATE SECTOR*
 - 4.2.1 *BIDDING CRITERIA*
5. *TYPES OF PROCUREMENT CONTRACTING*
 - 5.1 *GENERAL REGIME – PUBLIC TENDER*
 - 5.2 *SPECIAL REGIME*
 - 5.3 *EXCEPTIONAL REGIME*
 - 5.3.1 *PRE-QUALIFIED TENDER*
 - 5.3.2 *LIMITED TENDER*
 - 5.3.3 *TWO-STAGE TENDER*
 - 5.3.4 *REVERSE AUCTION*
 - 5.3.5 *DIRECT AWARD*
 - 5.4 *SMALL-SCALE TENDER*
 - 5.5 *CONTRACTING FOR CONSULTANCY SERVICES*
6. *TRANSPARENCY, ETHICS AND THE RIGHT OF APPEAL*

1. INTRODUCTION

This booklet is one of a series aimed at helping investors do business in Mozambique. It is based on the idea that informed investors can more easily follow the law, and the conviction that the rule of law is the best guarantor of property and of orderly and sustained development.

The series has been developed jointly by a number of institutions, including GTZ APSP (Ambiente Propício para o Sector Privado), GTZ PRODER (Programa de Desenvolvimento Rural), Projecto GERENA (Gestão de Recursos Naturais), CFJJ (Centro de Formação Jurídica e Judiciária), SAL & Caldeira Advogados e Consultores Lda, UFSA (Unidade Funcional de Supervisão das Aquisições), and ACIS. By combining the experience of these institutions, we hope to give investors clear, practical advice with a sound basis in law.

This booklet is aimed primarily at those companies interested in selling goods and services to, or undertaking public works on behalf of the government but is also a tool for those from the public sector promoting economic development in Mozambique. However the booklet cannot be all things to all people and with that in mind its main focus is on enabling companies to legally engage in business with the government of Mozambique.

As we developed the booklet at times we disagreed over what was the “proper” procedure. On further investigation we noted that this is because in some instances matters are handled differently in different parts of the country. While the sources of law governing most procedures are standardised at national level, local interpretation can vary. These differences are rarely of major significance but we felt it important, since this is a guide book of sorts, to note these differences. We have therefore taken the procedures as followed in Sofala Province as our baseline and, where we are aware of them, have made note of any differences in the way procedures are handled elsewhere in the country.

A number of additional legal requirements are mentioned in the booklet, such as the requirements for incorporation of a company and payment of taxes. These are complex subjects in their own right and some are the subjects of other booklets in this series. Where relevant we have opted not to give detailed treatment to these questions here but recommend that the reader consults the other titles in this series.

In this, the English language version of the booklet we have been faced with the choice of using terms in English or in Portuguese. We have opted to introduce both terms together and then to use the Portuguese term. While this may at first seem inconvenient to those who are not familiar with Portuguese in the longer run we believe it will help readers to become familiar with the basic terminology for procurement in Mozambique. A glossary of the terms used in Portuguese is included.

Much of the legislation cited in this booklet is available in both Portuguese and English. You may download it from ACIS' web site, www.acisofala.com and from the UFSA web site, www.concursospublicos.gov.mz.

While we have tried our best to be accurate, we may have made some mistakes, and we certainly made some omissions. Also, law and public administration are dynamic subjects,

and it is very likely that in the near future, some law or regulation described herein will be changed. We hope to correct the mistakes and supply the omissions in a next edition, so please do tell us of any that you find. In the meantime, the detailed nature of the subject matter and ordinary prudence both compel us to disclaim liability for those errors or omissions. In cases of doubt, readers would do well to consult legal counsel.

We hope that you find this booklet and the others in the series useful. Mozambique is a wonderful country and, as an entrepreneur creating wealth and employment, you have an important role to play in building it. Our role is to help you do yours. Força!

The copyright for this booklet belongs jointly to GTZ and ACIS. If you quote from the booklet, please do so with attribution. All rights are reserved.

A note about footnotes: This booklet is not designed for lawyers, and while we hope that it will also be of use to them we have taken the view that footnotes, where included should be easily accessible to the average reader who does not have legal training. Therefore we have provided the formal citation of pieces of legislation in the text where they first occur. Subsequent references use the "name" of the legislation, for example the Procurement Regulation etc.

2. GLOSSARY OF TERMS

Please find below a list of some of the terms you will encounter in this manual. Those used most frequently in public procurement are found in Article 3 of the Procurement Regulation. Defined terms are set forth in bold typeface.

Alvará	Company trading or operating license.
Assinatura Reconhecida	Signature on a document compared to that in an identity document and stamped as corresponding thereto, by the Notary .
Balcão Único	One Stop Shop. These entities have been created in provincial capitals. So far they receive licensing applications for commercial and industrial licenses and for import and export permits though under new regulations their role is to be expanded to cover other procedures in the incorporation and registration process including possibly receiving documents pertaining to immigration.
Boletim da Republica	The official gazette of the Government of Mozambique, in which laws and regulations, as well as companies' articles of association, must be published.
Certidão de Quitação	Certificate of no impediment issued by the Ministry of Finance or its local representative, indicating that the certified individual or organisation does not have any fiscal debt
Certidão de Registo Comercial	Certificate of commercial registration of a company, sometimes called the certidão comercial.
Cópia autenticada	Copy of a document compared to the original and stamped as corresponding thereto by the Notary .
Estatutos	The articles of association of a company, supplying the rules by which corporate life and the relationship between the quotaholders will be conducted.
Notary	The Provincial Notary Department, responsible for the preparation of public deeds (including for the incorporation of companies), official validation of certain other legal acts, and authentication of signatures and documents, among other duties. In Maputo, there are a variety of notarial offices distributed around the city.
NUIT	Número Único de Identificação Tributária, or tax registration number. The NUIT is sometimes also referred to as the VAT registration number. The NUIT must be clearly printed on all invoices and receipts, as well as being shown on any invoices and receipts submitted into the company accounts. Individuals' personal tax identification numbers are also referred to as NUITs .
Técnico de Contas	Government-registered accounts technician.
Unidade Funcional de Supervisão das Aquisições – UFSA	The government body responsible for oversight of the Procurement Regulation. The Unit for the Supervision of Acquisitions
UGEA – Unidade Gestora Executora das Aquisições	The government body responsible for the day-to-day management of procurement processes. The Unit for the Management and Execution of Acquisitions

3. BACKGROUND TO PROCUREMENT IN MOZAMBIQUE

A number of pieces of legislation provide the legal context and background for the procurement system in Mozambique. These include the 2005 Procurement Regulation, legislation governing state and municipal administration, and anti-corruption legislation. In addition other areas of legislation such as the Commercial, Notarial and Tax Codes also impact on procurement procedures. Certain aspects of this legislation are complex, and while we have endeavoured to simplify where possible, we encourage the reader to seek advice from legal counsel in cases of doubt.

Please also note that the web site www.concursospublicos.gov.mz includes details of tenders currently open, adjudication of completed tenders and details of past tenders undertaken under the new procurement legislation, and is therefore an important site for all those wanting to do business with the government.

3.1 PROCUREMENT LEGISLATION

In 2005 the Mozambican Government introduced new legislation regulating the contracting of public works, supply of goods and provision of services to the State. The regulation (Decree 54/2005 of 13 December, known throughout this book as the Procurement Regulation) was introduced with a view to streamlining procedures which had previously been the subject of various, at times overlapping, pieces of legislation, and to bringing state procurement in line with international norms and standards, and centralising it within the Ministries of Finance and Public Works. The development of the legislation now in force was the subject of much debate involving the Administrative Court, Finance Inspectorate, CTA, Mozambique's cooperation partners and others.

With the introduction of the Procurement Regulation all public works, goods and services procured by the government at all levels (national, provincial, district and municipal as well as companies in which the State holds 100% of the capital, where the financial activities of any of the aforementioned entities are linked to the State budget¹) including procurement using funds from donor governments is to be undertaken in accordance with the requirements provided in the Regulation. The Procurement Regulation also regulates consultancies and concessions². While some exceptions continue to exist in the main it is the Procurement Regulation which guides all business relationships between the private and public sectors.

The government body responsible for oversight of the Procurement Regulation is the Unit for the Supervision of Acquisitions (*Unidade Funcional de Supervisão das Aquisições* – UFSA). Ministerial Diplomas 141 and 142/2006 of 05 September established UFSA and approved the structure of UGEA.

The Procurement Regulation requires that all procurement procedures abide by a number of principles including legality, public interest, transparency, openness, equality,

¹ Decree 54/2005 of 13 December (the Procurement Regulation), Article 2

² Procurement Regulation, Article 1

competitiveness, impartiality and sound financial management³. In addition procurement processes must be decentralised wherever possible as indicated by UFSA, and must strive to optimise the benefits of procurement (for example through collective purchasing)⁴.

Procurement processes must provide clear justification of the type of tender to be used⁵. Types of tender are discussed in depth below in Section 5. In addition tender documents must be clear and concise, including the necessary technical, financial and legal qualifications, but must not be drafted in such a way as to limit competition, the stipulation of specific brands for example being prohibited⁶. Tenders must be well publicised and provide sufficient time for the bidders to prepare their responses⁷. Tenders must allow all potential bidders equal opportunity to bid and must ensure the maximum possible participation from potential bidders⁸. The criteria for awarding the tender must be established in the tender documents before the invitation to tender is made public, and the criteria must ensure the most advantageous bid wins while taking into account the principles of equal opportunity and fair competition⁹. The award criteria must be made available to potential bidders¹⁰. Above all procurement processes must be undertaken in accordance with that provided in law¹¹.

All documents related to a procurement process, including responses to tenders, must be in Portuguese. Tenders may simultaneously be issued in other languages, but Portuguese must also be used¹².

Details of how procurement procedures are carried out and how these relate to those interested in bidding on them are provided below in Sections 4 and 5.

3.2 OTHER RELEVANT LEGISLATION

3.2.1 ANTI-CORRUPTION

Owing to its nature, and often to the values involved, procurement is, unfortunately an area in many countries where corruption may be found. Mozambique has an anti-corruption law (Law 6/2004 of 17 June) and also a regulation which governs certain aspects of that legislation. In addition to the rights of appeal which those who participate in procurement processes have (see Section 6 below) the following provides a brief summary of rights of recourse under the anti-corruption legislation. These do not apply specifically to procurement processes.

- **Indemnity for damages**

³ Procurement Regulation, Article 4, paragraph 1

⁴ Procurement Regulation, Article 4, paragraph 2, clauses a) and b)

⁵ Procurement Regulation, Article 4, paragraph 2, clauses e) and f)

⁶ Procurement Regulation, Article 4, paragraph 2, clauses d) and j)

⁷ Procurement Regulation, Article 4, paragraph 2, clauses h) and i)

⁸ Procurement Regulation, Article 4, paragraph 2, clauses k) and l)

⁹ Procurement Regulation, Article 4, paragraph 2, clause m)

¹⁰ Procurement Regulation, Article 4, paragraph 2, clause n)

¹¹ Procurement Regulation, Article 4, paragraph 2, clause p)

¹² Procurement Regulation, Article 5

Law 6/2004 of 17 June, Article 3 paragraph 2 establishes that indemnity should be made for damages to public or private property or interests resulting from acts or omissions made by government functionaries.

The request for indemnity is made against government managers or functionaries who, for corrupt or illicit financial motives have undertaken acts or made omissions which have materially damaged public or private property or interests. The Constitution of the Republic allows that a claim may be awarded against the State if it is found liable to answer for the manager or functionary in question (Article 58, paragraph 2 of the 2004 Constitution).

Action may be taken by the party feeling himself injured. Action is taken before the Administrative Court (Law 9/2001 of 7th July, the Administrative Litigation Law Article 98 paragraph b) in conjunction with Article 99 and 102). The time taken for a process depends on how busy the court is, and costs are calculated according to a table of costs published in Decree 28/96 of 9th July. Costs may be awarded, though the winning party is also subject to up to 10,000MTn in costs.

- **Presentation of declarations**

All those with decision-making roles in the state apparatus are required to present declarations of assets (which include fixed and non-fixed assets both within and outside the country). These must be submitted before taking office and must be regularly updated. (Law 6/2004 article 4, Decree 22/2005 of 22nd June, article 3). Such declarations are to be regularly reviewed and may be used as evidence in anti-corruption investigations.

- **Recourse against administrative acts**

Administrative acts and decisions must be justified. The legislation requires that any administrative act which; either wholly or partially negates, restricts or otherwise affects rights; increases obligations, responsibilities or sanctions; affects legally protected interests; gives a decision on complaints or appeals; decides in any way against what the applicant has requested; decides contrary to the standard interpretation and application of legal precepts; or implies the revoking, modification or suspension of a previous administrative act must be justified with a clear indication of the motivation for the decision and include clear legal support for the decision taken. Any verbal decision of this nature given must be reduced to writing and presented within 7 days (Law 6/2004 Article 5).

As above complaints on this type of issue are taken before the Administrative Court. The time taken for a process depends on how busy the court is and costs are calculated according to a table of costs published in Decree 28/96 of 9th July. Costs may be awarded, though the winning party is also subject to up to 10,000MTn in costs.

- **Administrative or criminal process**

An administrative or criminal process may be brought by any person. To begin the process a document containing all supporting information (facts of the case, proof) should be

prepared. The document may be signed or may be anonymous. The complaint should be directed to the relevant administrative authority (in practice, the Anti-Corruption Office at national or provincial level, or the department in which the functionary being complained against is employed), the police or the Attorney General's office (Law 6/2004, article 12).

In a criminal process the injured party may have his legal representation designated as an "observer" so that counsel can actively participate in the investigation and prosecution process. A criminal process can be brought alongside an administrative process, the conclusion of the criminal process also serving as a conclusion to the administrative process (Decree Law 35007, article 4, paragraph 5).

The time taken for a criminal process depends on how full the court is. Costs may be awarded, though the cost of taking the process to court is with the complainant until the case is concluded.

- **Petition to the National Assembly**

In accordance with Article 79 of the Constitution of the Republic any citizen can take a petition before the Assembly. This included petitioning on cases of corruption. A petition is cost-free, the only stipulation being that it must be presented in writing. There are a number of requirements about the actual complaint – it must have a sound basis for example. The complaint then passes through a number of stages including discussion by committee, at which time further evidence or information may be gathered. The petition may be upheld, filed for consideration at a later date or turned down.

A number of useful contacts, as well as the anti-corruption legislation and commentary on it are available in the ACIS "Combating Business Participation in Corruption Toolkit" which is available in Portuguese and English on request from acisofala@tdm.co.mz

3.2.2 CONSTRUCTION & PUBLIC WORKS

Construction and the provision of construction services to the government in the form of public works are regulated by a raft of legislation. Given the complexity of the subject matter the discussion of the licensing of construction companies is outside the scope of this publication. However interested parties are referred to a forthcoming publication in the Legal Framework series, "The Legal Framework for Construction in Mozambique".

4. GENERAL REQUIREMENTS

The following requirements are based on the Procurement Regulation and on the Ministry of Finance Procedures Manual for procurement (hereafter the Procedures Manual) produced in 2007. The Procedures Manual includes a large volume of standard documents, many of which are destined for internal use within the public sector. Given that this booklet is aimed at the private sector we have opted to only reproduce in annexes those documents which bidders and other interested parties are likely to see. We have however referenced all documents to the Procedures Manual so that anyone with a deeper interest in the subject can

locate them. The procedures for certain types of tender may differ slightly, particularly in respect of small-scale procurement processes. Where these differ we have noted this fact.

4.1 IN RESPECT OF THE PUBLIC SECTOR

4.1.1 PREPARATION OF TENDER DOCUMENTS

The entity planning to undertake a procurement process must first send a request to the unit responsible for management and execution of acquisitions (Unidade Gestora Executora de Aquisições – UGEA). This request must include¹³:

- Need and purpose of the proposed procurement
- Specifications
- Detailed contract estimate and budget provision
- Any specific requirements that must be made of bidders

In the legislation the relevant authority and the contracting entity are differentiated. In the interests of brevity we have opted here to refer to both as the “applicant” or “applicant entity” and throughout the booklet these terms refer to the individual or institution which will ultimately contract with the private sector individual or company in respect of the works, goods or services to be provided.

Having analysed the information received and checked the budget situation of the applicant the UGEA then requests permission from the applicant to begin the procurement process¹⁴. This request is made by means of a form letter¹⁵. The applicant verifies that the details included in the form letter, which will form the basis for the tender documents are correct and then authorises the UGEA to proceed with the procurement process.

On the basis of this agreement with the applicant entity, the UGEA then opens an administrative process, which is allocated an internal administration number (separate from the tender number), develops the tender document and prepares the tender advertisement¹⁶.

Standard tender documents are provided either in the Procedures Manual or in the following legislation:

- Procurement of goods – Joint Ministry of Finance and Ministry of Industry & Commerce Ministerial Diploma 147/2006 of 30 December 2005;
- Contracting of Public Works – Joint Ministry of Finance and Ministry of Public Works Ministerial Diploma 145/2006 of 30 December 2005;
- Acquisition of school books – Joint Ministry of Finance and Ministry of Education Ministerial Diploma 150/2006 of 30 December 2005;
- Acquisition of medicines – Joint Ministry of Finance and Ministry of Health Ministerial Diploma 149/2006 of 30 December 2005;

¹³ Procedures Manual, Part III, Section 3.4, Chapter 1

¹⁴ Procedures Manual, Part III, Section 3.4, Chapter 1 and Procurement Regulation Article 11

¹⁵ Procedures Manual, Standard Document 1

¹⁶ Procedures Manual, Part III, Section 3.4, Chapter 1

- Contracting of General Services - Joint Ministry of Finance and Ministry of Industry & Commerce, Ministerial Diploma 147/2006 of 30 December 2005;
- Contracting of Consulting Services – Joint Ministerial Diploma 151/2006 of the Ministries of Finance, Public Works, Health and Education, issued on 30 December 2005;
- Procurement of goods (small scale¹⁷) - Joint Ministry of Finance and Ministry of Industry & Commerce Ministerial Diploma 148/2006 of 30 December 2005;
- Procurement of Public Works (small scale¹⁸) - Joint Ministry of Finance and Ministry of Public Works Ministerial Diploma 146/2006 of 30 December 2005.

and must be used for all tenders¹⁹.

Having prepared the tender document and the advertisement UGEA submits these for approval to the applicant and requests permission to launch the tender. The request for approval is based on a standard document²⁰ which requires that the applicant specifically approves the following parts of the tender document: Objective and purpose of the procurement (the public interest to be satisfied by this acquisition); type of tender selected (see Section 5 below); criteria for evaluating bids; and currency in which the bids can be accepted²¹.

In addition the UGEA requests that the applicant selects the jury or Tender Committee which will evaluate the bids received in accordance with the criteria established²². Selection of this committee is dealt with in greater detail in Section 4.1.2 below.

Having received this information from UGEA the applicant entity then approves or corrects the documents and returns them along with the list of members of the tender committee, to UGEA which is then in a position to launch the tender.

4.1.2 SELECTION OF TENDER COMMITTEE

The Tender Committee must be comprised of at least three people, qualified to decide on the matter, one of whom must be linked to the UGEA²³. Those nominated to comprise the Tender Committee are not permitted to delegate this function to anyone else²⁴. The role of the Tender Committee includes receiving the bids and opening them, requesting any clarifications from bidders, proposing to the applicant entity the use of specialists in

¹⁷ A small-scale goods procurement process is undertaken when the value of the work to be undertaken is estimated by the applicant entity to be not more than 131,250Mt, Procurement Regulation Article 3, clause r) in conjunction with Article 88, Paragraph 2, clause b)

¹⁸ A small-scale public works procurement process is undertaken when the value of the work to be undertaken is estimated by the applicant entity to be not more than 262,500Mt, Procurement Regulation Article 3, clause r) in conjunction with Article 88, Paragraph 2, clause a)

¹⁹ Procedures Manual, Part VII and Procurement Regulation, Article 63, Paragraph 3

²⁰ Procedures Manual, Standard Document 3

²¹ Procedures Manual, Part III, Section 3.4, Chapter 1, sub-section 1.5

²² Procedures Manual, Part III, Section 3.4, Chapter 1, sub-section 1.5 and Standard Document 4

²³ Procurement Regulation, Article 14

²⁴ Procurement Regulation, Article 16, paragraph 3

evaluating the bids if necessary, evaluating and classifying the bids and submitting a report with recommendations for the award of the contract to the applicant entity²⁵.

The Tender Committee is required to observe the principles of independence, impartiality and exemption from any potential conflict of interest in respect of the bids received²⁶. The following are considered impediments to an individual participating in a tender committee²⁷:

- Having a personal interest in the contracting of a particular bidder (either being personally involved in the company or being a manager or representative of said company);
- Having a spouse (including by common law), parent or other close relation with a personal interest in the contracting of a particular bidder;
- Personally having, or a spouse or close relation having shares in any of the companies bidding;
- Having any form of link to any of those bidding.

If any member of the Tender Committee believes that any of these impediments might apply they should immediately refer the question to the UGEA²⁸.

The Tender Committee makes its decisions in closed session based on the majority decision of those present and does not have quorum without the majority of its members being present²⁹. The decisions of the Tender Committee must be minuted, and the minutes must be signed by all those who participated in the meeting³⁰. In cases where one or more members of the Tender Committee object to the decision taken this must be included in the minutes along with the basis for the objection³¹.

4.1.3 PUBLICATION & NOTIFICATION

Having received approval of the tender document from the applicant along with the names of the members of the Tender Committee the UGEA attributes a tender number to the tender and proceeds with publication of the tender announcement. This announcement is published in a newspaper or through other means of mass communication³². The announcement must be published or broadcast at least twice³³. The announcement must also be displayed publicly at the headquarters of the applicant entity and of UGEA and a copy sent to the Functional Unit for the Supervision of Acquisitions (Unidade Funcional de Supervisão de Aquisições – UFSA)³⁴.

²⁵ Procurement Regulation, Article 15, paragraph 1

²⁶ Procurement Regulation, Article 15, paragraph 2

²⁷ Procurement Regulation, Article 13, paragraph 1

²⁸ Procurement Regulation, Article 13, paragraph 2

²⁹ Procurement Regulation, Article 16, paragraph 1

³⁰ Procurement Regulation, Article 16, paragraph 2

³¹ Procurement Regulation, Article 16, paragraph 2

³² In the case of small-scale tender processes it is permissible to only broadcast these over the radio – Procedures Manual, Part III, Section 3.5, Chapter 2, sub-section b)

³³ Procedures Manual, Part III, Section 3.4, Chapter 2, Procurement Regulation, Article 64

³⁴ Procurement Regulation, Article 61

At the same time the UGEA must make available the tender documents for those responding to the announcement. These documents may be issued to potential bidders for free or a fee may be charged. However this fee must only be sufficient to cover the cost of document reproduction³⁵. The UGEA is responsible for responding to any queries about the tender received from bidders³⁶. The UGEA must ensure that all bidders receive the responses to queries, including in cases where bidders have received the tender documents from the applicant entity, rather than from UGEA itself³⁷. If it proves necessary to alter the tender document on the basis of the queries received the UGEA issue an addendum to the original tender process³⁸.

The UGEA is also responsible for notifying the Tender Committee of any queries received from bidders as well as notifying the members of the Tender Committee of the date, time and location for the opening of the bids received³⁹. At the same time it must also notify the applicant entity of any issues which have arisen subsequent to the publication of the tender which could cause an impediment for the entity itself or for members of the Tender Committee, or of any issues which could result in the cancellation of the tender⁴⁰.

Having received documents from bidders, and the closing date for bids having been reached the UGEA is responsible for preparing a list of bidders which must include the tender number and description, and the names and addresses of bidders.

4.1.4 EVALUATION & DECISION-MAKING

UGEA receives all bids on behalf of the Tender Committee and must strictly observe the cut-off date and time stipulated for the receipt of tenders⁴¹. The time periods for tenders are counted from the date of second publication of the announcement.

As noted above the closing stage of the publication and notification phase of the tender process is marked by UGEA preparing a list of bids received. This list includes the order in which the bids were received, identity of the bidder and the date and time at which the bid was received. This list is then submitted to the Tender Committee along with the bids themselves⁴². At this point the responsibility for the procurement process shifts from the UGEA to the Tender Committee.

The Tender Committee, on receipt of the bids, opens them in a public meeting to which the representatives of bidders, and other interested parties are invited. A list of participants at this public meeting must be prepared by the Tender Committee⁴³. The Tender Committee

³⁵ Procedures Manual, Part III, Section 3.4, Chapter 2, sub-section e), Procurement Regulation, Article 62

³⁶ Procedures Manual, Part III, Section 3.4, Chapter 2

³⁷ Procurement Regulation, Article 65

³⁸ Procedures Manual, Part III, Section 3.4, Chapter 2 and Standard Documents 6, 7 and 8

³⁹ Procedures Manual, Part III, Section 3.4, Chapter 2, sub-section f)

⁴⁰ Procedures Manual, Part III, Section 3.4, Chapter 2, sub-sections h) and i)

⁴¹ Procedures Manual, Part III, Section 3.4, Chapter 3, In the case of a public tender the minimum time limit for receipt of bids is 30 days and in the case of limited tenders a minimum of 15 days – Procurement Regulation Articles 69 and 90 respectively

⁴² Procedures Manual, Part III, Section 3.4, Chapter 3, and Standard Document 9

⁴³ Procedures Manual, Part III, Section 3.4, Chapter 3, sub-section 3.2, and Standard Document 10

may only proceed with the public meeting if the majority of the committee's members are present. The public meeting then proceeds as follows⁴⁴:

- Identification of the tender process;
- Reading of list of bidders in the order in which the bids were received;
- Opening of the bids;
- Reading of the main details of each bid (including name of bidder, price quoted, existence of provisional guarantee where this is required, declaration of discounts offered);
- Signature by each member of the jury of every page of every bid received;
- Preparation and signing of a minute of the meeting – this must take place before the closure of the meeting.

No further discussion and no classification of the bids may take place in the public meeting. Following the public meeting the Tender Committee meets in closed session to evaluate the bids received. At the same time the Tender Committee passes any original provisional financial guarantees to the finance section of the applicant entity. A copy of the guarantee and of proof that it has been given to the finance section is then attached to the bid⁴⁵.

The evaluation of bids must be based solely on the criteria established in the tender document⁴⁶. The Tender Committee's discussions must be minuted⁴⁷. If necessary the Tender Committee may request technical or expert opinions. This is done by the committee requesting permission to do so from the applicant. The relevant expert then provides a written recommendation and comments for the Tender Committee. However the final decision rests with the Tender Committee⁴⁸.

The Tender Committee may request additional information, or the correction of omissions from the bid submitted, from the bidders. This must be done in writing and the bidder must be given a minimum⁴⁹ of two days to make corrections or to submit clarifications, which must also be provided in writing⁵⁰. The types of omission which can be corrected in this way include not having provided copies of certificates, licenses and so on. Omission only applies to documents which would have existed before the bid was submitted⁵¹. In addition bidders may be asked to correct errors in the calculation of their quote⁵². In this case the Tender Committee must provide their own correction of the calculation and this must be sent to all bidders. The bidder that made the error must then, in writing, state whether or not they accept the new calculation. Prices quoted may only be rectified if the Committee has made mistakes in the correction. If the bidder does not accept the change made by the Tender

⁴⁴ Procedures Manual, Part III, Section 3.4, Chapter 3, sub-section 3.2, and Standard Document 11

⁴⁵ Procedures Manual, Part III, Section 3.4, Chapter 4

⁴⁶ Procurement Regulation, Article 73, paragraph 6

⁴⁷ Procedures Manual, Part III, Section 3.4, Chapter 4, and Standard Document 11

⁴⁸ Procedures Manual, Part III, Section 3.4, Chapter 4

⁴⁹ In the case of small scale tenders a minimum of two days is permitted

⁵⁰ Procedures Manual, Part III, Section 3.4, Chapter 5, and Standard Documents 12 and 13

⁵¹ Procurement Regulation, Article 74

⁵² Procurement Regulation, Article 76, paragraph 2

Committee then their bid is declassified and they forfeit their guarantee in favour of the applicant entity⁵³.

Bids presented with items that have not been quoted on or that do not include a provisional guarantee (where this is required) cannot be rectified and are not considered as part of the evaluation⁵⁴.

Having requested and received any clarifications or adjustments to the bids as detailed above, the Tender Committee proceeds with classification of the bids. Any decision to declassify a bid must be taken with a sound legal basis and this must be documented⁵⁵. The Tender Committee prepares an Evaluation Report which includes details of the tender, the basis for its decisions, and recommendations in respect of the award. This report must be signed by all members of the Tender Committee⁵⁶.

The evaluation report is then passed to the applicant entity for a decision, and a copy is also passed to the UGEA⁵⁷. The general recommendations which guide the preparation of the evaluation report are provided in the Procedures Manual⁵⁸. The UGEA is responsible for supporting the applicant during this time, and if the process has taken longer than originally envisaged, for requesting a time extension in respect of the validity of the bids and the provisional guarantees, from the bidders⁵⁹.

The applicant examines the report provided by the Tender Committee. If there are any errors or findings in the report which prevent a decision being made the applicant may return the documents to the Tender Committee and request correction. If not, then the applicant makes a decision and communicates this to UGEA⁶⁰. The UGEA is then responsible for communicating the decision in writing to all the bidders⁶¹. This decision is also publicly displayed at the headquarters of the applicant entity.

The decision phase being completed the bidders may appeal (see Section 6 below). If there is no appeal within the time allowed for such⁶², or after the appeal process is completed the contract is awarded. In order for this to happen the UGEA communicates the outcome of the tender in writing with each of the bidders⁶³. In addition the outcome is published or broadcast in the media and publicly displayed at the headquarters of the applicant entity⁶⁴. At this stage the UGEA also takes the necessary steps to return the provisional guarantees to those who did not win the tender.

⁵³ Procedures Manual, Part III, Section 3.4, Chapter 5, sub-section b)

⁵⁴ Procedures Manual, Part III, Section 3.4, Chapter 5

⁵⁵ Procedures Manual, Part III, Section 3.4, Chapter 6

⁵⁶ Procedures Manual, Part III, Section 3.4, Chapter 6

⁵⁷ Procedures Manual, Part III, Section 3.4, Chapter 7

⁵⁸ Procedures Manual, Part V, Sections 5.1 and 5.2

⁵⁹ Procedures Manual, Part III, Section 3.4, Chapter 7

⁶⁰ Procedures Manual, Part III, Section 3.4, Chapter 8

⁶¹ Procedures Manual, Part III, Section 3.4, Chapter 8 and Standard Document 16

⁶² The time period provided for lodging a notice of intent to appeal is three days from the date on which the notification of the issue giving rise to the appeal was issued. Procurement Regulation, Article 131

⁶³ Procedures Manual, Standard Document 20

⁶⁴ Procedures Manual, Standard Document 21

4.1.5 CONTRACTING

The notification to bidders and the public in general that the tender has been awarded signals the start of the contracting phase of the tender process. This phase begins with the applicant requesting any additional documents from the bidder. These may include certificates or licenses which have expired during the tender process⁶⁵. The applicant has ten days to provide the relevant updated documents, otherwise the tender is awarded to the second choice bidder. At the same time the applicant verifies with the national suppliers register that there is no impediment to using the selected bidder. The applicant must also provide a written declaration to the effect that their budget has sufficient funds available to pay for the works, goods or services to be contracted⁶⁶.

These procedures having been completed the bidder is then invited to present the definitive financial guarantee (if required) and to sign the contract⁶⁷. The successful bidder then has thirty days to present the definitive guarantee and sign the contract. If this does not happen the second choice bidder is invited to take up the contract and the original first choice bidder loses their provisional guarantee in favour of the applicant entity⁶⁸. If a guarantee is not required then the applicant entity may establish a shorter time period for the signing of the contract, though this may not be less than 10 days⁶⁹.

The contract signed must be the same as the standard contract included in the original tender documents. The bidder's representative must provide documentary proof of having sufficient legal right to sign the contract⁷⁰. All contracts must be in writing⁷¹. They must include at least the following: the name of each of the contracting parties; the purpose of the contract; time periods for undertaking the work or providing the goods subject of the contract; guarantees if required; payment terms; sanctions; total contract value; the form of dispute resolution to be used (which may include arbitration, in Mozambique in Portuguese⁷²); an anti-corruption clause⁷³. The tender documents and the bidder's proposal form an integral part of the contract⁷⁴. Contracts for the supply of goods and services may not have a duration of more than one year, and are renewable once only under the same contract terms⁷⁵. No advanced payments may be made outside of the payment terms agreed in the contract unless the relevant works, goods or services have been provided⁷⁶. No advanced payment may be made without the deposit of the definitive bank guarantee, where this is required⁷⁷.

⁶⁵ Procedures Manual, Part III, Section 3.4, Chapter 11, sub-section a) and Standard Document 22

⁶⁶ Procurement Regulation, Article 40

⁶⁷ Procurement Regulation, Article 41 and Procedures Manual, Part III, Section 3.4, Chapter 11, sub-section c) and Standard Document 23

⁶⁸ Procedures Manual, Part III, Section 3.4, Chapter 11, sub-section c)

⁶⁹ Procedures Manual, Part III, Section 3.4, Chapter 11, sub-section c)

⁷⁰ Procedures Manual, Part III, Section 3.4, Chapter 11, subsection 11.1

⁷¹ Procurement Regulation, Article 42, paragraph 1

⁷² Procurement Regulation, Article 43, paragraph 2

⁷³ Procurement Regulation, Article 43, paragraph 1

⁷⁴ Procurement Regulation, Article 43, paragraph 4

⁷⁵ Procurement Regulation, Article 43, paragraph 5

⁷⁶ Procurement Regulation, Article 43, paragraph 6

⁷⁷ Procurement Regulation, Article 44

Within five days from the date of signing of the contract it must be submitted to the Administrative Court for approval⁷⁸. Neither the legislation nor the Manual include any reference to the procedures followed by the Administrative Court. However the principle of tacit approval is held to apply if the court has not ruled against the contract within a certain time frame.

Contracts may only be altered with justification if⁷⁹: there are new specifications which allow the contract to be fulfilled more effectively; the contract value alters for a justified reason; the original contract terms cannot be fulfilled; the payment terms alter. If a change of more than 25% of the original value of the contract is required this must be approved by the Ministry of Finance⁸⁰.

Contracts are considered concluded when they have been fulfilled, or by mutual agreement or by rescission⁸¹. In the latter two cases the conclusion of the contract must be documented⁸². Unilateral rescission of the contract by the contracting entity may take place if⁸³: the contract has not been complied with; the contracted works, goods or services are deficient in terms of what was agreed; the contract is systematically not complied with; the bidder is bankrupt or dies; the bidder's organisation undergoes changes in shareholding and ownership without the consent of the applicant entity; the contract is passed to another organisation for completion, without agreement; the bidder accumulates fines of up to 20% of the contract value.

Unilateral rescission of the contract by the contracted may take place if⁸⁴: the location for undertaking the work or providing the goods or services is not accessible or essential information is not made available; there is a delay of more than sixty days in making payment; the contract is suspended for more than sixty days by the contracting entity as a result of issues not related to the actions of the contracted party.

Notification of the decision to rescind the contract must be given in writing providing justification for the rescission. The offending party then has thirty days to correct the situation after which, if the problem is not resolved the contract is considered cancelled⁸⁵.

In the case of contracts rescinded by the contracting entity the bidder loses their guarantee and the right to outstanding payments. They may also be required to pay an indemnity⁸⁶. In the case of rescission by the contracted party they may demand the immediate return of their guarantee, payment for work done to date, and payment of costs associated with the conclusion of the contract (such as demobilization in the case of a construction project)⁸⁷.

⁷⁸ Procurement Regulation, Article 42, paragraph 2

⁷⁹ Procurement Regulation, Article 52, paragraph 1

⁸⁰ Procurement Regulation, Article 52, paragraph 3

⁸¹ Procurement Regulation, Article 53, paragraph 1

⁸² Procurement Regulation, Article 53, paragraph 2

⁸³ Procurement Regulation, Article 54, paragraph 1

⁸⁴ Procurement Regulation, Article 54, paragraph 2

⁸⁵ Procurement Regulation, Article 54, paragraphs 3 and 4

⁸⁶ Procurement Regulation, Article 55, paragraph 1

⁸⁷ Procurement Regulation, Article 55, paragraph 2

4.1.6 RECEIPT OF GOODS, WORKS OR SERVICES

Having signed the contract with the successful bidder the applicant entity must either⁸⁸:

- Appoint an independent overseer in the case of public works; or
- Appoint a committee composed of at least three people to oversee the receipt of goods or services⁸⁹.

The contracting of an independent overseer is undertaken in accordance with the requirements for procurement of consulting services (see Section 5.5 below)⁹⁰.

The applicant entity is responsible for ensuring that the works, goods or services received are provided in exact accordance with the terms of the original contract. In the case of public works these are initially received provisionally, based on an inspection by representatives of the contracting entity⁹¹, and the independent overseer, and definitively after the inspection of all work undertaken under the contract at the end of the contract period. This contract period may not be less than one year⁹². In the case of goods or services these are considered to have been received when all the contractual requirements are verified to have been complied with⁹³. In the case of goods or services which require inspection, or which require a certain time period in order to ensure that they are functioning correctly then reception may take place in two phases. The provisional phase is completed after initial supply and inspection of the goods or services and the definitive phase is completed after the time required for verification has elapsed.

If there are any problems with the work, goods or services these must be dealt with as soon as possible. All communication about such problems must be reduced to writing, and the contracted party must be given time to resolve the problems⁹⁴.

4.2 IN RESPECT OF THE PRIVATE SECTOR

Any natural or legal person, either national or foreign, that complies with the eligibility criteria set forth in the Procurement Regulation is eligible to bid on government procurement tenders⁹⁵.

The following (among others) are explicitly excluded from participating (see Article 19 of the Regulation for a complete list of exclusions)⁹⁶:

- Any person convicted of a crime which carries a prison sentence or which calls into question their professional integrity;
- Any natural or legal person prohibited from contracting with the State;

⁸⁸ Procedures Manual, Part III, Section 3.4, Chapter 12

⁸⁹ In the case of small-scale tenders the committee is comprised of two people - Procedures Manual, Part III, Section 3.5, Chapter 12 and Procurement Regulation, Article 50, paragraph 3

⁹⁰ Procurement Regulation, Chapter III

⁹¹ Procurement Regulation, Article 47

⁹² Procurement Regulation, Article 48

⁹³ Procurement Regulation, Article 50

⁹⁴ Procurement Regulation, Articles 45-51

⁹⁵ Procurement Regulation, Article 18

⁹⁶ Procurement Regulation, Article 19

- Any individual employed by, or organisation controlled by an individual employed by the applicant entity (the entity undertaking the procurement) or any other state entity involved in the specific procurement process being bid on;
- The designer of the project (be it a natural or legal person) for which the works, goods or services are being procured;
- Any legal person, either individually or as part of a consortium, in which the designer of the project for which the works, goods or services are being procured, holds more than 5% of the social capital⁹⁷.

Bidders are expected to comply with a number of criteria in order for their bid to be considered. These include legal, financial, technical and fiscal criteria as well as, in certain cases nationality criteria. Some or all of the documents listed below as comprising these criteria may be dispensed with either wholly or in part in the case of small-scale tenders⁹⁸. If this is the case these exemptions will be specifically indicated in the tender documents. For details on that constitutes a small-scale tender see Section 5.4 below.

All bid documents must be submitted in Portuguese⁹⁹.

A note about documents:

Bidders are required to submit a number of documents as proof of their qualifications to bid. Wherever possible, only copies of documents should be submitted. These copies must generally be authenticated by a notary or similar person recognised by the Mozambican Government. In the case of documents where the original is in another language these must be translated into Portuguese by an officially recognised translator. In this case the original document (or an authenticated copy thereof) is presented along with the translation, which is signed and sealed by the translator.

In addition bidders may be required to provide a power of attorney (*procuração*) demonstrating the right of a specific person to contract on their behalf. A *procuração* is usually drawn up for a limited purpose as appropriate to the context. You can have a *procuração* drawn up by a lawyer or by the Notary. The signature however must always be verified by a Notary. It is critically important to understand what powers you are conceding through a *procuração*, and to craft the limits of those powers appropriately.

Individuals who do not live in Mozambique can draw up and sign a *procuração* at a Mozambican Embassy or Consulate. Some embassies and consulates have been known to request notarized copies of the proxy's identity documents, and though there is no basis in law for this, it is often best to be prepared.

Legal persons may also draw up and sign a *procuração* at a Mozambican Embassy or Consulate. It is usually best to make and keep an authenticated copy of the *procuração*, especially in the case of a *procuração* from a legal person, because replacing it if it happens to be misplaced can be a lengthy process.

⁹⁷ The designer of the project may however be contracted to oversee, supervise or manage the project, reporting directly to the applicant entity. Procurement Regulation, Article 19, paragraph 3

⁹⁸ Procurement Regulation, Article 20, paragraph 3

⁹⁹ Procurement Regulation, Article 5

In the case of the submission of any documents, including a bidding document or any correspondence related to a bid or contract, to a government department it is advisable to retain a copy of the documents submitted and to request the individual receiving the document to stamp, date and sign the copy. This copy then serves as proof that the documents were submitted on a given date. The same is true for receipt of documents from the government, in this case it is important to note the date and time that a document was received. As we shall see below certain procedures including appeals and requirements to submit additional information have a specific time period which is counted from the date on which the bidder receives the relevant notification.

4.2.1 BIDDING CRITERIA

i. Legal criteria are as follows¹⁰⁰:

- In the case of natural persons a completed form¹⁰¹ and a authenticated copy¹⁰² of the bidder's identity document;
- In the case of legal persons a completed form¹⁰³ and a authenticated copy¹⁰⁴ of the bidder's commercial registration certificate (for example the *alvará*) and updated company articles of association (*estatutos* which may be provided as issued by the Notary or as published in the *BR*);
- A declaration (known as a "declaration of honour" or *Declaração de Honra*) that the bidder does not suffer any of the impediments listed above which specifically exclude them from participating in the bid.

In addition where relevant the bidder must present¹⁰⁵:

- Documents demonstrating the legal or planned creation of a consortium;
- Any other legal documents required for bidding on procurement for a specific sector.

ii. Financial criteria are as follows¹⁰⁶:

For natural persons:

- Declaration of income (*Declaração Periódica de Rendimentos* issued on a form provided by the Ministry of Finance);
- Annual accounting and tax declaration (issued on a form provided by the Ministry of Finance);
- Declaration that there is no judicial sentence affecting the person's financial status (issued by the court, on written application).

¹⁰⁰ Procurement Regulation, Article 20, paragraph 1

¹⁰¹ The Procedures Manual provides several types of form which may be required to be filled in by the bidder. These are provided at the time that the bidder collects the tender documents.

¹⁰² Copy of a document compared to the original and stamped as corresponding thereto by the Notary

¹⁰³ The Procedures Manual provides several types of form which may be required to be filled in by the bidder. These are provided at the time that the bidder collects the tender documents.

¹⁰⁴ Copy of a document compared to the original and stamped as corresponding thereto by the Notary

¹⁰⁵ Procurement Regulation, Article 20, paragraph 2

¹⁰⁶ Procurement Regulation, Article 21, paragraph 1

For legal persons:

- Declaration of income (*Declaração Periódica de Rendimentos* issued by the entity's accountant or auditor);
- Annual accounting and tax declaration (issued by the entity's accountant or auditor);
- Three years worth of trading accounts prepared in accordance with Mozambique's General Accounting Plan (issued by the entity's accountant or auditor);
- Declaration that the company is not insolvent or in the process of liquidation (issued by the court, on written application).

In addition the tender documents may specifically request¹⁰⁷:

- Proof of invoicing for work similar to that being procured (for example a list of clients);
- Average annual income for the three preceding tax years demonstrating a value equal to or exceeding the minimum value for such income stipulated in the tender documents. The minimum value is limited to between one and three times the estimated value of the works, goods or services being procured;
- Social capital or liquid assets equal to or in excess of the value stipulated in the tender documents. This value may not be set at more than 10% of the estimated value of the works, goods or services being procured (demonstrated by the submission of the entity's *estatutos* for example);
- Confirmation of access to credit of the value stipulated in the tender document (for example a letter from the bank).

The financial qualifications for bidding must be in keeping with the financial responsibilities the bidder would have to assume to complete the contract and be proportionate to the size and nature of the likely bidders¹⁰⁸.

In the case of tenders for the award of concessions, the value of social capital or liquid assets set in the tender documents must take into account the costs which the concessionaire will have to assume during the first three years of operation (as estimated by the conceding entity), including any fees payable in respect of the concession contract¹⁰⁹.

iii. Technical criteria are as follows¹¹⁰:

- Certificate issued by the relevant body demonstrating registration for a professional activity compatible with the objective of the tender (for example *alvará*);
- Declaration made by the bidder that they have sufficient infrastructure and equipment at their disposal to enable them to carry out the contract, including details which would allow the verification of the information provided (using a form available from UFSA);

¹⁰⁷ Procurement Regulation, Article 21, paragraph 2

¹⁰⁸ Procurement Regulation, Article 21, paragraph 3

¹⁰⁹ Procurement Regulation, Article 21, paragraphs 5 and 6

¹¹⁰ Procurement Regulation, Article 22

- Declaration made by the bidder that they have sufficient qualified staff to carry out the contract. This declaration must be accompanied by the CVs of all key staff that will work on the contract (using a form available from UFSA);
- Independent declaration stating that the bidder has experience in undertaking activities of a similar technical specification to those outlined in the tender document (using a form available from UFSA);
- Certificates demonstrating the academic and professional qualifications of those who will be responsible for the execution of the contract;
- Nationally or internationally recognised quality standards certificate attesting to the quality of the goods or services to be provided, and their conformity with national quality standards (in theory these would be provided by INNOQ – the National Quality Standards Institute, however there is currently no legal basis for the issuing of such certificates. On occasion international quality certificates may be requested);
- Operating license (*alvará*)

The tender documents must clearly establish the minimum level of information and documentation required in order for a bidder to be eligible according to the technical criteria¹¹¹. The technical qualifications for bidding must be in keeping with the technical responsibilities the bidder would have to assume to complete the contract and be proportionate to the size and nature of the likely bidders¹¹².

iv. Fiscal criteria

In addition to the foregoing the bidder must demonstrate that both fiscal and social security obligations have been complied with. This is done by submitting¹¹³:

- A certificate of no impediment (*Certidão de Quitação*) issued by the relevant section of the Ministry of Finance (usually the tax office where the bidder pays his regular taxes). In the case of small-scale procurement processes this document may be replaced with proof of having paid withholding tax or other relevant proof of tax compliance depending on the size of the company involved¹¹⁴;
- A valid declaration of no impediment from the Social Security Institute (*INSS*) (for example a *Certidão de Quitação*).

v. Nationality criteria

The tender document may restrict the participation in tenders based on the nationality of bidders and on the basis of preferential procurement of nationally produced goods¹¹⁵. Alternatively, in open tenders the tender evaluation criteria may provide a preferential margin to national bidders or nationally produced goods. The margins used are 10% of the pre-tax contract value for public works and 15% of the pre-tax contract value for nationally produced goods¹¹⁶. These criteria must be specifically mentioned in the tender documents in

¹¹¹ Procurement Regulation, Article 22, paragraph 2

¹¹² Procurement Regulation, Article 22, paragraph 3

¹¹³ Procurement Regulation, Article 23, paragraph 1, clause a)

¹¹⁴ Procurement Regulation, Article 23, paragraph 2

¹¹⁵ Procurement Regulation, Article 24 paragraphs 2 and 5

¹¹⁶ Procurement Regulation, Article 24, paragraph 4

order to apply. If the applicant plans to establish such criteria in a tender process they must first obtain permission from their line ministry and the Ministry of Finance¹¹⁷.

In the case of the nationality criteria tenders up to a value of three times those provided for Limited Tenders (i.e. of a maximum total value of 2.625.000,00MT for small-scale goods procurement processes¹¹⁸ and 5.520.000,00MT for small-scale public works procurement processes¹¹⁹) may be restricted on this basis¹²⁰.

In respect of nationally produced goods these require proof of having incorporated national raw materials or nationally produced consumables for at least 30% of the value of the finished product at the factory door¹²¹.

The nationality criteria are determined as follows¹²²:

- For natural persons – being of Mozambican nationality;
- For legal persons – being legally incorporated and registered in Mozambique and having at least 50% of their social capital held by a natural person with Mozambican nationality or held by a legal person which itself has at least 50% of its social capital held by a natural person with Mozambican nationality.

Foreign bidders are held to be either those that do not fulfil the nationality criteria outlined above, in tenders where this criterion is applied or, on all other tenders, those that are not resident, incorporated or registered in Mozambique¹²³. Foreign bidders are required to fulfil the same general criteria established for national bidders, presenting equivalent documents from their home country in cases where they do not have Mozambican documents. In addition foreign bidders, regardless of whether or not they are legally authorised to operate in Mozambique, are required to provide the following¹²⁴:

- Proof of having a legal representative, or mandate holder domiciled in the country. This representative must specifically have the authority to respond and contract on behalf of the foreign entity (i.e. the power of attorney which the representative holds should explicitly state that the representative has this right);
- Demonstrate compliance with the legal, financial, technical and fiscal criteria outlined above, in their country of origin;
- Demonstrate that they have no impediment to undertaking business either in Mozambique or in their home country.

All of the documents submitted by the foreign bidder must be submitted in Portuguese¹²⁵. Where relevant documents must be translated by an official translator registered as such with

¹¹⁷ Procurement Regulation, Article 24, paragraph 6

¹¹⁸ Procurement Regulation Article 88, paragraph 2, clause b) in conjunction with Article 24, paragraph 2

¹¹⁹ Procurement Regulation Article 88, paragraph 2, clause a) in conjunction with Article 24, paragraph 2

¹²⁰ Procurement Regulation, Article 24, paragraph 2

¹²¹ Procurement Regulation, Article 24, paragraph 5

¹²² Procurement Regulation, Article 24, paragraph 1

¹²³ Procurement Regulation, Article 25

¹²⁴ Procurement Regulation, Article 25, paragraph 2

¹²⁵ Procurement Regulation, Article 25, paragraph 2, clause d)

the Mozambican government, and copies of documents must be authenticated by a notary or official recognised by the Mozambican government.

vi. Consortia and Associations

Bidders are permitted to form consortia and associations. Individual members of a consortium or association may not bid separately or as part of more than one consortium or association on the same tender¹²⁶.

The constitution of an association is regulated by specific legislation governing the creation of associations¹²⁷. The documents submitted as part of the bid and demonstrating the creation of a consortium must include¹²⁸:

- The name and qualifications of each individual member of the consortium, including their proposed role in the bid;
- The identity of the representative of the consortium in respect of the tender, including demonstration that the representative has the right to act on behalf of all members of the consortium;
- A declaration by each of the members of the consortium of their joint acceptance of responsibility for acts undertaken by or in the name of the consortium;
- Proof that the consortium has been constituted or a documented statement to the effect that the consortium will be legally constituted if the tender is won¹²⁹.

Each individual member of a consortium must submit documents demonstrating compliance with the legal, financial, technical and fiscal criteria outlined above. The requirements in respect of income, social capital and liquid assets may be fulfilled as a function of the combined income, social capital and liquid assets of the members of the consortium¹³⁰. The technical qualifications requirement may be met by a combination of the qualifications of the various members of the consortium, and is held to apply to the consortium overall not to each individual member¹³¹. Where provisional financial guarantees are required as part of the bid these may be put up by one member of the consortium or in the form of separate contributions by each of the members of the consortium¹³².

vii. Listing on the Single Register

In addition to the foregoing bidders wanting to participate in government tenders may be registered on the Single Register (Cadastro Único) though in practice inclusion on the Single Register is not yet a prerequisite for bidding on government tenders. However one of the benefits of registration is that in registering the bidder submits all of the documents listed above in respect of the various criteria. In future tenders the registered bidder is not then required to re-submit these documents, but can instead refer to their registration number (in

¹²⁶ Procurement Regulation, Article 26

¹²⁷ Procurement Regulation, Article 27, paragraph 2

¹²⁸ Procurement Regulation, Article 27, paragraph 1

¹²⁹ Procurement Regulation, Article 28, paragraph 1

¹³⁰ Procurement Regulation, Article 28, paragraph 2

¹³¹ Procurement Regulation, Article 28, paragraph 3

¹³² Procurement Regulation, Article 28, paragraph 4

Limited Tenders the bidder can submit their registration application right up until the closing date of the tender)¹³³. On application to join the register the applicant receives a number and a notification that their application has been received. These are sufficient to permit the applicant to tender without submitting all the documents already presented to UFA for the purposes of registration. Having been added to the register the applicant receives a certificate which is valid for one year.

The register is managed by UFSA which is responsible for regularly inviting bidders to register and for automatically updating the register to include successful bidders that are contracted on the basis of tenders¹³⁴. In addition to the Single register, UFSA also maintains a register of bidders that are specifically excluded from bidding on public procurement tenders¹³⁵.

It is the responsibility of bidders to ensure that the details recorded on the Single Register are up to date¹³⁶, and it is the responsibility of UFSA to ensure that the register is freely available to anyone who wants to consult it¹³⁷.

Application for inclusion on the register is carried out by completing a form and submitting the relevant proofs of compliance with the various criteria listed above. Applications may be submitted directly to UFSA in Maputo (in the 33 Storey Building, 7th floor, doors 701 and 702) or at the Provincial Directorate of Finance in each province. Forms and further information on the types of documents required can also be downloaded from www.concursospublicos.gov.mz

5. TYPES OF PROCUREMENT CONTRACTING

The Procurement Regulation provides for a number of different types of tender in different circumstances. These are described below. However, the procedures for each type of tender, and for bidding on them, are, unless otherwise noted below, the same for each type.

5.1 GENERAL REGIME – PUBLIC TENDER

The General Regime of Public Tender is envisaged by the Procurement Regulation and the Procedures Manual as the standard form of conducting a procurement process. Both documents are clear in stating that this is the method that should always be used unless other exceptional circumstances apply¹³⁸.

5.2 SPECIAL REGIME

The General Regime as regulated by the Procurement Regulation, is considered compulsory for all state and municipal institutions and state-owned companies¹³⁹. However in certain

¹³³ Procurement Regulation, Article 57, paragraph 5

¹³⁴ Procurement Regulation, Article 56

¹³⁵ Procurement Regulation, Article 56, paragraph 1, clause b)

¹³⁶ Procurement Regulation, Article 57, paragraphs 2 and 3

¹³⁷ Procurement Regulation, Article 58

¹³⁸ Procurement Regulation, Article 7, Procedures Manual, Part II, Section 2.2

¹³⁹ Procedures Manual, Part II, Section 2.3

circumstances the Procurement Regulation is held not to apply¹⁴⁰. These circumstances are¹⁴¹: in the case of contracts arising from treaties or international agreements between Mozambique and another state or international organization, where the agreement made requires a specific type of procurement contracting to take place; or where the procurement contracting will completely or for a substantial part of the contract, use funds donated by an official international cooperation agency or multilateral funding agency, where the use of specific procurement contracting criteria form part of the funding agreement.

In both of these cases the applicant entity must first seek approval from the Ministry of Finance and the tender announcements must make specific reference to the type of procurement procedures that will be followed¹⁴². This does not exempt bidder from the need to fulfil all the standard requirements listed above, in addition to any extra requirements resulting from the special type of procurement procedure to be used¹⁴³.

5.3 EXCEPTIONAL REGIME

This regime is followed whenever the General Regime is not the most appropriate method for undertaking the procurement¹⁴⁴. Adoption of any of the types of tender process provided by this regime is based on prior approval from the relevant authority¹⁴⁵. All the standard requirements for public tenders under the general regime apply to tenders under the exceptional regime, unless a specific provision to the contrary is made in the Procurement Regulation¹⁴⁶.

5.3.1 PRE-QUALIFIED TENDER

A pre-qualified tender is used when the nature of the procurement is sufficiently technically complex to warrant the use of a short-list of potential bidders¹⁴⁷. The tender is undertaken in two stages, with bidders being invited to put forward documents which demonstrate their qualification to compete based on the technical specifications. Bidders are then short-listed and invited to formally bid¹⁴⁸. For the first stage of the process bidders have no more than twenty days to present their expressions of interest and demonstration of qualifications¹⁴⁹. A short-list is prepared and excluded bidders have the right to appeal¹⁵⁰. The second stage of the pre-qualified procurement process follows the norms established for the public tender as described above.

5.3.2 LIMITED TENDER

¹⁴⁰ Procedures Manual, Part II, Section 2.3 and Procurement Regulation, Article 8

¹⁴¹ Procedures Manual, Part II, Section 2.3 and Procurement Regulation, Article 8

¹⁴² Procedures Manual, Part II, Section 2.3 and Procurement Regulation, Article 8

¹⁴³ Procedures Manual, Part II, Section 2.3

¹⁴⁴ Procurement Regulation, Article 9

¹⁴⁵ Procurement Regulation, Article 9, paragraph 2

¹⁴⁶ Procedures Manual, Part II, Section 2.4, Procurement Regulation, Article 9, paragraph 4

¹⁴⁷ Procurement Regulation, Article 83

¹⁴⁸ Procurement Regulation, Article 84

¹⁴⁹ Procurement Regulation, Article 85

¹⁵⁰ Procurement Regulation, Article 84, clause f)

A limited tender is restricted to the procurement of public works of less than 1,750,000Mt and goods and services of a value less than 875,000Mt¹⁵¹. It is limited to those registered on the Single Register by a given date¹⁵². Other than this, the limited tender procurement process follows the norms established for the public tender as described above.

5.3.3 TWO-STAGE TENDER

A two-stage tender process is used when the nature of the works, goods or services to be procured is not sufficiently clear to enable the applicant entity to define the exact nature of the tender document¹⁵³. In this case bidders are invited to submit a provisional technical proposal as a first phase. On the basis of this more detailed tender documents are prepared and bidders are then invited to submit a definitive technical proposal along with the standard documentation required for a standard tender process, as described above¹⁵⁴.

5.3.4 REVERSE AUCTION

This type of process is restricted to goods and services which are required immediately. Bidders compete in a form of open public auction at which bidders compete to offer the best technical offer at the lowest price¹⁵⁵. The use of this method remains to be specifically regulated¹⁵⁶.

5.3.5 DIRECT AWARD

A direct award may be used when other procedures are considered inconvenient or non-viable¹⁵⁷. The following circumstances justify the use of this method¹⁵⁸:

- When the object of the contract can only be provided by one bidder;
- When the objective is the renewal of an existing contract and there are substantial benefits to continuing to use the same supplier;
- In an emergency, or situation of war or public disorder;
- If in a previous tender process no one bid or all the bidders were declassified, but the tender cannot be repeated;
- In cases of national security;
- Where the estimated contract value is less than 87,500Mt for public works or 43,750Mt for goods or services.

Direct awards must wherever possible ensure that the cost of the contract is in accordance with standard market rates, and UFSA must always be advised of the use of this type of tender¹⁵⁹.

¹⁵¹ Procurement Regulation, Article 88, paragraph 2

¹⁵² Procurement Regulation, Article 88, paragraph 1

¹⁵³ Procurement Regulation, Article 92, paragraph 2

¹⁵⁴ Procurement Regulation, Article 92, paragraph 1

¹⁵⁵ Procurement Regulation, Article 97

¹⁵⁶ Procedures Manual, Part II, Section 2.4

¹⁵⁷ Procurement Regulation, Article 104, paragraph 1

¹⁵⁸ Procurement Regulation, Article 104, paragraph 2

¹⁵⁹ Procurement Regulation, Articles 108 and 109

5.4 SMALL-SCALE TENDER

Small-scale tenders are a simplified form of procurement process and are designed for use where the values involved are low and the items being procured are not technically complex¹⁶⁰. A small-scale goods procurement process is undertaken when the value of the work to be undertaken is estimated by the applicant entity to be not more than 131,250Mt¹⁶¹. A small-scale public works procurement process is undertaken when the value of the work to be undertaken is estimated by the applicant entity to be not more than 262,500Mt¹⁶². This type of tender is also used to promote the involvement of national companies, particularly Small and Medium Enterprises in procurement.

Small-scale tenders allow for the possibility of, among other things:

- Dispensing with some or all qualification documents¹⁶³;
- Substituting tax registration with payment of withholding tax¹⁶⁴;
- Announcing the tender by radio¹⁶⁵;
- Evaluation solely on the basis of lowest price¹⁶⁶;
- Use of simplified contracts and simplified tender documents¹⁶⁷;
- Dispensing with the need for a definitive guarantee¹⁶⁸;
- Direct oversight of the work¹⁶⁹.

In general however these tenders follow the same procedures and stages as those outlined above for standard procurement processes.

5.5 CONTRACTING FOR CONSULTANCY SERVICES

The contracting of consultancy services must usually follow a short-list process like the one described above for pre-qualified tenders¹⁷⁰. Both individuals and organisations can provide consultancy services¹⁷¹. The Procurement Regulation provides a number of conflicts of interest which must be avoided, these include those applied to standard procurement processes along with the prohibition of those involved in the development of terms of reference bidding on the work to which the terms apply¹⁷².

In the case of consultancies the terms of reference form the basis for the tender document¹⁷³. Invitation to bid is based on a short-list of between three and six consultants,

¹⁶⁰ Procedures Manual, Part II, Section 2.5

¹⁶¹ Procurement Regulation Article 88, paragraph 2, clause b)

¹⁶² Procurement Regulation Article 88, paragraph 2, clause a)

¹⁶³ Procurement Regulation, Article 20, paragraph 3, Article 21, paragraph 4 and Article 22, paragraph 4

¹⁶⁴ Procurement Regulation, Article 23, paragraph 2

¹⁶⁵ Procurement Regulation, Article 30, paragraph 3

¹⁶⁶ Procurement Regulation, Article 33, paragraph 3

¹⁶⁷ Procurement Regulation, Article 43, paragraph 3 and Article 63, paragraph 2

¹⁶⁸ Procurement Regulation, Article 44, paragraph 3

¹⁶⁹ Procurement Regulation, Article 46, paragraph 2

¹⁷⁰ Procurement Regulation, Article 110

¹⁷¹ Procurement Regulation, Article 111

¹⁷² Procurement Regulation, Article 112

¹⁷³ Procurement Regulation, Article 114

one third of which must be national wherever possible¹⁷⁴. Selection of the winning bid may be based on quality, qualifications of the bidders or on maximum or minimum price. Each of these criteria is dealt with in greater detail in the regulation, but in general corresponds to the requirements of the standard procurement process¹⁷⁵.

7. TRANSPARENCY, ETHICS AND THE RIGHT OF APPEAL

Transparency and ethics are considered fundamental principles guiding the implementation of the Procurement Regulation¹⁷⁶. In addition the application of the regulation is supported by Mozambique's anti-corruption legislation and legislation governing the behaviour of state employees (see Section 3.2 above). Both public sector staff and bidders may be subject to sanction for infractions under the Procurement Regulation¹⁷⁷.

If however a bidder believes that a procurement process has not been conducted fairly the regulation provides a right of appeal. Bidders may appeal against the classification or declassification of bidders in a given process. This must be done in writing within three days of notification of the classification or declassification. During the period in which appeals can be made all bidders have the right to openly inspect the bids submitted. The Tender Committee must forward the complaint and their opinion on it to the applicant entity within three days of receiving the appeal. The applicant entity then makes a decision within three days of having received the appeal. While an appeal is pending the tender process is suspended¹⁷⁸.

In order for the appeal to be accepted the complainant must put up a guarantee of 0.25% of the estimated contract value as stipulated in the tender document, up to a maximum value of 125,000Mt. If the appeal is successful the guarantee is returned to the complainant, and if the appeal is not, the value deposited is forfeit in favour of the applicant entity¹⁷⁹.

In cases where the norms of the Procurement Regulation, or the contents of the tender document are believed to have been violated or where there is thought to have been an abuse of administrative law the complainant may appeal within three days to the hierarchical superior of the applicant entity. This must be done within three days of the applicant entity communicating the result of the tender process. The appeal suspends the contracting of the winning bidder for five days. In this case the hierarchical superior of the applicant entity (usually the line ministry responsible for the sector) may request support from UFSA to resolve the matter. As with an appeal to the applicant entity in order for the appeal to be accepted the complainant must put up a guarantee of 0.25% of the contract value as stipulated in the tender document, up to a maximum value of 125,000Mt. If the appeal is successful the guarantee is returned to the complainant, and if the appeal is not, the value deposited is forfeit in favour of the applicant entity¹⁸⁰.

¹⁷⁴ Procurement Regulation, Article 117

¹⁷⁵ Procurement Regulation, Articles 120 - 130

¹⁷⁶ Procurement Regulation, Article 4 and Articles 136 - 138

¹⁷⁷ Procurement Regulation, Articles 137 and 138

¹⁷⁸ Procurement Regulation, Article 131

¹⁷⁹ Procurement Regulation, Article 132

¹⁸⁰ Procurement Regulation, Articles 133 and 134

The decision provided by the hierarchical superior is subject to legal recourse through the courts. In this situation a formal complaint must be lodged with the Administrative Court within ten days of the date of notification of the decision about the outcome of the appeal¹⁸¹.

¹⁸¹ Procurement Regulation, Article 135