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LEGAL NOTICE NO. 324 OF 2020

THE PROCUREMENT ACT, 2011
(Act No. 7 of 2011

THE PUBLIC PROCUREMENT REGULATIONS, 2020
(Under Section 65)

In exercise of the powers conferred by Section 65 of the Procurement Act, 2011, the Minister for Finance makes the following Regulations-

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PART I
PRELIMINARY

Citation and Commencement

1. (1) These Regulations may be cited as the Public Procurement Regulations, 2020.

(2) These Regulations shall come into operation on a date to be determined by the Minister by Notice published in the Gazette.

Application

2. (1) These Regulations shall apply to-

(a) all public procurement of goods, works and non-consultancy services undertaken by a procuring entity; and

(b) selection and employment of consultants.

(2) The provisions of these Regulations and the Act shall apply to procurement undertaken by all public entities notwithstanding the provisions of any law to the contrary in force before or after the commencement of these Regulations.

Interpretation

3. (1) In these Regulations and unless the context otherwise requires-

"applicant" means a person submitting an application to pre-qualify or an expression of interest;

"day" means calendar day unless otherwise specified as working day;

"foreign company" means a body corporate incorporated under the laws of a foreign country;

"framework contract" means a contractual arrangement which allows a procuring entity to procure goods, services or works that are needed continuously or repeatedly at an agreed price or under agreed terms and conditions over an agreed period of time, through placement of a number of orders;

"obstructive practice" means deliberately withholding, concealing, destroying or refusing to produce any book, record or document required for the purpose of an examination or investigation; making false statements; threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to an investigation or any other acts intended to impede the exercise of inspection and audit activities of the Agency;

"performance security" means a guarantee or a bond from a successful tenderer's bank or an insurance company, which shall be provided by the successful tenderer to the procuring entity with the aim of compensation for any loss resulting from the tenderer's failure to complete its obligations under the contract;

"procurement process" includes the process of procurement from the planning stage, invitation of tenders, awarding of contracts, and contract management to the formal acknowledgement of completion of the contract;

"public private partnership" means the contractual agreement between Government or public enterprises or other Government entities and the private sector whereby the private sector will provide services or facilities in sectors and services traditionally provided by the public-sector;

"tenderer consortium" means a joint venture of two or more natural persons or incorporated bodies that offer jointly to provide goods, works or services in response to an invitation from a procuring entity and includes, where applicable potential tenderers and applicants to prequalify;

"tender security" means a guarantee or bond from a tenderer's bank or an insurance company which is provided by the tenderer as part of its tendering with the aim of protecting the procuring entity against the risk of tenderer's conduct during the tender period which would warrant the forfeiture of that security or otherwise be returned to the tenderer after tender process;

"tender securing declaration" means a security by way of declaration provided by the tenderer when the procurement is within the exclusive preference limits; provided under a preference scheme that is promulgated in accordance with the laws of Eswatini;

"the Act" means the Public Procurement Act, 2011, or its successor; and

(2) Other terms defined in the Act shall have the same meaning in these Regulations as in the Act.

Purpose and Objectives of Regulations

4. (1) The purpose of these Regulations is to regulate the procurement of goods, works and services by procuring entities.

(2) The objectives of these Regulations are to establish a system and practices that serve to-

(a) ensure transparency and accountability in public procurement while maintaining appropriate confidentiality of information;

(b) achieve economic efficiency and maximum competition to ensure value for money in the use of public funds;

(c) promote more diverse private sector participation, through fair and nondiscriminatory treatment of tenderers;

(d) develop economic capacity in Eswatini, through the provision of opportunities for Emaswati suppliers, contractors, service providers and consultants to participate in public procurement; and

(e) promote regional and international trade through agreements entered into by the Government of Eswatini.

Procedure for Issuing Deviations

5. (1) Where the need to deviate from the use of a public procurement method, rule, process or document arises, the concerned controlling officer shall submit an application for a deviation to the Agency in writing, stating -

(a) the method, rule, procedure or document from which a deviation is required;

(b) the reasons for the deviation;

(c) an explanation of the proposed alternative method, rule, procedure or document to be used; and

(d) any other relevant information, including such additional information as the Agency may request.

(2) The Agency shall within seven (7) working days communicate in writing its decision to the controlling officer.

(3) The Agency shall record in its minutes at least-

(a) the members present at the meeting;

(b) all applications requesting deviations and whether the applications were approved or rejected; and

(c) the reasons for rejection of any submission and any conditions to approved submissions.

(4) All applications for deviation shall be made before the procurement is conducted.

PART II
INSTITUTIONAL ARRANGEMENTS

Lead procuring entity

6. (1) Procurement of common use items and certain specialised items or categories of procurement shall be managed by a lead procuring entity, which may include but is not limited to the -

(a) ministry responsible for health for medical and pharmaceutical products and related services;

(b) ministry responsible for agriculture for drugs and related services for use by the Veterinary Department;

(c) ministry responsible for transport for vehicles and mechanical plant, including heavy earth moving equipment, spare parts for vehicles and mechanical plant and services related to the foregoing;

(d) ministry responsible for public works for all building, engineering and other works and for all consultancy services related to works procurement; and

(e) the Technical Secretariat may designate other lead procuring entities, with responsibility for managing the procurement of common use items and certain specialised items or categories of procurement.

(2) A procuring entity to be designated as a lead procuring entity shall, establish an entity procurement unit and obtain authorisation of the Agency to establish an Entity Tender Board.

(3) The provisions of sub-regulation (2) shall be applicable only after the procuring entities referred to therein establish an entity procurement unit and obtain authorisation of the Agency to establish an Entity Tender Board.

(4) Notwithstanding the provisions of sub-regulation (2), the requesting entity may procure the goods, works or services without reference to a lead procuring entity where -

(a) the procurement does not exceed the level of authority of the controlling officer established in accordance with section 24 of the Act; and

(b) the items are not common use items subject to central procurement arrangements in accordance with regulation 9.

Subcommittees of the Government Tender Board

7. (1) The Government Tender Board may establish sub-committees in accordance with provisions of section 26 of the Act to conduct particular functions of the Government Tender Board under delegated authority from the Government Tender Board.

(2) In establishing subcommittees, the Government Tender Board may appoint members from outside the Government Tender Board.

(3) The Head of the Technical Secretariat or a representative shall be the Secretary to all subcommittees of the Government Tender Board.

Procurement Authorisations and Levels of Authority

8. (1) The Controlling Officer shall-

(a) award contracts subject to the prior authorisations of the relevant approvals authority;
(b) make any amendment to a contract subject to the prior authorisations of the relevant approvals authority; and

(c) approve the individual procurement plans including the invitation documents, advertisements and shortlists prior to their issue.

(2) The evaluation committee may make a recommendation for review by the relevant approvals authority.

(3) The following stages of the procurement process shall require the prior authorisation of the relevant approvals authority-

(a) recommendations for contract award provided the approvals authority is satisfied that;

(i) the procurement process was carried out in accordance with the Act and these Regulations;

(ii) the approved individual procurement plan was followed; and that,

(iii) value for money in the use of public funds has been achieved; and,

(b) recommendations for-

(i) any amendment or series of amendments to a contract which, in aggregate, increases the contract value or

(ii) contract termination.

(4) The use of single source procurement, in accordance with Regulation 42 and 96, shall require the prior authorisation of the relevant approvals authority.

(5) The relevant approvals authority shall be determined in accordance with the levels of authority established in accordance with section 27(3) of the Act.

(6) The relevant approvals authority shall be -

(a) the controlling officer where the procurement does not exceed the level of authority established in accordance with section 24 of the Act and the procurement is conducted either by a requesting entity itself or by an entity procurement unit where no Entity Tender Board is established;

(b) the Entity Tender Board where the procurement does not exceed the level of authority established in accordance with section 27(3) of the Act and the procurement is conducted by the entity procurement unit of the procuring entity;

(c) the Entity Tender Board of a lead procuring entity where the procurement does not exceed the level of authority authorised by the Agency for the lead procuring entity and the procurement is conducted by the entity procurement unit of the lead procuring entity;

(d) any subcommittee of the Government Tender Board where the procurement does not exceed the level of authority delegated to the subcommittee by the Government Tender Board; or

(e) the Government Tender Board where the procurement exceeds the levels of authority of all lower approvals authorities.

(7) The Head of the Technical Secretariat shall notify all procuring entities of the level of authority of any subcommittee with delegated authority from the Government Tender Board.

(8) Contract awards shall be approved by the controlling officer or their delegate prior to the issue of contract documents.

(9) The contract documents mentioned in sub-regulation (8) shall be in line with the authorisations of the relevant approvals authority.

(10) A copy of the contract issued in terms of this regulation shall be provided to the relevant approvals authority.

PART III
PROCUREMENT OF COMMON USE ITEMS AND SOURCES OF SUPPLY

Procurement of Common Use Items

9. (1) The Lead Procurement Entity shall on annual basis, publish in the Eswatini Government website the descriptions of items available on the stores sources of supply.

(2) The Government Central Stores shall arrange for procurement of common use items and services by procuring entities through framework contracts.

(3) A framework contract under this regulation shall not be less than one year which may be extended for a further period of not exceeding one year.

(4) The Government Central Stores shall publish in the Eswatini Government website the list of suppliers awarded framework contracts.

(5) A procuring entity-

(a) shall, by the end of January each year, submit to the Designated Lead Procurement Entity their provisional annual estimates of the required common use items and services which shall include descriptions, specifications, statement of requirements and quantities;

(b) shall procure common use items and services from tenderers awarded framework contracts by the Government Central Stores through placing of call off orders prepared by the entity procurement unit and approved by the controlling officer or any delegated officer; and

(c) shall submit to the Government Central Stores and the Agency, monthly reports on procurement made through framework contracts indicating the names of suppliers, description of goods or services, quantity and the value.

(6) In the case of common use items and services falling under open framework contracts, the procuring entity shall seek approval of the tender board to conduct a mini competition amongst the suppliers awarded framework contracts.

(7) The Government Central Stores may on annual basis provide an opportunity to new tenderers to participate in tendering process for common use items and services and the names of successful tenderers shall be included in the current list of suppliers.

(8) A tenderer who has entered into a framework contract with the Government Central Stores shall comply with terms and conditions of the agreement, and shall-

(a) honour call off orders prepared and submitted by procuring entities in respect of framework contracts signed;

(b) supply and deliver all goods and services to the procuring entity at the rates, prices and at places stated in the framework contract and call off order;

(c) where samples are required, provide the samples for approval, and all goods supplied shall be in accordance with the approved samples;

(d) indemnify the procuring entity in the case of damage or loss of benefit caused by delay in delivery or any other act; and

(e) prepare and submit to the Government Central Stores a monthly sales report indicating the value of goods and services sold to procuring entity through call off orders.

(9) The procuring entity shall prepare, and place call off orders to tenderers who are awarded framework contracts, and, in particular, shall be responsible for-

(a) effecting payments for goods and services delivered and accepted;

(b) claiming for damages caused by delayed delivery or any other act; and

(c) reporting to the Government Central Stores and the Agency any breach of contract or unsatisfactory performance by a tenderer under framework contracts.

(10) The Government Central Stores shall prepare and sign framework contracts with tenderers, and, in particular, shall be responsible for receiving and reviewing reports on default of framework contracts from procuring entities and where a breach of contract is determined, submit a proposal for suspension of a supplier to the Agency.

(11) The Government Central Stores shall include in framework contracts price fluctuation formulae.

(12) The Government Central Stores shall, in each financial year, prepare and make available to procuring entities, a schedule of prices to be adhered to by such procuring entities in procurement of common used items and services.

(13) The Minister responsible for public works shall, in each financial year, prepare and make available to the Government Central Stores a schedule of unit rates to be adhered to by procuring entities in procurement relating to construction works.

Requirement for Tender Consortium or Joint Venture

10. (1) For a tenderer consortium to be eligible to offer goods, services or works, it shall fulfil in addition to any qualification requirements in accordance with sub-regulation (2) the following conditions-

(a) the consortium members are not actual or potential competitors; or,

(b) the consortium members are all owned by the same parent company.

(2) Notwithstanding sub-regulation (3), a tenderer consortium consisting of members that are actual or potential competitors is permitted if all the following conditions are met-

(a) none of the consortium members could fulfil the requirements of the tender competition or the contract on its own no subset of the consortium members could together fulfil the requirements of the tender competition or the contract;

(b) only the minimum amount of information strictly necessary for the formulation of the consortium tendering and the performance of the contract (if awarded) is shared between the consortium members and is restricted to relevant staff on a 'need to know' basis; and,

(c) the consortium members ensure that they compete vigorously as normal in all other contexts.

(3) Procuring entities may verify the qualifications of tenderers through either prequalification in accordance with regulation 46 or post-qualification in accordance with regulation 65.

(4) Qualifications of Tenderers for consulting services shall be verified as part of the short-listing process in accordance with regulation 49.

(5) Notwithstanding the provision of this Regulation the Agency may, in consultation with the Minister, issue any circular or manual which shall provide guidance and requirement for Joint Venture or Consortium Tendering.

PART IV
MEASURES TO PROMOTE SWATI COMPANIES AND CITIZEN SERVICE PROVIDERS

Measures to Promote Swati Companies and Citizen Service Providers

11. (1) The Government shall, with a view to promoting economic capacity and the competitiveness of businesses in Eswatini, initiate measures to facilitate participation by Swati companies and citizen service providers in public procurement.

(2) The measures referred to in sub-regulation (1) may include, but shall not be limited to-

(a) encouraging foreign companies to subcontract or partner with Swati companies and citizen service providers;

(b) publishing indicative notices of planned procurement, particularly for high value contracts which may include subcontracting opportunities;

(c) where feasible and appropriate, dividing procurement requirements into lots, of a size for which small Swati companies are qualified and able to tender;

(d) favouring approaches to technical requirements and standards which are familiar to companies in Eswatini;

(e) granting preferences to Swati companies in the evaluation of tenders;

(f) ensuring the prompt payment of invoices; and

(g) providing training in tendering requirements for Swati companies.

Preference for Swati Companies in Goods, Works and Non-Consultancy Services

12. (1) Swati companies and citizen service providers shall be given a preference in the evaluation of tenders for goods, works and non-consultancy services by adding a specified margin to the evaluated price of other tenderers who are not eligible for the preference during the financial evaluation of tenders.

(2) For purposes of this Regulation, a Swati company is one -

(a) which is registered in Eswatini; and

(b) of which at least sixty percent (60%) of the controlling shares are owned by Eswatini citizens.

(3) The margin referred to in sub-regulation 1 shall be specified in the invitation document and may be up to a maximum of fifteen percent (15 %,) subject to the provisions of the Act or any applicable law enacted by Parliament.

(4) To be eligible for any preference, companies shall -

(a) be a Swati company in accordance with sub-regulation 1 or

(b) be a citizen service provider in accordance with sub-regulation 1.

(5) Preference may also be given to foreign companies which sub-contract or partner Swati companies or citizens service providers or supply Swati manufactured goods.

(6) The preference referred to in sub-regulation (5) shall be in the form of a margin specified in the invitation document and may be up to a maximum of seven and a half percent (7.5%).

(7) Further rules may be included in the invitation document concerning eligibility for the margin of preference, the documentation required as evidence of eligibility and the manner in which the margin of preference will be applied during evaluation.

(8) The level of preference accorded to a tenderer may be variable but shall be proportional to the percentage of the contract to be actually executed with Swati manufactured goods or by Swati agents or nationals.

Participation by Swati Companies and Citizen Service Providers in Consultancy Services

13. (1) In the evaluation of proposals for consultancy services, evaluation points shall be allocated for participation by Swati companies or citizen service providers during the technical evaluation of proposals.

(2) Participation may be by associating or sub-contracting with a Swati company or by using Swati citizen service providers as key entities or personnel.

(3) The points shall be specified in the request for proposals document and may be up to fifteen percent (15%) for participation by Swati companies and twenty percent (20%) for citizen service providers.

PART V
GENERAL PROCUREMENT RULES

Record Keeping

14. (1) Procuring entities, requesting entities and the technical secretariat shall maintain records of all procurement proceedings.

(2) Such records shall be maintained for a period of five years from the date of –

(a) contract completion or termination;

(b) a decision to terminate the procurement proceedings; or

(c) the settlement of any dispute under the contract; whichever is later.

(3) All procurement records shall contain at least the following documents, where appropriate -

(a) the request to initiate procurement proceedings;

(b) a copy of the individual procurement plan;

(c) justification for restricting competition through the use of limited tendering or single source tendering;

(d) a copy of any published notices;

(e) a record of any tenderers or organisations to which the invitation notice is sent directly;

(f) any shortlist or list of pre-qualified tenderers;

(g) a copy of the pre-qualification and invitation documents and any amendments or clarifications;

(h) the pre-qualification evaluation report(s);

(i) the records of tenders received and tender openings;

(j) copies of all tenders evaluated, and any clarifications requested, and responses received;

(k) the evaluation report(s);

(l) minutes of any meetings related to the procurement, including pre-tendering meetings;

(m) the notification of contract award;

(n) the signed contract document;

(o) any contract amendments or variations;

(p) all submissions to and all approvals of the relevant authority related to the procurement or contract amendments;

(q) all post contract documentation relating to the fulfilment of contract obligations, in particular copies of bank guarantees or advance payment guarantees;

(r) all documentation evidencing deliveries of goods or completion certificates in relation to contracts for works or services;

(s) copies of all invoices for goods, works and services and details of payment authorisations;

(t) copies of any claims or disputes under the contract;

(u) all correspondence between the procuring entity and tenderers and the supplier; and

(v) a record of lessons learned and record of actual performance as a result of the delivery of the contract.

Communication

15. (1) Subject to the provisions of these Regulations, communication between tenderers and a procuring entity shall be in written or electronic form, otherwise provided for in these regulations, that provides a record of the content of the communication.

(2) For the purposes of this Regulation, in writing shall mean in a form that provides a record of the content of the communication and may include fax or electronic mail, except where otherwise indicated in these regulations or in invitation documents.

(3) Meetings between a procuring entity and tenderers or suppliers shall be recorded, and any agreement reached shall be confirmed in writing.

(4) The procuring entity shall determine the form in which tenderers submit or transmit documents, notifications, decisions or other communications.

(5) Every communication to a tender board shall be addressed to the secretary of the tender board through the postal, physical or electronic means.

Recommendation for suspension of a Tenderer

16. (1) Where a procurement proceeding is in progress, a proposal for suspension may include a recommendation that the potential tenderer falls within any of the situation listed in sub regulation 2 will be suspended from participating in procurement pending the determination of suspension proposal.

(2) A recommendation for suspension as a result of audit or investigation by the Agency or a suspension proposal submitted pursuant to sub-regulation 17(5) shall specify-

(a) the name and address of the potential tenderer recommended for suspension;

(b) the grounds for the proposed action;

(c) factual record which include all evidence, information and documents; and

(d) any other information or documents in the possession of, or known to, the person submitting the suspension proposal.

Suspension of Tenderers and Suppliers

17. (1) Suspension proceedings may be initiated by the Agency as a result of audit or investigation conducted by the Agency or where a suspension proposal is submitted to it, by any person.

(2) Any suspension by a procuring entity shall be pursuant to section 55 and section 56 of the Act.

(3) The Agency may require any public body or person to produce information, documents or any evidence concerning possible grounds for suspension of a potential tenderer.

(4) A public body or a person required under sub-regulation (3) to produce information, documents or evidence, shall produce the documents or evidence within fourteen days from the date of receiving the request.

(5) Where the Agency determines that there are grounds for suspension on the basis of the produced information, documents and evidences, the Agency shall, within twenty-one days from the date of receiving the evidence, issue to the tenderer a notice of suspension.

(6) The notice of suspension shall inform the tenderer of the facts constituting grounds for the proposed suspension.

(7) The notice shall require the tenderer to make written representation showing cause why he should not be suspended from participating in public procurement for a period specified pursuant to the Act and these Regulations.

(8) The tenderer shall respond to the notice referred to in sub-regulation (6) within fourteen days from the date of receiving the notice.

(9) Any representation made pursuant to sub-regulation (7) shall contain a certificate signed by the tenderer under oath that the information contained in the representation is true to the best of the knowledge of such tenderer.

(10) Upon receipt of the representation made pursuant to sub-regulation (7), the Agency may, depending on the circumstances of the case, determine whether or not the tenderer should be precluded from participating in procurement proceedings pending the completion of suspension proceedings.

(11) Where the Agency determines that the tenderer should be precluded in accordance with sub-regulation (10), the Agency shall preclude the tenderer for a period that the Agency may determine or, until the final determination of suspension proceedings.

(12) The Agency may terminate the preclusion where it considers that the grounds for the preclusion are no longer valid.

(13) Any preclusion under this regulation shall remain in effect until a decision on the proposed suspension is taken or where a preclusion is terminated pursuant to sub-regulation (12).

(14) The Agency shall send a copy of its decision under sub-regulations (15) and (17) to the tenderer and where applicable, to the person who proposed the suspension.

(15) The Agency shall decide on the proposed suspension within thirty days-

(a) from the date of receiving the representation from the tenderer;

(b) from the date of the decision for preclusion where the preclusion is determined pursuant to sub-regulation (11); or

(c) after the expiry of the period specified in sub-regulation (11).

(16) The period of suspension of the tenderer shall be decided in accordance with subregulations (5) and (6).

(17) The decision of the Agency shall be in writing and shall include a summary of the findings of fact and reasons for the decision.

(18) The Agency shall send a copy of its decision made pursuant to sub-regulation (17) to the tenderer and to any other person who has legitimate interest on the procurement in question.

(19) The Agency shall notify procuring entities on the decision made pursuant to subregulation 17 and shall publish such decision in the Eswatini Government website.

Register of suspended tenderers

18. (1) The Agency shall maintain a register of all suspended tenderers which shall, among other things, specify the name and address of each tenderer under preclusion or suspension, grounds for preclusion or suspension and the period under which the tenderer is on preclusion or suspension, as the case may be.

(2) The register shall, at all times during office hours, be made available to the public through the Eswatini Government website.

(3) A tenderer who is suspended under these Regulations shall not be permitted to start a new supply, contracting or consulting firm during that period for the purpose of participating in public procurement or disposal.

(4) Procuring entities shall not procure from, contract with, or engage a tenderer who is precluded or suspended from participating in public procurement proceedings pursuant to the Act and these Regulations.

(5) Where a tenderer is suspended under the provisions of these regulations, any person who, at the time of suspension, was concerned with the management of the affairs of the suspended company or firm as director, partner, agent or an officer, shall be suspended from participating in public procurement or disposal by tender for the same period.

(6) The Agency shall inform the relevant statutory bodies upon suspension or preclusion of a tenderer.

(7) Any suspension of a potential tenderer under these regulations shall not affect any existing contracts entered into between the tenderer and any public body before the suspension decision except where bankruptcy, insolvency, fraud and corruption is established.

(8) A tenderer who is dissatisfied with the suspension decision made by the Agency under these Regulations, may appeal against the decision in accordance with section 57 of the Act.

(9) The Independent Review Committee shall conduct a hearing of appeal or review in accordance with the rules and procedures made under the Act.

(10) A tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approvals authority by the Act or these Regulations may apply for a review in accordance with section 47 of the Act.

Use of Standard Documents

19. (1) Procuring entities shall use the standard documents issued in accordance with these Regulations as templates for drafting all invitation and contract documents and notices.

(2) Procuring entities shall consult the Technical Secretariat on the document to be used where no suitable standard document has been issued.

Procurement Reference Numbers

20. All procurement requirements shall be given a unique procurement reference number, in accordance with the numbering system determined by the Technical Secretariat.

Publication of Notice

21. (1) Notices inviting potential tenderers to participate in procurement proceedings shall be published -

(a) in at least one publication in Eswatini, which shall be of wide enough circulation to reach sufficient potential tenderers to ensure effective competition; and

(b) in the Eswatini Government website.

(2) Where an abridged version of the notice is published in accordance with sub-regulation (1) (b) above, such abridged notice shall make reference to the Eswatini Government website.

(3) Where the procuring entity believes it is necessary to ensure wide competition, it may, after the date of publication of the notice, send invitation notices directly to -

(a) potential tenderers, who may be registered tenderers, past suppliers or any other identified potential sources;

(b) professional or industry associations; or

(c) Swati embassies and Missions in countries which are likely to participate or foreign embassies of those countries in Eswatini where international tendering is used.

(4) The procuring entity shall keep a record of any tenderers or organisations to whom the invitation notice is sent directly, which shall form part of the procurement record.

Publication of Results of Tender Award and Notice of Intention to Award

22. The results of tender award shall be published in the Eswatini Government website by the Technical Secretariat within seven days of tender award.

Request for Information

23. (1) Where a tenderer for a contract on which a decision has been made prefers to make a formal request for information about the reasons for a tender being unsuccessful, subject to sub-regulation (2), the unsuccessful tenderer shall make a written statement to the Controlling Officer requesting a statement which shall specifying the material issues of fact and the broad reasons for the decision

(2) Upon receipt of such statement the Controlling Officer shall, subject to subregulation (1) furnish the tenderer of the requested statement within fourteen days of receipt of such request.

(3) Except where a tenderer specifically advises otherwise, all details of tenders submitted shall be treated as confidential between the tenderer and the procuring entity.

Submission of Procurement Report

24. Within thirty days from the date of a contract award, the controlling officer or a delegate shall prepare and submit to the Agency, in accordance with guidelines for reporting procurement information issued by the Agency, a summary which shall include the following information-

(a) the names of the person or body to whom the contract is awarded;

(b) the amount of tender and the date on which the award was made;

(c) description of the contract, tender process including tender invitation, tender opening schedule pre-tender clarifications if any, and evaluation; and (d) complaints received during tender process, if any.

Period of Validity of Tender

25. (1) The validity period required for tenders shall be specified in the tender document.

(2) A tender which purports to be valid for a shorter period shall be rejected by a procuring entity as being substantially non- responsive.

(3) The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract.

(4) In exceptional circumstances, prior to the expiry of the original period of validity of tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time.

(5) A tenderer may refuse the request under sub-regulation (4) without forfeiting its tender security and the validity of its tender shall be terminated upon the expiry of the unextended period of validity.

(6) The request and the responses shall be made in writing.

(7) Tenderers who agree to an extension of the period of validity of their tenders shall extend or seek an extension of the period of validity of their tender securities provided by them or provide new tender securities to cover the extended period of validity of their tenders.

(8) A tenderer whose tender security is not extended or, who has not provided a new tender security shall be considered to have refused the request to extend the period of validity of its tender.

(9) The provisions of regulation 52 regarding discharge and forfeiture of tender security shall apply during the extended period of tender validity.

(10) The successful tenderer shall remain bound by that tender for a further period of thirty days following the receipt of communication notifying that successful tenderer of the selection.

Failed Tenders

26. (1) Where no responsive tenders are received, or tender proceedings are otherwise unsuccessful, the procuring entity shall investigate the failed tender proceedings and prepare a report for the Tender Board.

(2) The report shall include the reasons why the procurement was unsuccessful and recommendations on how any new procurement proceedings should be managed to avoid similar shortcomings.

(3) The investigation shall consider all relevant issues, which may include, but are not limited to-

(a) whether the tendering period was sufficient;

(b) whether the requirements of the invitation document and the terms and conditions of the proposed contract were reasonable and not so excessive as to deter competition;

(c) whether the Statement of Requirements was clear, reasonable and designed to encourage fair and open competition;

(d) whether any tender notice was published in an appropriate publication and on the required date;

(e) whether any shortlist included sufficient tenderers and whether the tenderers included provide the goods, works or services required;

(f) whether there was any delay in issuing the invitation documents;

(g) whether any amendments or clarifications to the invitation documents allowed sufficient time for tenderers to take them into account in preparing their tenders;

(h) whether there were other extraneous events or circumstances, which may have affected the ability of tenderers to respond;

(i) whether the evaluation process was conducted in accordance with these regulations and the invitation document and whether staff responsible for the evaluation had adequate skills and resources;

(j) whether there is any suspicion of collusion between potential tenderers; and

(k) whether the original choice of procurement method was appropriate.

(4) The procuring entity shall make any appropriate recommendations, which may include, but are not limited to-

(a) the use of an alternative method of procurement;

(b) amendments to the invitation document, including tendering requirements, the statement of requirements, the type of contract or the terms and conditions of the proposed contract;

(c) alternative publication of any invitation document or a revised shortlist; and

(d) the introduction of international competition.

Rejection of All Tenders

27. (1) Subject to approval by the relevant approvals authority or their delegate, and if so specified in the invitation documents, the procuring entity may, prior to awarding the contract and notwithstanding the stage reached in the proceedings leading to the conclusion of the contract-

(a) decide to reject all tenders at any time or annul the tender or selection proceedings in accordance with and order that the proceedings be recommenced, if necessary, using another method; or

(b) where the procurement is divided into lots, award only certain lots and decide whether or not the others are to be the subject of another tender or other tenders, if necessary, using another method.

(2) Rejection of a tender or selection proceeding may take place where-

(a) no tender or proposal is substantially responsive to the tender documents or request for proposals;

(b) no tender or proposal satisfies the criteria for the award of the contract as set out in the tender documents or request for proposal;

(c) the economic or technical data of the project have been materially altered;

(d) exceptional circumstances render normal performance of the contract impossible;

(e) every tender or proposal received exceeds the budgetary resources available;

(f) the tenders or proposals received contain serious irregularities resulting in interference with the normal play of market forces; or

(g) funds voted or earmarked for the procurement have been withheld, suspended or have otherwise not been made available.

(3) When the rejection of all tenders or annulment of selection proceedings is caused by circumstances which do not necessitate the opening of tenders, the unopened and sealed envelopes containing the price proposals and the other elements of the tenders or proposals shall be returned to the tenderers.

(4) The procuring entity shall not incur any liability solely by virtue of invoking subregulations (1) towards tenderers that submitted tenders.

(5) Where all tenders are rejected pursuant to this regulation the procuring entity shall:

(a) review the causes justifying the rejection and consider whether revision of the specifications or terms of reference or modification in the project or both are required before inviting new tenders or opt for another procurement method;

(b) consider inviting new tenders from tenderers who were invited to submit tenders in the first instance as well as from new tenderers, allowing a reasonable amount of time for the submission of the new tenders; or

(c) the procuring entity may, where it considers appropriate, require that the whole tender or selection proceeding be recommenced.

Environmental Issues

28. (1) A procuring entity shall avoid wherever possible the procurement of chemicals, pesticides or other goods which are known to have or suspected to have harmful effects on the health of the population, the environment, domestic animals, wildlife and flora.

(2) Where procurement of potentially harmful or hazardous goods by a procuring entity is necessary, the requesting entity concerned shall ensure that the use and storage of those goods is restricted so that any harmful effects are avoided or limited.

(3) A procuring entity shall assess the impact on the environment of any works at the planning stage of the project and in any case before procurement proceedings are commenced.

(4) A procuring entity shall pay due regard to repair and re-use of goods wherever practicable and economically viable before disposing them by tender and procuring new replacements.

(5) A procuring entity shall comply with all environmental standards and ensure that all their suppliers comply with such laws.

Continuous Monitoring

29. (1) For the Agency to continuously monitor procurement activities and contract implementation, procuring entities shall submit to the Agency annual procurement plans, information on tender notices, invitations for quotations, request for proposals, contract award, contract termination and in addition, quarterly and annual procurement implementation reports in the prescribed format and through systems developed by the Agency.

(2) The controlling officers of procuring entities and the Chairman of the Independent Review Committee shall submit to the Agency not later than fourteen days after issuing their decisions, copies of the decisions concerning complaints or disputes in procurement proceedings.

(3) The Agency may, upon receipt of reports of findings from the controlling officer or decision of the Independent Review Committee, recommend to the competent authority to take disciplinary measures against the concerned person or body implicated in the report or decision, as the case may be, in accordance with the provisions of the Act.

Procurement Contract and Performance Audits

30. (1) Subject to the criteria as may be prescribed by the Agency, the Agency may, at any time and where circumstances require, select a procuring entity, project, or contract for audit.

(2) Before the audit, the Agency shall inform the relevant procuring entity on the intention, objectives and compliance indicators to be used for the audit.

(3) For the purpose of enabling the Agency to efficiently carry out the audit, procuring entities shall make available all the documents requested for the audit in a timely manner.

(4) For ease of procurement information retrieval, procuring entities shall be required to keep procurement records in a proper manner as prescribed in regulation 14.

(5) Upon completion of the audit and before issuing the final audit report, the Agency shall submit, in writing, the audit findings to the audited procuring entity.

(6) A procuring entity shall submit to the Agency detailed responses to the audit findings within fourteen days of receiving the audit findings.

(7) The Agency shall submit the audit report to the procuring entity together with recommendations of the Agency.

(8) Pursuant to section 10 (a) (ii) of the Act the Agency shall include an audit report and submit to the Minister for consideration and onward transmission.

PART VI
PROCUREMENT PLANNING

Annual Procurement Plans

31. (1) Every Ministry or Department shall prepare a procurement plan for each financial year and shall revise such as appropriate during the course of each year.

(2) Annual procurement planning shall be integrated with applicable budget processes and based on indicative or approved budgets, as appropriate.

(3) The annual procurement plan for each procuring entity shall include but is not limited to–

(a) a list of the goods, works and services required;

(b) a schedule of the delivery, implementation or completion dates for all goods, works and services required;

(c) an indication of which items can be aggregated for procurement as a single package or for procurement through any applicable arrangements for common use items in accordance with these regulations;

(d) an estimate of the value of each package of goods, works or services required and details of the budget available and sources of funding;

(e) an indication of the rules applicable to the procurement, where any procurement is not subject to these regulations;

(f) an indication of the anticipated procurement method for each procurement requirement, including any need for pre-qualification, and the anticipated time for the complete procurement cycle, taking into account the applicable approval requirements; and,

(g) an indication of the lead procurement organisation expected to manage the procurement.

(4) Every requesting entity shall submit a copy of its annual procurement plan, and each update, to the Agency not later than thirty (30) days after approval by the appropriate budget approving authority.

Unplanned Procurement

32. Where a requesting entity needs to procure goods, works or services which are not included in its procurement plan, it shall –

(a) complete a procurement requisition in accordance with regulation 35;

(b) mark the requisition as unplanned procurement, providing an explanation of why it was not planned and indicate the source of funding for such procurement;

(c) update its procurement plan to include the additional goods, works or services and ensure that an updated version is submitted to the Agency in accordance with regulation 31.

Procurement Requisition and Allocation of Funds

33. (1) Every procurement requirement shall be documented by a procurement requisition, which shall include –

(a) a statement of requirements for the goods, works or services, in accordance with regulation 35;

(b) the estimated value of the fully delivered or completed goods, works or services; and

(c) details of the funds budgeted for the requirement.

(2) The requesting entity shall ensure that the estimated value is realistic and based on up-to-date information on economic and market conditions.

(3) The requisition shall be approved by the controlling officer, or an officer designated by the controlling officer to perform this function, prior to the initiation of procurement proceedings.

(4) The approval of requisitions shall include confirmation–

(a) of the need for the items listed and authority to proceed with procurement; and

(b) of the availability of funds for the procurement.

(5) Approved requisitions shall be submitted to the appropriate procuring entity to initiate procurement proceedings.

(6) The procuring entity, conducting procurement proceedings, shall be responsible for notifying and liaising with the Government Tender Board or other approvals authority, the Technical Secretariat or any other entity or individual required to provide input to the procurement process.

Statement of Requirements

34. (1) All statements of requirements shall give a correct and complete description of the goods, works or services and their intended purpose or use.

(2) The statement of requirements shall be -

(a) included in the invitation document by which tenderers will be informed of the requirements of the requesting entity;

(b) used in evaluation to determine whether a tenderer meets the requirements of the requesting entity, as specified in the invitation document, and where appropriate, to determine the quality of the tender; and

(c) included in the contract to define the goods, works or services being procured.

(3) The statement of requirements included in the invitation document shall be prepared with a view to -

(a) creating fair and open competition; and

(b) ensuring that the goods, works or services are fit for the purpose for which they are being procured and are of appropriate quality.

(4) To the extent possible, the statement of requirements shall be based on the relevant objective technical and quality characteristics of the goods, works or services to be procured.

(5) In preparing the statement of requirements, the requesting entity shall ensure that it seeks technical and commercial advice, where required.

Statement of Requirements for Goods

35. (1) In addition to the provisions of regulation 34, a statement of requirements for goods shall provide a complete, precise and unambiguous description of the goods required and shall include, where appropriate -

(a) a list of the goods and the quantities required, including any incidental services or works, such as delivery, installation, commissioning, maintenance, repair, user training or the provision of after-sales services;

(b) a delivery and completion schedule;

(c) specifications; and

(d) drawings.

(2) Specifications shall include, where appropriate -

(a) the purpose and objectives of the goods;

(b) a full description of the requirement;

(c) a generic specification to an appropriate level of detail;

(d) a functional description of the goods, including any environmental or safety features;

(e) performance parameters, including outputs, timescales and any indicators or criteria by which satisfactory performance can be judged;

(f) process and materials descriptions;

(g) dimensions, symbols, terminology language, packaging, marking and labelling requirements;

(h) inspection and testing requirements; and

(i) any applicable standards.

(3) Statements of requirements for goods shall not include any reference to the following; a particular trademark, brand name, patent, design, type, specific origin, producer, manufacturer, catalogue or numbered item.

(4) Notwithstanding the provisions of sub regulation (2),-

(a) where there is no other sufficiently precise or intelligible way of describing the requirement, the words "or equivalent" shall be included and such description shall serve only as a benchmark during the evaluation process; and

(b) where a particular trademark, brand name, patent, design, type, specific origin, producer, manufacturer, catalogue or numbered item is required for reasons of technical compatibility, servicing, maintenance or preservation of warranty conditions, such description may be used, subject to written justification.

Statement of Requirements for Works

36. In addition to the provisions of regulation 35, a statement of requirements for works shall provide a complete, precise and unambiguous description of the works required and shall include, where appropriate –

(a) a description of the scope of the works, which may include, but not be limited to design, construction or installation of equipment;

(b) the purpose and objectives of the works;

(c) the duration or completion schedule for the works;

(d) details of the supervision requirements, working relationships and other administrative arrangements;

(e) drawings or design requirements;

(f) specifications and standards;

(g) bills of quantities or equivalent; and

(h) inspection and testing requirements.

Statement of Requirements for Services

37. In addition to the provisions of regulation 36, a statement of requirements for services shall provide a complete, precise and unambiguous description of the services required and shall include, where appropriate –

(a) a background narrative to the required services;

(b) the objectives of the services and targets to be achieved;

(c) a list of specific tasks or duties;

(d) deliverables or outputs for the assignment;

(e) the role, qualifications or experience required for any key staff;

(f) management and reporting lines for the supplier, including administrative arrangements and reporting requirements;

(g) any facilities, services or resources to be provided by the procuring entity;

(h) inspection or quality testing requirements or indicators of successful performance; and

(i) the duration or completion schedule.

PART VII
PROCUREMENT METHODS

Open Tendering

38. (1) Open tendering is the procurement method for goods, works and non-consulting services which is open to participation on equal terms by all eligible tenderers, through advertisement of the opportunity.

(2) The objective of open tendering is to obtain value for money and promote private sector participation through the maximum possible competition.

(3) Procuring entities shall use open tendering for the procurement of all goods, works and non-consulting services, except where the procurement meets the conditions for use of an alternative method in accordance with this Part.

(4) Tendering shall be international where-

(a) the goods, works or services are not available under competitive price and other conditions from at least three suppliers in Eswatini; or

(b) regional or international participation is required in accordance with an agreement entered into by the Government.

(5) Open tendering may be conducted with or without pre-qualification.

Limited Tendering

39. (1) Limited tendering is the procurement method for goods, works and non-consulting services where tenders are obtained by direct invitation to a shortlist of tenderers, without open advertisement.

(2) The objective of limited tendering is to obtain competition and value for money to the extent possible where the circumstances do not justify or permit the use of open tendering.

(3) Limited tendering may be used where-

(a) the goods, works or non-consulting services are only available from a limited number of suppliers;

(b) there is insufficient time for use of open tendering in an emergency situation;

(c) the estimated value does not exceed the threshold specified in the First Schedule;

(d) there is a need to achieve certain social objectives by calling for participation of local communities or local firms; or

(e) no tenders were received under an open tender.

(4) Limited tendering may, in particular, be used by a procuring entity for setting aside contracts for the purpose of building the capacity of citizen service providers.

(5) The justification for limited tendering under sub-regulation (2) and (3) shall be prescribed in the record of procurement proceedings made pursuant to regulation 33.

(6) Except where tenderers have already been prequalified, a procuring entity issuing a limited tender shall seek tenders from a broad list of potential tenderers with a view to encouraging competition.

Request for Proposals

40. (1) Request for proposals is the procurement method for consulting services where proposals are obtained from a shortlist of tenderers, which may be developed with or without advertisement of the opportunity.

(2) The objective of the request for proposals method is to obtain competition and value for money through the use of the best possible shortlist for the requirement.

(3) Procuring entities shall use the request for proposals method for the procurement of all consulting services, except where the procurement meets the conditions for use of an alternative method in accordance with this Part.

Request for Quotations

41. (1) Request for quotations is the procurement method which compares quotations from a number of tenderers.

(2) The objective of request for quotations is to obtain competition and value for money to the extent possible, while maintaining economy and efficiency, where the circumstances do not justify the use of open or limited tendering.

(3) Request for quotations may be used where the estimated value of the goods, works or non-consulting services does not exceed the threshold specified in the First Schedule.

Single Source Procurement

42. (1) Single source procurement is the procurement method where a tender is obtained directly from a single tenderer, without competition.

(2) The objective of single source procurement is to achieve timely and efficient procurement, where the circumstances or value do not justify or permit the use of competition.

(3) Single source procurement may be used where-

(a) the goods, works or services are only available from a single source;

(b) there is insufficient time for use of any other method in an emergency situation;

(c) additional goods, works or services shall be procured from the same source because of the need for compatibility, standardisation or continuity;

(d) an existing contract could be extended for additional goods, works or services of a similar nature and no advantage could be obtained by further competition; or

(e) the estimated value of the goods works, or services does not exceed the threshold specified in First Schedule.

Prohibition on Disaggregation

43. (1) A procuring entities shall not divide procurement requirements which could be procured as a single contract to avoid the use of open tendering or any other procurement method involving competition.

(2) Notwithstanding the prohibition on disaggregation of procurement in subregulation (1) procuring entities may divide a procurement requirement, which could be procured as a single contract, into a package, consisting of several lots which are to be tendered together, where it is anticipated that the award of several separate contracts may result in the best overall value for the procuring entity.

Public Private Partnerships

44. (1) Public Private Partnerships as contemplated in section 43 of the Act shall be governed by Government Policy regulating Public Private Partnerships.

(2) The following principles shall be adhered to in all procurement undertaken within the ambit of Public Private Partnerships:

(a) be in the public interest;

(b) provide value for money;

(c) be conducted transparently;

(d) be procured transparently;

(e) be developed with full stakeholder consultation;

(f) not infringe consumer rights; and

(g) share risk.

PART VIII
PROCEDURES FOR TENDERING
SECTION A – Tendering Procedures

Inviting Tenders

45. Tenderers shall be invited –

(a) through the publication of a tender notice in accordance with regulation 21 in the case of open tendering, where no pre-qualification has been conducted;

(b) from the list of pre-qualified applicants in the case of open tendering, where a prequalification has been conducted in accordance with regulation 46; and

(c) from a shortlist of tenderers in accordance with regulation 49 in the case of limited tendering.

Pre-qualification

46. (1) Pre-qualification may be used under open tendering to obtain a list of pre-qualified tenderers who have been assessed to be capable of effectively performing the proposed contract.

(2) Pre-qualification may be used where-

(a) the goods, works or services are complex, specialised or require detailed design or method;

(b) the costs of preparing a detailed tender would discourage competition; or,

(c) the evaluation is particularly detailed and the evaluation of a large number of tenders would require excessive time and resources from a procuring entity.

(3) Pre-qualification may also be used to pre-qualify tenderers for a group of similar contracts, such as regular procurements of common use items.

(4) Where the procuring entity conducts pre-qualification, it shall publish a prequalification notice in accordance with regulation 21, inviting all potential applicants to submit applications to pre-qualify.

(5) The procuring entity shall promptly issue pre-qualification documents to all applicants who request them and shall maintain a record of all applicants to whom documents are issued.

(6) The pre-qualification document shall contain all the information required by applicants to prepare and submit applications to pre-qualify and shall be drafted using the standard document issued in accordance with regulation 19.

(7) Where pre-qualification is for a group of contracts, the pre-qualification notice and document shall contain an estimate of the period of time covered by the pre-qualification, an estimate of the number and value of contracts to be awarded and any categories to be used in pre-qualifying applicants.

(8) The procuring entity shall allow a sufficient period of time, to enable applicants to prepare and submit their applications to pre-qualify.

(9) The minimum period of time for submission of applications to pre-qualify shall be -

(a) fourteen (14) days where the publication of notices is national only; or

(b) twenty-one (21) days where the publication of notices is regional or international.

Evaluation of Applications to Pre-qualify

47. (1) An application to pre-qualify received on time shall be evaluated by an evaluation committee appointed in accordance with regulation 59.

(2) Evaluation of applications shall be on a pass or fail basis against the criteria in the pre-qualification document.

(3) The evaluation committee shall prepare a record of its evaluation of applications, which shall clearly state which applicants were determined to be qualified and the reasons why any applicants were determined to be not qualified.

(4) Where pre-qualification is conducted for a group of similar contracts-

(a) a limit on the number or total value of awards to a tenderer may be made on the basis of the qualifications of the tenderer; and

(b) where appropriate, applicants may be qualified in different categories with differing levels of qualifications.

(5) The results of the pre-qualification, including the record of the evaluation of applications, shall be submitted to the approvals authority for authorisation.

(6) The procuring entity shall invite all pre-qualified applicants, or all pre-qualified applicants in the appropriate category, to submit tenders.

Tender Notices

48. Tender notices shall be published in accordance with regulation 21 and shall contain at least-

(a) the name, address and contact details of the procuring entity;

(b) the nature of the procurement requirement, including the quantity of goods, works or services and the location and timetable for delivery or performance of the contract;

(c) a statement of any key technical requirements. where applicable

(d) instructions on obtaining the invitation documents, including any fee payable; and

(e) instructions on the location and deadline for submission of tenders.

Shortlists

49. (1) Where the procuring entity invites tenders from a shortlist of tenderers, the shortlist shall include-

(a) all potential tenderers, where limited tendering is used on the grounds of a limited number of sources, in accordance with regulation 39; or,

(b) at least three tenderers in all other cases.

(2) Tenderers shall not be included on a shortlist unless they are expected to fully satisfy the requirements of the procurement entity, including, but not limited to, those related to eligibility, qualifications, capacity, resources and experience.

(3) The proposed shortlist shall be authorised by the relevant approvals authority or their delegate, prior to issue of the invitation documents.

(4) Pre-qualified tenderers shall be rotated on successive shortlists to ensure equal opportunities to all pre-qualified tenderers.

Invitation Documents

50. (1) Every invitation document shall contain all the information required by tenderers to prepare and submit tenders and shall be drafted using the standard document issued in accordance with regulation 19.

(2) Every invitation document shall contain -

(a) clear instructions on the management of the procurement process and the applicable rules;

(b) a clear statement of requirements giving a description of the goods, works or services to be procured;

(c) a clear explanation of the evaluation process and a statement of all evaluation, eligibility and qualification criteria to be applied;

(d) the proposed form and conditions of contract; and

(e) grounds on disqualifications

(3) The tender document shall be authorised by the controlling officer or their delegate, prior to its issue.

Minimum Tendering Periods

51. (1) The tendering shall start on the date of the first publication of the tender notice or issue of the invitation document to all pre-qualified or shortlisted tenderers and shall finish on the date of the tender submission deadline.

(2) The minimum tendering period shall be-

(a) twenty-eight (28) days for open tendering where the notice is published in Eswatini only;

(b) forty-two (42) days for open tendering where the notice is published internationally;

(c) twenty-one (21) days for limited tendering where shortlisted tenderers are national only; or

(d) twenty-eight (28) days for limited tendering where the shortlist includes foreign tenderers.

(3) Notwithstanding the provisions of sub-regulations (c) and (d), where limited tendering is used on grounds of urgency, in accordance with regulation 100, the tendering period may be reduced to a minimum of seven (7) days.

Tender Securities

52. (1) A procuring entity shall require tender securities for all procurement requirements for high relative value and high-risk categories of goods, services or works as set out in Second Schedule, in order to deter irresponsible tenders and encourage tenderers to fulfil the conditions of their tenders.

(2) The invitation documents shall specify the requirements for a tender security, including the form and wording, and the conditions for forfeiture of the security.

(3) The value of any required tender security shall be expressed as a fixed amount and not as a percentage.

(4) The amount shall not be less than two percent of the estimated value of the contract and shall be high enough to deter irresponsible tenderers, but not so high as to discourage competition especially from local Eswatini suppliers.

(5) Notwithstanding the provisions of sub-regulations (1) and (3), where it can be substantiated through the evidence derived from analysis of the relevant supply market that suppliers are reluctant to tender, the requirement for a tender security may be waived if authorised by the controlling officer or their delegate.

(6) Where the procuring entity requires tenderers submitting tenders to provide a tender security-

(a) the requirement shall apply to all tenderers;

(b) the invitation documents shall stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, and the form and terms of the tender security, have to be acceptable to the procuring entity;

(c) the confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the grounds that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks credit worthiness.

(7) Notwithstanding the provision of sub-regulation (6) (b) and unless the acceptance by the procuring entity of a tender security would be in violation of laws of Eswatini, a procuring entity shall not reject a tender security on the grounds that the tender security was not issued by an issuer in Eswatini if the tender security and the issuer otherwise conform to the requirements prescribed in the invitation documents.

(8) Prior to submitting a tender, a tenderer may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer and the procuring entity shall respond promptly to such request.

(9) The tender security shall be in accordance with the form of the tendering security or tendering securing declaration included in the invitation documents or any other form approved by the procuring entity prior to the tender submission.

(10) The tender security, at the option of the tenderer, shall be in the form of a certified cheque, a letter of credit, a bank guarantee from a reputable bank or an insurance bond from a reputable insurance firm.

(11) The procuring entity shall specify in the invitation documents, any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security.

(12) Any requirement that refers directly or indirectly to conduct by a tenderer submitting the tender shall not relate to conduct other than-

(a) withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline, if so stipulated in the invitation documents;

(b) disagreement to arithmetical correction made to the tender prices;

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

(d) failure to provide a required security for the performance of the contract or to comply with any other condition precedent to signing the procurement or disposal contract specified in the invitation documents.

(13) Subject to sub-regulation (8), tenderers shall be allowed to submit bank guarantees directly issued by a bank of their choice, or insurance bonds issued directly by a firm of their choice located in Eswatini or their country.

(14) The tender security shall remain valid for a period of not less than twenty-eight days beyond the validity period of the tender, in order to provide the procuring entity time to act if the security is called for.

(15) The tender securities of unsuccessful tenderers shall be released not more than thirty (30) days after the expiration of the tender validity period, as extended where appropriate or upon the award of contract, whichever is earlier.

(16) The tender security of the successful tenderer shall be discharged when the tenderer has signed the contract and furnished any required performance security to the satisfaction of the procuring entity.

(17) The procuring entity shall make no claim to the amount of the tender security, and shall return within thirty (30) days, or procure the return of the tender security document, after whichever of the following that occurs earliest-

(a) the expiry of the tender security;

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

(c) the rejection by the procuring entity of all tenders pursuant to these Regulations; or

(d) the withdrawal of the tender prior to the deadline for the submission of tenders, unless the invitation documents stipulate that no such withdrawal is permitted.

Tender Securing Declaration

53. Tender securities may not be required from tenderers participating in a preference scheme that is promulgated in accordance with the laws of Eswatini.

Clarification and Amendment of Tender Documents

54. (1) The invitation document shall state that a tenderer may seek clarification of the invitation document in writing from the procuring entity and shall state the final date after which such clarification may not be sought.

(2) The date mentioned is sub regulation (1) shall allow adequate time for tenderers, including foreign tenderers, to receive and study the invitation document.

(3) The procuring entity shall promptly provide a clarification in writing where a request for clarification is received.

(4) The clarification shall be copied to all tenderers and shall include a description of the inquiry, but without identifying the source.

(5) The procuring entity may, either at its own initiative or in response to a request for clarification from a tenderer, amend the invitation document by issuing an addendum at any time prior to the deadline for submission of tenders.

(6) Any amendment shall be issued in writing and the same information shall be provided to all tenderers at the same time.

(7) Every amendment shall be numbered sequentially.

(8) The procuring entity may, at its discretion, extend the deadline for the submission of tenders the issue of an amendment, to give tenderers reasonable time in which to take a clarification or amendment into account in preparing their tenders.

(9) Every clarification and addenda to the invitation document shall be binding on tenderers.

(10) Every amendment to the invitation documents shall be approved by the Technical Secretariat.

Pre-tendering meetings and site visits

55. (1) The procuring entity may organise -

(a) a pre-tendering conference in order to brief tenderers or to offer the opportunity for them to seek clarifications; or

(b) a site visit, to enable tenderers to gain access to the site for delivery of any proposed works or services.

(2) Details of pre-tendering conferences and site visits, including the date, time and location, shall be included in the invitation document and any tender notice.

(3) The date of any pre-tendering conference or site visit shall be sufficiently published early in the tendering period, to enable tenderers to take the information into account in preparing their tenders but shall not be so early as to make attendance difficult.

(4) The procuring entity shall prepare minutes of any pre-tendering conference and shall promptly send them to all tenderers to whom the invitation document has been issued.

(5) The minutes shall include -

(a) all information provided as part of any briefing;

(b) details of any clarifications requested, but without identifying the source of the inquiry;

(c) the details of responses provided to clarifications;

(d) a record of attendance; and

(e) a record of all the decisions taken.

(6) Following any pre-tendering conference or site visit, the procuring entity shall, where required, issue clarifications or amend the invitation document, in accordance with regulation 54.

Receipt of Tenders

56. (1) The tender document shall clearly state the date and time of the tendering deadline and that late and unlabelled tenders shall be rejected.

(2) The Tender Board shall ensure that-

(a) a tender box, or other means of receiving tenders, is made available to tenderers;

(b) tenders are kept confidential, and in the case of sealed tenders unopened, until the time for opening of tenders; and

(c) tendering is closed at the precise date and time of the tendering deadline and no late tenders are accepted.

(3) Every late tender shall be labelled as late, stating the date and time of actual receipt and shall be returned unopened to the tenderer.

(4) Immediately after the tender closing, the Bid Opening Committee appointed by the controlling officer or a delegate shall assume full responsibility for the tenders received, and shall open them in accordance with regulation 58.

Modification or withdrawal of tenders

57. (1) A tenderer may modify, or withdraw the tender prior to the deadline for the submission of tenders without forfeiting its tender security unless otherwise stipulated in the invitation documents.

(2) The modification or notice of withdrawal shall be effective if it is received by the procuring entity prior to the deadline for submission of tenders.

Tender Opening

58. (1) The Tender Opening Committee shall open in public all tenders received on time at the date, time and location indicated in the tender document.

(2) The time for tender opening shall be the same as, or immediately after, the time of the deadline for submission of tenders.

(3) Every tenderer, or representatives of that tenderer, shall be permitted to attend the opening of a tender.

(4) Details of the tender opening shall be included in the tender document.

(5) Except for unlabelled tenders, all tenders received on time shall be opened in turn and the details indicated in the tender document read out, which shall include at least-

(a) the name of the tenderer;

(b) the total price of the tender, including the currency and amount;

(c) Tender Securities; and,

(d) such other details as specified in the tender document.

(6) The chairperson of the tender opening shall stamp on the key pages of every tender that has been opened.

(7) Key pages shall include at least the priced and signed pages.

(8) A tender shall not be accepted, rejected or evaluated in any way at the tender opening with the exception of late tenders.

(9) Any discrepancies or missing documents shall be noted in the record of tender opening.

(10) The Tender Opening Committee shall make a record of the tender opening, which shall be kept as part of the procurement record and shall include at least the details read out in accordance with sub-regulation (5) and the names of all staff and representatives of tenderers who are attending the opening.

(11) Every representative of a tenderer who is attending the tender opening shall be requested to sign the record.

(12) The opened tenders shall immediately be taken to a secure location, where they shall be kept until the evaluation begins.

(13) The opened tenders, a copy of which shall be retained by the technical secretariat shall immediately be taken to a secure location, where they shall be kept until the evaluation begins.

SECTION B – Evaluation

Evaluation Committees

59. (1) The controlling officer of the procuring entity shall appoint an ad hoc evaluation committee for each procurement requirement and such committee shall be comprised of persons that meet fit-and-proper requirements as prescribed by the Agency.

(2) The evaluation committee shall be responsible for the evaluation of tenders, proposals or quotations in accordance with these regulations and the invitation document and the preparation of an evaluation report or reports for submission to the approvals authority.

(3) The number and level of expertise of members of the evaluation committee shall depend on the nature and complexity of the procurement requirement but shall be not less than three members.

(4) The evaluation committee shall include skills, knowledge and experience relevant to the procurement requirement as far as possible, which may include -

(a) technical skills relevant to the procurement requirement;

(b) end user representation;

(c) procurement and contracting skills;

(d) financial management or analysis skills; or

(e) legal expertise.

(5) The evaluation committee may seek guidance and advice from the Technical Secretariat where required.

(6) For purposes of transparency, section 30 of the Act on "Disclosure of Interest" shall also be applicable to members of the Evaluation Committee.

(7) A member of the Tender Board or any other approvals authority shall not be a member of the evaluation committee.

(8) Where required, the evaluation committee may include a member who is external to the procuring entity.

General Evaluation Rules

60. (1) All invitation documents shall clearly state the method and criteria to be used in the evaluation of tenders and the determination of the lowest or best evaluated tender.

(2) Any other method or criteria, other than those stated in the invitation document, shall not be taken into account and all criteria shall be applied equally to all tenders.

(3) The evaluation committee may in writing ask tenderers for written clarification of their tenders in order to assist in evaluation, but no changes in the substance of tenders, including

changes in price, shall be permitted after the date and time of tender closing, unless otherwise provided for in these regulations.

(4) The failure of a tenderer to reply to a request for clarification in writing may result in the rejection of its tender.

(5) The determination of the evaluation committee of a responsiveness of the tenderer shall be based on the contents of the tender itself, subject to any clarifications received.

(6) The non-material non-conformity, error or omission shall be quantified in monetary terms to the extent possible and taken into account in the financial evaluation and comparison of tenders.

(7) The evaluation committee may correct purely arithmetical errors in tenders in accordance with the procedure stated in the tender document.

(8) Tenderers shall be notified in writing of any arithmetical corrections and requested to provide written agreement to the correction.

(9) Any tenderer who does not provide written acceptance of the correction of an arithmetical error shall be rejected and the tender security of that tenderer may be forfeited.

(10) During the evaluation process no member of the evaluation committee shall be permitted to remove the proposals from the secure location where such proposals are kept.

Evaluation Methodology

61. (1) The methodology for evaluation of a tender shall consist of-

(a) a preliminary examination to determine whether tenders are complete and are responsive to the basic instructions and requirements of the tender document;

(b) a technical evaluation to compare each tender to the technical requirements of the statement of requirements on a pass or fail basis, to determine whether the tenders are substantially responsive; and

(c) a financial evaluation and comparison to determine the tender with the lowest evaluated price.

(2) Where appropriate, the procuring entity may include additional evaluation criteria in the tender document, which shall be taken into account in determining the evaluated price of each tender.

(3) Every additional evaluation criterion shall be related to the performance, characteristics or terms and conditions of a tender, such as delivery or completion schedule, payment schedule, the cost of spare parts or after sales service, operating or maintenance costs or the productivity of equipment.

(4) Any additional evaluation criteria shall be designed to measure the advantage or disadvantage of a factor to the procuring entity.

(5) Any advantage or disadvantage shall be quantified in monetary terms and applied as an increase or decrease to the tender price, for purposes of evaluation only.

(6) The tender document shall state the methodology for calculating and applying the adjustment to the tender price.

Preliminary Examination

62. (1) The evaluation committee shall conduct a preliminary examination to determine whether tenders are complete and are responsive to the basic instructions and requirements of the tender document.

(2) The preliminary examination conducted in term of this regulation shall determine whether -

(a) the tender has been submitted in the correct format;

(b) any required tender security has been submitted, in the correct form and amount and valid for at least the period required;

(c) the tender has been submitted without material reservations or deviations from the terms and conditions of the tender document;

(d) the tender has been correctly signed and authorised;

(e) the correct number of copies of the tender have been submitted;

(f) the tender is valid for at least the period required;

(g) all key documents and information required have been submitted;

(h) any required samples have been submitted;

(i) the tender meets any other key requirements of the tender document; and

(j) there have been any alterations or changes to the tender documents, except those required as part of the tender requirement.

(3) Any non-conformity, which are considered to be material, shall result in rejection of the tender and such tenders shall not be subject to technical evaluation.

(4) Any non-conformity which is considered to be non-material by the procuring entity shall not result in rejection of the tender.

(5) A material non-conformity is one that-

(a) affects in any substantial way the quality or delivery of the goods or the scope, quality, or execution of the services or works;

(b) represents a substantial inconsistency with the Tender Documents the rights of the Procuring Entity or, the obligations of the Tenderer under the Contract; or

(c) would affect unfairly the competitive position of other Tenderers presenting substantially responsive tenders where the non-conformity may be rectified, such may be permitted by the evaluation committee as it deems fit.

(6) The preliminary examination shall also determine whether tenderers are eligible in accordance with section 40 of the Act and where this has not been determined prior to inviting tenders.

Technical Evaluation

63. (1) The evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the statement of requirements in the tender document, to determine whether the tenders are substantially responsive.

(2) The factors taken into account shall be those indicated in the tender document only and may include, but not be limited to -

(a) conformity to specifications, standards, drawings or terms of reference, without material deviation or reservation;

(b) satisfactory understanding of an assignment, as demonstrated by any method or design; or,

(c) suitable staffing or arrangements for supervision or management of an assignment.

(3) The evaluation shall not take into account any requirements which were not included in the tender document.

(4) Any material deviations shall result in rejection of the tender and such tenders shall not be subject to financial evaluation and comparison.

Financial Evaluation and Comparison

64. (1) The evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price or cost of each tender and determine the lowest priced or cost tender, which is substantially responsive to the requirements of the tender document.

(2) The evaluated price or cost for each tender shall be determined by -

(a) taking the tender price, as read out at the tender opening;

(b) correcting any arithmetic errors, in accordance with the method stated in the tender document;

(c) applying any non-conditional discounts offered in the tender;

(d) making adjustments for any non-material non-conformity, error or omission;

(e) applying any additional evaluation criteria, through an increase or decrease to the tender price;

(f) converting all tenders to a single currency, using the currency and the source and date of exchange rate indicated in the tender document; and

(g) applying any margin of preference indicated in the tender document.

(3) Tenders shall be compared by ranking them according to their evaluated price or cost and determining the tender with the lowest evaluated price or cost, which shall be the best evaluated tender.

(4) Where the tender document includes more than one lot and permits tenderers to offer discounts, which are conditional on the award of one or more lots, the evaluation committee shall conduct a further financial evaluation, to determine the lowest evaluated combination of tenders.

(5) Where the lowest priced tender appears to be abnormally low, the evaluation committee may request a breakdown and justification of prices in order to verify the responsiveness of the tender or the qualifications of tenderer.

(6) Where a tender is uneconomically priced without justification, the evaluation committee may recommend the rejection of that tender.

(7) The budget estimate by the procuring entity may be used as guidance in assessing pricing, but variation from the estimate shall not be used as the sole grounds for rejection of a tender without further justification.

Post-Qualification

65. (1) Where appropriate, a post-qualification may be undertaken in accordance with the criteria in the tender document, to determine whether a tenderer has the capability and resources to effectively carry out the contract.

(2) Where a tenderer is determined not to be qualified, the tender shall be rejected, and a post-qualification conducted on the tenderer who submitted the next lowest evaluated responsive tender.

(3) Where a pre-qualification has been conducted, the evaluation committee shall verify the information submitted by the tenderer who submitted the lowest evaluated responsive tender.

(4) Where a pre-qualification has been conducted and where the tenderer no longer meets the qualification criteria, the tender shall be rejected, and the qualifications of the next best evaluated tenderer verified.

Evaluation Report and Award Recommendation

66. (1) The evaluation committee shall prepare an evaluation report for submission to the approvals authority.

(2) The evaluation report shall include -

(a) an overview of the requirement;

(b) the invitation document;

(c) a summary of the tenders received and opened;

(d) the results of the preliminary examination;

(e) the results of the technical evaluation;

(f) reasons why any tenders were declared non-responsive;

(g) details of any non-material non-conformities which were accepted and the way in which they were quantified and taken into account in the financial evaluation;

(h) the evaluated price or cost of each tender, showing any corrections or adjustments to the tender price and any conversion to a common currency;

(i) the ranking of the tenders, according to their total evaluated price or cost;

(j) a statement of the best evaluated tender, for each lot where applicable;

(k) a summary of the application of any conditional discounts and the best evaluated combination of tenders, where applicable;

(l) the results of any post-qualification;

(m) a recommendation to award the contract or contracts to the best evaluated tender or combination of tenders, or other appropriate recommendation, such as cancellation of the procurement process or re-tendering; and

(n) the relevant budget approval.

(3) The evaluation report and recommendations shall be approved by the relevant approvals authority, prior to proceeding with contract award or any other action, such as cancellation of the procurement process or re-tendering.

(4) A copy of the individual procurement plan, original tender documentation together with the evaluation report and recommendations shall be made available to the approvals authority.

PART IX
PROCEDURES FOR REQUEST FOR PROPOSALS
SECTION A –Invitation Procedures

Selection procedures

67. (1) These procedures are applicable to the procurement of consultants, services and that are not easily specified or to works involving innovation in design or project delivery where value for money is achieved by selecting the tenderer that is capable of providing the most cost effective solution to the needs of the procuring entity.

(2) Tenderers shall normally be selected through the publication of a notice inviting expressions of interest and development of a shortlist in accordance with regulations 69 and 70.

(3) A shortlist may be developed without publication of a notice inviting expressions of interest in as required by regulation 68 where-

(a) an analysis of the relevant supply market substantiates that the services are only available from a limited number of services providers, contractors or consultants;

(b) there is insufficient time for publication of a notice in an emergency situation; or

(c) the procurement is for goods, services or works categorised as low relative value as specified in First Schedule.

(4) For commonly or repeatedly required services, consultancies or works a prequalification for a group of contracts may be conducted in accordance with regulation 46.

(5) A shortlist for such services may be developed without publication of a notice inviting expressions of interest as required by regulation 68.

Notices Inviting Expressions of Interest

68. (1) Notices requesting expressions of interest shall invite all potential applicants to submit expressions of interest.

(2) A notice in terms of Regulation 68 (3) shall be published in accordance with regulation 21 and shall be by direct invitation and all notices under this regulation shall contain at least-

(a) the name, address and contact details of the procuring entity;

(b) details of the scope of the service, assignment or works;

(c) a statement of the key criteria for short-listing, which shall be related to the applicant's experience, qualifications, personnel and any other factor related to their ability to successfully perform the service, assignment or works;

(d) details of the information to be included in the expression of interest, including any information or documentation required to verify the applicant's eligibility or qualifications; and

(e) the date, time and address for submission and any special instructions on sealing, marking or submission of expressions of interest.

(3) Notices seeking expressions of interest shall be published at least fourteen (14) days prior to the deadline for submission.

Evaluation of Expressions of Interest and Development of Shortlist

69. (1) All expressions of interest shall be evaluated by an evaluation committee appointed in accordance with regulation 59.

(2) The evaluation shall be conducted using the criteria stated in the notice inviting expressions of interest, in order to develop a shortlist of tenderers who are expected to be able to meet the requirements of the procuring entity.

(3) The procuring entity shall maintain a proper and efficient record of the evaluation of expressions of interest.

(4) The shortlist shall include sufficient tenderers to ensure effective competition, which shall be between three and six tenderers, wherever possible.

(5) The applicants who best meet the procuring entity's requirements shall be included on the shortlist where the number of suitable tenderers is greater than six.

(6) Tenderers shall not be included unless they are expected to fully satisfy the requirements of the procuring entity, including those related to eligibility, qualifications, capacity, resources and experience.

(7) The results of the evaluation of the expressions of interest and the proposed shortlist shall be authorised by the Tender Board prior to issue of the request for proposals document.

Development of Shortlists without Expressions of Interest

70. (1) Where the procuring entity develops a shortlist, without seeking expressions of interest, the shortlist shall include-

(a) all potential tenderers, where the services are only available from a limited number of service providers, consultants or contractors, in accordance with regulation 49; or,

(b) at least three tenderers in all other cases.

(2) Where a shortlist is developed following a pre-qualification in accordance with regulation 49, pre-qualified tenderers shall be rotated on successive shortlists to ensure equal opportunities to all pre-qualified tenderers.

(3) The proposed shortlist shall be authorised by the Tender Board prior to issue of the request for proposals documents.

Request for Proposals Document

71. (1) The request for proposals document shall contain all the information required by tenderers to prepare and submit proposals and shall be drafted using the standard document issued in accordance with regulation 19.

(2) Every request for proposals document shall contain-

(a) clear instructions on the management of the procurement process and the applicable rules, including the requirement to submit separate technical and financial proposals and for separate technical and financial evaluations;

(b) a clear description of the services required in the form of a statement of requirements;

(c) a clear statement and explanation of the selection procedure used and a statement of all evaluation, eligibility and qualification criteria to be applied; and

(d) the proposed form and conditions of contract.

(3) The request for proposals document shall state the estimated person months for the services, assignment or works, but the budget shall not be disclosed.

(4) The request for proposals document shall clearly state that no financial information should be included in the technical proposal.

(5) The request for proposals document shall be authorised by the by the technical secretariat, prior to its issue.

Evaluation Methods

72. (1) The procuring entity shall select the most appropriate evaluation method and shall set it out in the invitation document.

(2) Alternative selection methods, evaluation methods and conditions for consulting assignments are set out in regulation 87 but the usual evaluation methods shall be either;

(a) Quality and Cost Based Selection, which takes into account both the quality and the cost of proposals and selects the proposal which offers the optimum balance of quality and cost; or,

(b) Least Cost Selection, which selects the lowest priced proposal, which meets the technical requirements of the procuring entity.

(3) Quality and Cost Based Selection shall be the preferred selection procedure.

(4) Least Cost Selection may be used for services, assignments work of a standard or routine nature, where well-established practices and standards exist.

Evaluation Criteria

73. (1) The request for proposals document shall state the evaluation criteria to be applied during the technical evaluation.

(2) The evaluation criteria shall be designed to assess the ability of tenderers to-

(a) perform the assignment, services or works through assessment of their experience, method or personnel; or,

(b) meet objectives of the requirement, such as the transfer of knowledge or involve national suppliers.

(3) Each criterion shall be allocated a maximum number of points and the total for all criteria shall equal one hundred.

(4) The number of points allocated to each criterion shall be directly related to its importance to the procurement, except that the points allocated to experience may be limited, where experience has already been taken into account in the development of the shortlist.

Minimum Tendering Periods

74. (1) The tendering period shall start on the date of issue of the request for proposals document to all shortlisted tenderers and shall finish on the date of the proposal submission deadline.

(2) The minimum tendering period shall be-

(a) seven (7) days where the shortlist includes national tenderers only; or,

(b) twenty-one (21) days where the shortlist includes foreign tenderers.

(3) Notwithstanding the provisions of sub-regulation (2), where the shortlist is developed without inviting expressions of interest on grounds of urgency in accordance with regulation 51, the tendering period may be reduced to a minimum of seven days.

(4) Urgency should not have been foreseen by the procuring entity, or be a result of inadequate planning, self-creation or caused by dilatory conduct.

Receipt of Proposals

75. (1) The request for proposals document shall clearly state the date and time of the tendering deadline and that late proposals shall be rejected.

(2) The procuring entity shall ensure that-

(a) a tender box, or other means of receiving proposals, is made available to tenderers;

(b) proposals are kept confidential, and in the case of sealed proposals unopened, until the time for opening of proposals; and

(c) tendering is closed at the precise date and time of the tendering deadline and no late proposals are accepted.

(3) Late proposals shall not be accepted.

(4) Immediately after the tender closing, the Tendering Opening Committee appointed by the controlling officer or their delegate shall assume full responsibility for the proposals received, which shall be taken to the location for proposal opening.

Opening of Technical Proposals.

76. (1) The Tendering Opening Committee shall open all proposals received on time at the time of, or immediately after, the deadline for submission of proposals.

(2) All proposals received on time shall have their outer envelopes opened in turn and the technical proposals within opened.

(3) The details indicated in the request for proposals document shall be read out, which shall include at least-

(a) the name of the tenderer; and

(b) whether or not a separately sealed financial proposal has been submitted.

(4) All technical proposals opened shall be stamped on key pages by the chairperson of the Tendering Opening Committee.

(5) With the exception of late proposals, no proposal shall be accepted, rejected or evaluated in any way at the proposal opening. Any discrepancies or missing documents shall be noted in the record of proposal opening.

(6) The Tendering Opening Committee shall make a record of the proposal opening, which shall be kept as part of the procurement record.

(7) The record of the proposal opening shall include at least the details read out in accordance with sub-regulation (3) and the names of all staff attending the opening.

(8) The technical proposals shall be taken immediately to a secure location, where they shall be kept until the evaluation begins.

(9) Financial proposals shall be kept unopened in a secure location, until the time for opening of financial proposals.

(10) The proposal opening shall be held in public.

SECTION B – Evaluation

Evaluation Method

77. The method for the evaluation of proposals shall consist of-

(a) a preliminary examination to determine whether proposals are complete and are responsive to the basic instructions and requirements of the request for proposals document;

(b) a technical evaluation to assess the technical quality of proposals against the evaluation criteria on a merit point system, to determine the technical score of each technical proposal and to determine which technical proposals reached the minimum technical score; and

(c) a financial evaluation and comparison to determine the best evaluated proposal, according to the specified evaluation method.

Preliminary Examination

78. (1) The evaluation committee appointed in accordance with regulation 59 shall conduct a preliminary examination to determine whether proposals are complete and responsive to the basic instructions and requirements of the request for proposals document.

(2) The preliminary examination conducted in terms of sub-regulation (1) shall determine whether-

(a) the proposal has been submitted in the correct format;

(b) the proposal has been submitted without material reservations or deviations from the terms and conditions of the request for proposals document;

(c) the proposal has been correctly signed and authorised;

(d) the correct number of copies of the proposal have been submitted;

(e) a separately sealed financial proposal has been submitted and that no financial details are contained in the technical proposal;

(f) the proposal is valid for at least the period required;

(g) curriculum vitae has been correctly signed, if required; (SBDs should include letter from an expect confirming availability;

(h) all key documents and information have been submitted; and

(i) the proposal meets any other key requirements of the request for proposals document.

(3) Any material deviations shall result in rejection of the proposal and such proposals shall not be subject to technical evaluation.

(4) The preliminary examination shall also determine whether tenderers are eligible, in accordance with section 40 of the Act, where this has not been determined prior to inviting proposals.

Technical Evaluation

79. (1) Each member of the evaluation committee shall independently conduct a technical evaluation of each proposal, awarding scores against each criterion and recording strengths and weaknesses of each proposal.

(2) Every awarded score shall be recorded in a score sheet which shall be signed by the evaluators.

(3) Scores from each member of the evaluation committee shall be compiled and an average score for each proposal shall be calculated from the individual scores awarded by members of the evaluation committee.

(4) The evaluation committee shall consider any significant deviations from the average score or inconsistencies in scoring and evaluators may be required to justify the scores awarded.

(5) Where an evaluator has misunderstood a proposal or the criteria or has evaluated proposals in an inconsistent manner, the evaluator may be permitted to adjust his scores, but no evaluator shall be obliged to make adjustments to his scores or permitted to adjust scores without justification.

(6) Where any score is adjusted, the original score sheet shall be kept as part of the record of the evaluation, the adjusted scores recorded on a new score sheet and the reasons for making adjustments shall be recorded.

(7) The average score for each proposal shall be its total technical score for evaluation purposes.

(8) The total technical score of each proposal shall be compared to the minimum technical qualifying mark stated in the request for proposals document.

(9) Any proposal with a score less than the minimum technical qualifying mark shall be rejected and eliminated from further evaluation.

(10) All proposals with a score equal to or higher than the minimum technical qualifying mark shall be recommended for financial evaluation.

Technical Evaluation Report

80. (1) The evaluation committee shall prepare a technical evaluation report, which shall include-

(a) minutes of the opening of technical proposals;

(b) the results of the preliminary examination, with reasons why any proposals were rejected;

(c) the technical scores awarded by each evaluation in respect each proposal;

(d) a summary of the relative strengths and weaknesses of each proposal;

(e) an analysis of any significant discrepancies or inconsistencies in scoring and an explanation of any adjustments made to scores;

(f) the total technical score for each proposal;

(g) a list of the proposals which reached the minimum technical qualifying mark and a recommendation to open the financial proposals of these tenderers; and

(h) a recommendation to reject all proposals which did not reach the minimum technical qualifying mark.

(2) The recommendations of the technical evaluation committee shall be approved by the approvals authority prior to proceeding with the opening and evaluation of financial proposals, or the rejection of any proposals.

Opening of Financial Proposals

81. (1) The procuring entity shall notify the tenderers, whose proposals are proceeding to the financial evaluation of the date and time set for the opening of financial proposals following approval of the recommendations of the technical evaluation report by the approvals authority.

(2) The opening date of financial proposals shall not be sooner than fourteen (14) days after the notification date where foreign tenderers are included, or seven (7) days where all tenderers are national, with the exception of tenders for which urgency has been justified in accordance with regulation 74(3).

(3) The Tender Opening Committee shall open the recommended financial proposals at the time, date and location notified to tenderers. Tenderers' representatives shall be permitted to attend and witness the opening.

(4) Key pages of the financial proposals shall be stamped, and the following information read out and recorded-

(a) name of the tenderer; and

(b) total proposal price.

(5) The opened financial proposals shall be taken immediately to a secure location, where they shall be kept until the financial evaluation begins.

(6) The Tender Opening Committee shall maintain a record of the financial proposal opening, which shall form part of the procurement record.

(7) All representatives of tenderers attending the financial opening shall be requested to sign the record, but the absence of any signature shall not invalidate the record.

(8) The financial proposals of tenderers who did not meet the minimum technical qualifying mark shall be returned unopened following award and signature of the contract.

Financial Evaluation for Quality and Cost Based Selection

82. (1) The evaluation committee shall determine the evaluated price of each proposal by-

(a) correcting any arithmetic errors in accordance with the Request for Proposals document;

(b) determining whether financial proposals are complete and have costed all corresponding inputs in the technical proposal, costing any missing items and adding them to the proposal price;

(c) in the case of lump sum contracts, the costing of missing items shall not be allowed; and

(d) converting all proposals to a single currency for purposes of evaluation, using the currency, source and date of exchange rates indicated in the request for proposals document.

(2) The lowest priced proposal shall be given a financial score of one hundred (100) and other proposals shall be given a financial score which is inversely proportional to the lowest evaluated price, using the method stated in the request for proposals document.

(3) The technical and financial scores of each proposal shall be weighted, using the weights stated in the request for proposals document.

(4) The weighted technical and financial scores shall be added together, to give a total score for each proposal.

(5) The proposal with the highest total score shall be the best evaluated proposal and shall be recommended for award of contract, subject to any negotiations required.

Financial Evaluation Report for Quality and Cost Based Selection

83. (1) The evaluation committee shall prepare a financial evaluation report, which shall include-

(a) minutes of the opening of financial proposals, including the technical scores and proposal prices read out;

(b) the evaluated price of each proposal, following any corrections, adjustments and the conversion to a single currency;

(c) the financial score of each proposal and the methodology used for allocating financial scores;

(d) the weighting of the technical and financial scores;

(e) the total score for each proposal;

(f) a recommendation to award the contract to the tenderer obtaining the highest total score, subject to any negotiations required; and

(g) the currency and price of the proposed contract, subject to any changes following negotiations.

(2) Any negotiations shall be conducted in accordance with regulations 86 and 107.

Financial Evaluation for Least Cost Selection

84. (1) The evaluation committee shall determine the evaluated price of each proposal by-

(a) correcting any arithmetic errors;

(b) determining whether financial proposals are complete and have costed all corresponding inputs in the technical proposal, costing any missing items and adding them to the proposal price; and,

(c) converting all proposals to a single currency for purposes of evaluation, using the currency, source and date of exchange rates indicated in the request for proposals document.

(2) All proposals shall be ranked, according to their evaluated price.

(3) The proposal with the lowest evaluated price shall be the best evaluated proposal and shall be recommended for award of contract, subject to any negotiations required.

Financial Evaluation Report for Least Cost Selection

85. (1) The evaluation committee shall prepare a financial evaluation report, which shall include-

(a) minutes of the opening of financial proposals, including the technical scores and proposal prices read out;

(b) the evaluated price of each proposal, following any corrections, adjustments and the conversion to a single currency;

(c) a recommendation to award the contract to the tenderer with the lowest evaluated price, subject to any negotiations required; and

(d) the currency and price of the proposed contract, subject to any changes following negotiations.

(2) Any negotiations shall be conducted in accordance with regulations 86 and 107.

Scope of Negotiations

86. (1) Negotiations may relate to-

(a) minor alterations to the terms of reference, methodology and staffing;

(b) minor amendments to the Special Conditions of Contract;

(c) mobilisation arrangements, the work-plan and completion schedule; and

(d) inputs required from the procuring entity.

(2) Negotiations shall not be conducted to-

(a) substantially change the technical quality or details of the proposal, including the tasks or responsibilities of the tenderer;

(b) materially alter the terms and conditions of contract;

(c) reduce fee rates or reimbursable costs, except where changes are required to reflect any agreed changes to the technical proposal; or,

(d) substantially alter anything which was a deciding factor in the evaluation of proposals.

Alternative selection methods, procedures and conditions for application on consultancies and services

87. (1) The selection method, procedure and evaluation criteria to be adopted shall be determined by the procuring entity and shall be stated in the Request for Proposals document.

(2) The following principal selection methods shall be applied according to the characteristics of the service required-

(a) selection based solely on technical quality;

(b) selection based on technical quality with price consideration;

(c) selection based on the compatibility of technical proposal and least cost consideration; and

(d) selection based on quality and fixed budget.

(3) The adoption of any of the principal selection methods listed in sub-regulation (2) shall depend on the nature of the assignment, service, the impact of the assignment on the resulting end-product and the probability that the proposals will lead to comparable outputs.

Selection based solely on technical quality

88. (1) In the selection procedure based solely on technical quality, the firm which has submitted the best technically acceptable proposal shall be the first to be invited for negotiations in accordance with regulation 107.

(2) Quality based selection is appropriate for the following types of assignments-

(a) complex or highly specialized assignments for which it is difficult to define precise terms of reference and the required input from the consultants, and for which the client expects the consultants to demonstrate innovation in their proposals;

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

(c) assignments that can be carried out in substantially different ways, such as management advice and sector and policy studies in which the value of the services depends on the quality of the analysis; and

(d) architectural services.

(3) Subject to sub-regulation (2) novel and complex architectural services may be obtained through architectural competition in accordance with architectural procedures prescribed by the relevant professional regulatory body subject to approval of the use of such procedures by the Agency.

(4) A firm shall be eligible to participate in architectural competition pursuant to subregulation (1) if it is registered or capable of being registered with the relevant professional body.

(5) In quality-based selection, the request for proposals may request submission of a technical proposal only or request for submission of both technical and financial proposals at the same time, but in separate envelopes and the request for proposals shall not provide the estimated budget.

(6) If technical proposals alone were invited, after evaluating the technical proposals, the procuring entity shall ask the consultant with the highest ranked technical proposal entity and the consultant shall then negotiate in accordance with regulation 107 the financial proposal and the contract.

(7) If consultants were requested to provide financial proposals initially together with the technical proposals, safeguards shall be built in to ensure that the price envelope of only the selected proposal is opened and the rest returned unopened, after the negotiations are successfully concluded.

(8) The envelope containing the financial proposal shall be opened in the firm's presence and its contents examined and where no agreement is reached, then the consultant whose technical proposal is ranked the second shall be invited for negotiations.

(9) The exercise may continue until an agreement is reached with one of the firms whose technical proposal is considered satisfactory and retained.

(10) The financial envelopes containing the proposals of firms not invited for negotiations will be returned unopened to the firms.

Selection based on combined technical quality and price consideration.

89. (1) The selection procedure based on the technical quality with price consideration shall start with the evaluation of technical proposals.

(2) The technical proposals considered satisfactory and classified by order of merit shall have the corresponding financial proposals opened.

(3) After the necessary correction of arithmetic errors are made, a score of one-hundred percent shall be given to the lowest financial proposal and the score given to each of the other financial proposals is proportionately reduced.

(4) The technical and financial proposals shall be weighted as specified in the request for proposal and the combined value of the two proposals shall be calculated for each firm.

(5) Negotiations shall be initiated with the firm which has the highest combined score and shall be conducted in accordance with regulation 107, until an agreement is reached with one of the firms whose technical proposals are considered satisfactory and retained.

Selection based on compatibility of technical proposals and least cost consideration

90. (1) The selection based on compatibility of technical proposals and least cost consideration may be used in the selection of consultants or service providers for assignments of a standard or routine nature where well-established practices and standards exist, and in which the contract amount is small.

(2) The procedure shall start with the evaluation of the technical proposal and firms whose technical proposals are retained shall be those who scored equal or above the minimum specified threshold.

(3) Only the envelopes containing the financial proposals of consultants who scored equal or above the minimum specified threshold shall be opened at the stage of examination of financial proposals.

(4) The necessary arithmetic corrections will then be made for the purposes of comparison and the consultant or service provider whose financial offer is considered the lowest shall be invited for negotiations in accordance with regulation 107.

(5) The consultant or service whose financial offer is ranked second lowest, shall in turn be invited to negotiate and so on until an agreement is reached, with one of the best ranked consultants or service providers where an agreement is not reached.

Selection based on quality and fixed budget

91. (1) The selection based on quality and fixed budget method may be used when the assignment is simple and can be precisely defined, when the budget is fixed.

(2) The request for proposals shall indicate the available budget and request the consultants to provide their technical and financial proposals in separate envelopes, within the budget.

(3) Terms of reference shall be prepared to make sure that the budget is sufficient for the consultants or service provider to perform the expected tasks.

(4) Evaluation of all technical proposals shall be carried out first and the price envelopes of those scoring above the minimum threshold shall be opened in public.

(5) Proposals that exceed the indicated budget shall be rejected.

(6) The consultant or service provider who has submitted the highest ranked technical proposal among the rest shall be selected and invited to negotiate a contract in accordance with regulation 107.

Selection of public bodies, agencies and consultants

92. Consulting firms or service providers which are partially or totally controlled or sponsored by the government or public authorities may be eligible for public financed projects if-

(a) their qualification and experience are suitable for the assignment in question;

(b) their structure and legal status are such that they can enter into a legally binding agreement with the public authorities' project implementation Ministry; and

(c) privileges as well as other advantages such as tax exemptions and other facilities and special payment provisions are evaluated and neutralized in the cost comparison to ensure fair competition.

PART X
PROCEDURES FOR REQUEST FOR QUOTATIONS

Request for Quotation

93. (1) The procuring entity may request tenderers to submit written quotations where the estimated value of the goods, works or non-consulting services does not exceed the threshold specified in the First Schedule.

(2) The tendering period shall start on the date of issue of the request for quotations document to shortlisted tenderers and shall finish on the date of the tender submission deadline.

(3) The tendering period shall be specified in the Receipt for Quotation document.

(4) A Request for Quotations document shall specify the location, date and time for submission of quotations and any quotation received after the deadline for submission shall be rejected.

(5) Every quotation shall be kept securely until after the deadline for submission of quotations.

(6) Procedures for receiving and opening of quotations shall be prescribed by the Agency through manual, circulars and instructions.

(7) Electronic quotations shall be permitted only in instances where a secure portal is used to receive such quotations and such portal shall be maintained by the procuring entity or through a secure email address or internet site dedicated to the tendering process.

(8) Submissions by fax shall not be permissible as dedicated and secure fax lines are not practical.

Request for Quotations documents

94. (1) The Request for Quotations document shall contain all the information required by tenderers to prepare and submit quotations and shall be drafted using the standard document issued in accordance with regulation 21.

(2) The request for quotations document shall be authorised by the controlling officer or a delegate of the controlling officer, prior to its issue.

(3) Negotiations shall not be permitted under the request for quotations method.

Evaluation of quotations

95. (1) The procuring entity shall evaluate the quotations received.

(2) The evaluation of quotations shall be conducted in accordance with the rules and procedures in this part, except that the determination of the evaluated price of quotations shall not include the application of any additional evaluation method as prescribed in regulation 77.

(3) The quotation with the lowest evaluated price, which is substantially responsive to the requirements of the procuring entity, shall be recommended for award of contract.

Shortlists of Tenderers authorised by controlling officer

96. (1) Written quotations shall be requested from a shortlist of tenderers which shall be authorised by the controlling officer prior to issue of the request for quotations document.

(2) The shortlist shall include sufficient tenderers to ensure effective competition and shall normally not exceed four quotations.

(3) Tenderers shall not be included on a shortlist unless they are expected to fully satisfy the requirements of the procuring entity including those related to eligibility, qualifications, capacity, resources and experience.

PART XI
PROCEDURES FOR SINGLE SOURCE PROCUREMENT
SECTION A – Single Source Procurement for goods and services

Single Source Procurement for goods and services

97. (1) A procuring entity may engage in a single-source procurement, subject to prior approval by the approvals authority under the following circumstances-

(a) the goods or services are available only from a particular tenderer who has exclusive rights in respect of the goods or services, and no reasonable alternative or substitute exists (sole-sourcing);

(b) there is an urgent need for the goods or services, and engaging in tendering proceedings or any other method of procurement would, therefore, be impractical, and the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) a procuring entity, having procured goods, equipment, technology, services or spare parts from a supplier, following national or international competitive tendering, determines that additional supplies or services of the same type as those purchased under an existing contract are required;

(d) a procuring entity seeks to enter into a contract with a tenderer for the purpose of research, experiment, except where the contract includes the product of goods in quantities to establish their commercial viability or to recover research and development costs;

(e) procurement involving national defence or national security and where it is determined that a single - source procurement is the most appropriate method of procurement for security reasons;

(f) where critical items need to be purchased from a specified supplier to ensure that the output of a process plant shall be guaranteed by the contractor responsible for the process design;

(g) where standardization of equipment is essential for economic and technical reasons and it has been proved to the satisfaction of the controlling officer or their delegate that compatibility of the existing equipment or item with another make of equipment cannot be established and that there is no advantage in having an alternative supplier;

(h) where standardization of spare parts is required so that they may be compatible with existing equipment or spare parts or stock items related to specific and specialized equipment or machinery; or

(i) where an on-going contract, additional items or services need to be purchased for the completion.

(2) In the circumstances prescribed under sub-regulation (1), a procuring entity may procure the goods or services, by inviting a tender or a proposal or a price quotation from a single supplier.

(3) In circumstances not prescribed under sub-regulation (1), a procuring entity shall seek the prior authorisation of the relevant approvals authority before procuring the goods or services by inviting a tender or a proposal or price quotation from a single supplier.

Procedure for single source procurement of goods and services

98. (1) Subject to prior approval by the Tender Board a procuring entity may engage in single-source procurement when procurement from a particular supplier or service provider and in such a case, the letter of invitation to the selected tenderer shall contain-

(a) the full name and address of the procuring entity;

(b) instructions for submission of the tender document;

(c) a full description of the goods or services to be procured, including the required technical or quality characteristics, specifications, designs, plans and drawings, as appropriate;

(d) the quantities of any goods, or the desired results of any service to be supplied or provided and the required time and place of delivery, any requirements for minimum performance, warranty and maintenance for such goods or management and reporting requirements of a service provider;

(e) whether any alternatives to the required specifications or characteristics of the goods or services, or to other contractual conditions, are to be permitted;

(f) the period during which the tender is to remain valid;

(g) the form of contract or Purchase Order, to include all conditions and terms of payment;

(h) a statement of the currency in which the supplier or service provider will be paid;

(i) fees if any, to be charged by the procuring entity for the tender document; and

(j) a statement that the procuring entity does not bind itself to accept the tender.

(2) The procuring entity shall evaluate any tender received and, where necessary, negotiate with the supplier with a view to ensuring that the requirement for the goods or services are complied with, and the price quoted is not excessive and is in line with reasonable expectations.

(3) The procuring entity shall not make undesirable reductions in the quality of the goods or services in order to achieve cost savings.

(4) The justification for single source procurement according to regulation 97 shall be prescribed in the record of procurement proceedings.

Single source procurement for works

99. (1) Subject to approval by approvals authority a procuring entity may obtain a tender from a single contractor, negotiate and enter into a direct contract if-

(a) there is an urgent need for the works such that there would be insufficient time for a procuring entity to engage in tendering or any other method of procurement, provided that the circumstances giving rise to the urgency could not have been foreseen by the procuring entity and have not been caused by dilatory conduct on its part; or

(b) there is only one particular contractor which a procuring entity can reasonably expect to undertake the required works within the required timeframe.

(2) Subject to the approval of the relevant approvals authority, a procuring entity may obtain a priced quotation from a single contractor, negotiate and enter into a direct contract if-

(a) there are advantages to a procuring entity in using a particular contractor who has undertaken or is undertaking similar works or who may have already been mobilised with plant, equipment and staff in the vicinity or any other resources as may be appropriate; or

(b) works which are under execution are to be extended, and the corresponding contract is awarded following national or international competitive tendering.

(3) The letter of invitation to the selected contractor shall contain-

(a) the full name and address of the procuring entity;

(b) instructions for submission of a tender document;

(c) a full description of the works to be procured, including the required technical or quality characteristics, specifications, designs, plans and drawings;

(d) bills of quantities, the location and the required time for their completion;

(e) any alternatives to the required specifications or characteristics of the works, or to other contractual conditions, if such alternatives are to be permitted;

(f) the period during which the tender is to remain valid;

(g) the form of contract or Purchase Order, to include all conditions and terms of payment;

(h) a statement of the currency in which the contractor will be paid;

(i) fees if any, to be charged by the procuring entity for the tender document; and

(j) a statement that the procuring entity does not bind itself to accept the tender.

(4) A procuring entity shall evaluate any tender received and, where necessary, negotiate with the contractor with a view to ensuring that the requirement for the works is properly addressed and the price quoted is not excessive and is in line with reasonable expectations.

(5) A procuring entity shall not make undesirable reductions in the quality and scope of the works in order to achieve cost savings.

(6) The justification for direct contracting shall be set out in the record of procurement proceedings.

Single source procurement for consultancy services

100. (1) The use for single-source selection method shall be examined in the context of the overall interests of a procuring entity and the controlling officer's responsibility to ensure economy and efficiency and provide opportunity to all consultants to the extent possible.

(2) Subject to approval by the approvals authority, single-source selection may be undertaken only if it presents a clearly justified advantage over competition where -

(a) the tasks represent a natural continuation of previous work carried out by the firm;

(b) a rapid selection is essential such as in an emergency situation or

(c) only one firm is qualified or has experience of exceptional worth for the assignment.

(3) The initial request for proposals shall outline this prospect and, if practical, the factors used for the selection of the consultant shall take into account the likelihood of continuity for downstream work, when continuity for downstream work is essential.

(4) Continuity in the technical approach, experience acquired, and continued professional liability of the same consultant may make continuation with the initial consultant preferable to a new competition.

(5) Subject to satisfactory performance in the initial assignment and for such downstream assignments, the procuring entity shall request the initially selected consultant to prepare technical and financial proposals on the basis of terms of reference furnished by the procuring entity which shall then be negotiated in accordance with regulation 107.

(6) If the initial assignment was not awarded on a competitive basis or was awarded under tied financing or reserved selection or, if the downstream assignment was substantially larger in value, a competitive selection process shall be pursued and the consultant carrying out the initial work shall not be excluded from consideration if interest is expressed.

SECTION B – Single Source Procurement for Emergency Needs

Procurement for Emergency Needs

101. Where the procuring entity conducts single source procurement on the grounds that there is insufficient time for any other method in an emergency situation, the procuring entity shall –

(a) first confirm that the goods, works or services required are not available from stores or under any existing framework contract or similar arrangement;

(b) identify a suitable tenderer;

(c) prepare a written request for a tender, containing a statement of requirements for the goods, works or services required and a statement of the proposed contract form and terms and conditions of contract;

(d) evaluate the tender;

(e) negotiate with the tenderer, if required, in accordance with the negotiation procedure laid down by these regulations;

(f) where time does not permit the controlling officer shall obtain a written quotation from the identified supplier and facilitate evaluation of such quotation and in this case tendering may be verbal; and

(g) prepare a brief report for submission to the relevant approvals authority, which shall contain –

(i) details of the requirement and the emergency circumstances;

(ii) a summary of the action taken to invite, evaluate and negotiate the tender; and

(iii) a recommendation to award the contract or take other appropriate action.

Procedure for conducting Emergency Procurement

102. (1) Subject to the provisions of the Act, where public interest demands the emergency procurement of any goods, services or works, the controlling officer shall-

(a) evaluate the need for the emergency procurement and decide the preferred procurement method in order to guarantee economy and efficiency;

(b) identify, specify and prioritize the immediate procurement activities which may be used in the period of the emergency;

(c) where possible, identify other government bodies that can provide immediate assistance; and

(d) specify the time frame within which the emergency procurement will be undertaken.

(2) Upon satisfying the requirements under sub-regulation 1, the controlling officer shall proceed to procure the goods, works or services in accordance with the method of procurement selected.

Report on Emergency Procurement

103. (1) The controlling officer shall, within thirty (30) days after completion of the procurement process, prepare and submit a report on the emergency procurement to the Agency.

(2) The report under sub-regulation (1) shall be in the format prescribed in the guidelines issued by the Agency.

Prohibition to the relevant approvals authority

104. The relevant approvals authority shall not grant retrospective approval for emergency procurement.

Application of Emergency Procurement

105. (1) The emergency shall not be a result of self-created urgency or as a result of dilatory conduct.

(2) A procuring entity shall not use an emergency procurement method if-

(a) goods or services fall under common procurement arrangement; or

(b) the specific event could have been anticipated and planned.

Evaluation of tender

106. (1) The evaluation of the tender shall be conducted by an evaluation committee to determine whether the tender -

(a) meets the technical needs of the procuring entity and in particular its required delivery or completion schedule;

(b) accepts the contractual terms and conditions proposed by the procuring entity or offers other terms and conditions which are acceptable to the procuring entity; and

(c) offers value for money, based on prices previously obtained for similar goods, works or services or a breakdown analysis of the costs of each component, taking into account the circumstances and value of the procurement and any additional costs involved in meeting the delivery or completion schedule of the procuring.

(2) The evaluation committee shall, based on the evaluation, determine whether negotiations are required with the tenderer.

(3) Any negotiations shall be in accordance with the procedure laid down by these Regulations.

(4) The evaluation report and recommendations shall be submitted to the relevant approvals authority.

Procedure for Negotiations

107. (1) The evaluation committee shall prepare a plan for the negotiations, which shall specify the issues to be negotiated and objectives to be achieved and shall, to the extent possible, quantify the objectives and set maximum and minimum negotiation parameters.

(2) The negotiations shall be conducted by not less than three staff of the procuring entity, who shall not commit the procuring entity to any proposed arrangement or agreements.

(3) Staff conducting the negotiations shall prepare minutes of the negotiations, which shall form part of the record of the procurement and shall obtain the written agreement of the tenderer that they are a true and accurate record of the negotiations held.

Approval Arrangements for Emergency Procurement

108. (1) The procuring entity shall notify the Tender Board as soon as it identifies a procurement requirement which will be subject to single source procurement on the grounds of an emergency need.

(2) In order to ensure that emergency procurement proceeds promptly, any prior authorisations by the Tender Board shall be sought.

(3) The Tender Board shall promptly consider any contract award recommendation.

(4) Where a Tender Board is unable to meet within a reasonable time, the contract award recommendation may be authorised by the written approval of a majority of the members, without the Tender Board having met.

SECTION C – Single Source Procurement for Low Value Items

Procurement of Low Value Items from a Single Source

109. (1) Where the procuring entity conducts single source procurement on the grounds of low value, the procedure shall be as follows-

(a) the procuring entity shall first confirm that the goods, works or services required are not available from stores or under any existing framework contract or similar arrangement;

(b) the procuring entity shall identify a suitable supplier;

(c) the procuring entity shall request a quotation, from the identified supplier, based on the statement of requirements included in the requisition; and

(d) if the procuring entity is satisfied that the quotation meets its needs and offers value for money, the entity shall award a contract and issue a written purchase order or similar document.

(2) Notwithstanding the provisions of sub-regulation (1) (a) the procuring entity shall not award or issue a written purchase order or similar documents unless funds have been committed for the purchase.

SECTION D – Single Source Procurement from Existing Sources

Procurement from Existing Sources

110. (1) Where the procuring entity conducts single source procurement from an existing source, in accordance with regulation 97 the procurement shall be managed-

(a) as an amendment to a contract in accordance with regulation 113 where the existing contract is still in force; or

(b) in accordance with regulation 114 where the existing contract has been completed.

PART XII
CONTRACT MANAGEMENT

Contract Management Responsibilities

111. (1) The procuring entity shall designate a member of staff as the contract manager for every contract awarded.

(2) The contract manager shall be responsible for-

(a) monitoring the performance of the supplier, to ensure that all delivery or performance obligations are met or appropriate action taken by the procuring entity in the event of obligations not being met;

(b) ensuring that the supplier submits all required documentation;

(c) ensuring that the procuring entity meets all its payment and other obligations on time and in accordance with the contract;

(d) ensuring that there is adequate cost, quality and time control, where required;

(e) preparing any required contract variations or change orders and obtaining all required approvals before their issue;

(f) preparing any required contract amendments and referring them to the approvals authority for authorisation prior to issue;

(g) managing any handover or acceptance procedures;

(h) referring any recommendations for contract termination to the approvals authority prior to issue;

(i) notifying the approval authority of any disputes with suppliers and seeking their prior approval for the actions taken in managing the dispute;

(j) ensuring that the contract is complete, prior to closing the contract file;

(k) recording lessons learned by the entity from the delivery of the contract; and

(l) ensuring that all contract management records are kept and archived as required.

(3) The procuring entity shall produce a record of performance, and submit it to the controlling officer for approval.

(4) The procuring entity shall submit a record of past performance record to the technical secretariat and such record shall be used in evaluation of subsequent tenders.

Administration of Sub-Contracts

112. (1) Any subcontracting shall be subject to prior written consent of the procuring entity.

(2) The main contractor shall be responsible for administering any subcontracts and the procuring entity shall monitor only the main contractor's management of its subcontracts.

(3) The procuring entity shall not directly administer any subcontracts, except where-

(a) there is a risk of the procuring entity incurring undue cost or delay;

(b) successful completion of the main contract is threatened; or

(c) special surveillance of high risk or critical subsystems is required.

Contract Amendments

113. (1) Where any change to the terms and conditions of a contract is required, the procuring entity shall prepare a written contract amendment.

(2) The procuring entity shall obtain the prior authorisation of the approvals authority for any amendment to a contract.

(3) An amended contract in terms of this Regulation shall not be issued or effected without the approval of the approvals authority.

(4) The appropriate approvals authority shall be determined by the original or amended value of the contract, whichever is higher, and not by the value of the amendment.

(5) Any contract amendment shall only be valid when signed by authorised representatives of both the procuring entity and the supplier.

Variation of a contract

114. (1) Where appropriate, in order to facilitate adaptations to unanticipated events or changes in requirements, the contract may permit-

(a) the contract manager, supervising engineer or other designated official to order variations to the description of goods, works or services, the price or the completion date; or

(b) defined compensation events to justify variations in the price or completion date.

(2) Where a variation results in a change in price, any additional funds shall be committed, prior to issue of the variation, unless such funds are already provided by any committed amount for contingencies or similar provisions.

(3) The contract shall clearly state any approval requirements relating to contract variations.

Contract Termination

115. (1) The contract document shall specify the grounds on which the contract may be terminated and specify the procedures applicable to termination.

(2) The procuring entity shall obtain the prior authorisation of the approvals authority which authorised the recommendations for the original contract award, prior to terminating the contract.

(3) The request for termination approval shall clearly state-

(a) the reasons for termination;

(b) actions which have been taken to avoid the need for termination;

(c) the contractual grounds for termination; and

(d) the costs, if any, for which the procuring entity will be liable following termination.

PART XIII
MISCELLANEOUS

Repeal, transition and savings

116. (1) The Public Procurement Regulations, 2008 are repealed.

(2) Notwithstanding the provision of sub-regulation (1), any valid and lawful tender, award, contract or document issued under the Public Procurement Regulations, 2008, shall remain valid until its accomplishment.

FIRST SCHEDULE

PART I
LEVELS OF AUTHORITY FOR APPROVAL OF PROCUREMENT ACTIVITIES

(1) The approvals authority shall be the Controlling Officer where the value of the procurement does not exceed—

(a) twenty thousand Emalangeni (E20,000) for goods and services; and

(b) fifty thousand Emalangeni (E50,000) for works.

(2) The level of authority for any subcommittee of the Tender Board shall be as delegated by the Tender Board.

(3) The approvals authority shall be the Tender Board for all other procurement, where the value exceeds the levels of authority of all lower approvals authorities.

PART II
THRESHOLDS FOR PROCUREMENT METHODS

Open Tendering	Goods	above E200,000
	Non Consultancy Services	above E200,000
	Works	above E500,000
Limited Tendering	Goods	below E200,000
	Non Consultancy Services	below E200,000
	Works	below E500,000
Request for Proposals	Consultancy Services— – with publication of a notice	above E200,000
	– without publication of a notice	below E200,000
Request for Quotations	Goods	below E20,000
	Non Consultancy Services	below E20,000
	Works	below E50,000
Single Source Procurement	Goods	below E2,000
	Non Consultancy Services	below E2,000
	Consultancy Services	below E2,000
	Works	below E5,000

PART III

THRESHOLDS FOR APPROVALS AUTHORITIES

The levels of authority are established in accordance with section 27(3) of the Act and the following thresholds shall apply:

APPROVAL AUTHORITIES	THRESHOLD FOR PRIOR APPROVALS	EXPLANATION
Controlling officer or their delegate, including where no Entity Tender Board has been established.	All categories of goods, services and works assessed as low relative value and low risk in accordance with the method approved by the Agency.	All procurement transactions within each of the low relative value and low risk categories regardless of the value of each transaction.
Entity Tender Board	All categories of goods, services and works assessed as high relative value and/or high risk in accordance with the method approved by the Agency except for categories subject to common use or lead agency arrangements for which the procuring entity is not so designated. Single source procurement in accordance with regulations 97 (3) and 99 (2).	All procurement transactions within each of the high relative value and/or high-risk categories regardless of the value of each transaction. Prior approval to engage in single source procurement in accordance with regulations 97 (3) and 99 (2) regardless of the value of the transaction.
Entity Tender Board of a lead procuring entity	All categories of goods, services and works subject to lead agency arrangements as designated by the Agency.	All procurement transactions within each category of goods, services and works subject to lead agency arrangements regardless of the value of each transaction.
Government Tender Board and its subcommittees	Where no Entity Tender Board is established and/or where procurement is undertaken on	All procurement transactions within each of the high relative value and/or high-risk categories

APPROVAL AUTHORITIES	THRESHOLD FOR PRIOR APPROVALS	EXPLANATION
	behalf of a procuring entity by the Technical Secretariat:	regardless of the value of each transaction.
	(a) all categories of goods, services and works assessed as high relative value and/or high risk in accordance with a method approved by the Agency; and,	Prior approval to engage in single source procurement in accordance with regulations 97 (3) and 99 (2) regardless of the value of the transaction.
	(b) single source procurement in accordance with regulations 97 (3) and 99 (2).	All procurement transactions within each category of goods, services and works subject to common use or lead agency arrangements regardless of the value of each transaction.
	All categories subject to common use and lead agency arrangements where the Technical Secretariat or the Central Government Stores are so designated by the Agency.	

SECOND SCHEDULE

FEES FOR SERVICES RENDERED BY THE AGENCY

(Under sections 47(2) and 5(7) of the Act)

Description	Fee
A) GENERAL FEES	
1. Fees charged to a tenderer seeking administrative review	
Fee for processing application for administrative review	Shall be 0.5 percent of tender value subject to a minimum of E5,000.00 and 100 000 maximum
2. Fees charged to a tenderer or supplier seeking an appeal against suspension	
2.1 Fee for processing appeal against suspension	50 ,000.00

FORMS

FORM 1

(Tendering Security (Tendering Bond) Form)

BOND NO. *[insert Bond number]*

BY THIS BOND *[insert name of Tendering der; if joint venture, insert complete legal names of partners]* as Principal (hereinafter called "the Principal"), and *[insert name, legal title, and address of Surety]*, **authorized to transact business in** *[insert name of country of Employer]*, as Surety (hereinafter called "the Surety"), are held and firmly bound unto *[insert name of Employer]* as Obligee (hereinafter called "the Employer") in the sum of *[insert amount in figures expressed in the currency of the Purchaser's Country or the equivalent amount in an international freely convertible currency] [insert amount in words]*, for the payment of which sum, well and truly to be made, we, the said Principal and Surety, bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

WHEREAS the Principal has submitted a written Tendering to the Employer dated the *[number]* day of *[month], [year]*, for the construction of *[insert name of Contract]* (hereinafter called the "Tendering ").

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the

Principal:

(a) withdraws its Tendering during the period of tendering validity specified in the Form of Tendering;

(b) refuses to accept the correction of its Tendering Price, pursuant to the Invitation Document;

(c) having been notified of the acceptance of its Tendering by the Employer during the period of Tendering validity;

(d) fails or refuses to execute the Form of Agreement in accordance with the Instructions to Tenderers, if required; or

(e) fails or refuses to furnish the Performance Security in accordance with the Instructions to Tenderers;

Then the Surety undertakes to immediately pay to the Employer up to the above amount upon receipt of the Employer's first written demand, without the Employer having to substantiate its demand, provided that in its demand the Employer shall state that the demand arises from the occurrence of any of the above events, specifying which event(s) has occurred.

The Surety hereby agrees that its obligation shall remain in full force and affect up to and including the date 28 days after the date of expiration of the Tendering validity as stated in the Invitation to Tendering or extended by the Employer at any time prior to this date, notice of which extension(s) to the Surety being hereby waived.

IN TESTIMONY WHEREOF, the Principal and the Surety have caused these presents to be executed in their respective names this *[insert number]* day of *[month], [year]*

Principal: _____ Surety: _____
Corporate Seal (where appropriate)

_____ _____
[insert signature(s) of authorized representative(s)] *[insert signature(s)* of authorized *representative(s)]*

_____ _____
[insert printed name and title] *[insert printed name and title]*

1. Performance Bank Guarantee [*Unconditional]*

[The ***bank/successful Tendering der*** *providing the Guarantee shall fill in this form in accordance with the instructions indicated in brackets, if the Employer requires this type of security.]*

[insert bank's name, and address of issuing branch or office]

Beneficiary: *[insert name and address of Employer]*

Date: *[insert date]*

PERFORMANCE GUARANTEE No.: *[insert Performance Guarantee number]* We have been informed that *[insert name of Contractor]* (hereinafter called "the Contractor") has entered into Contract No. *[insert reference number of the Contract]* dated with you, for the execution of *[insert name of Contract and brief description of Works]* (hereinafter called "the Contract").

Furthermore, we understand that, according to the conditions of the Contract, a performance guarantee is required.

At the request of the Contractor, we *[insert name of Bank]* hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of *[insert amount in figures] ([insert amount in words])*, such sum being payable in the types and proportions of currencies in which the Contract Price is payable, upon receipt by us of your first demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligation(s) under the Contract, without your needing to prove or to show grounds for your demand or the sum specified therein.

This guarantee shall expire no later than twenty-eight days from the date of issuance of the Taking-Over Certificate, calculated based on a copy of such Certificate which shall be provided to us, or on the [insert number day of *[insert month], [insert year]*, whichever occurs first. Consequently, any demand for payment under this guarantee shall be received by us at this office on or before that date.

[signature (s) of an authorized representative(s) of the Bank]

2. Performance Bond

[The Surety/successful Tendering der providing the Bond shall fill in this form in accordance with the instructions indicated in brackets, if the Employer requires this type of security]

By this Bond, *[insert name and address of Contractor]* as Principal (hereinafter called "the Contractor") and *[insert name, legal title, and address of surety, bonding company, or insurance company]* as Surety (hereinafter called "the Surety"), are held and firmly bound unto *[insert name and address of Employer]* as Obligee (hereinafter called "the Employer") in the amount of *[insert amount of Bond] [insert amount of Bond in words*], for the payment of which sum well and truly to be made in the types and proportions of currencies in which the Contract Price is payable, the Contractor and the Surety bind themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas the Contractor has entered into a Contract with the Employer dated the *[insert number] day of [insert month], [insert year] for [insert name of Contract]* in accordance with the documents, plans, specifications, and amendments thereto, which to the extent herein provided for, are by reference made part hereof and are hereinafter referred to as the Contract.

Now, therefore, the Condition of this Obligation is such that, if the Contractor shall promptly and faithfully perform the said Contract (including any amendments thereto), then this obligation shall be null and void; otherwise it shall remain in full force and effect. Whenever the Contractor shall be, and declared by the Employer to be, in default under the Contract, the Employer having performed the Employer's obligations thereunder, the Surety may promptly remedy the default, or shall promptly:

(a) complete the Contract in accordance with its terms and conditions; or

(b) obtain a Tendering or tendering s from qualified tendering ders for submission to the Employer for completing the Contract in accordance with its terms and conditions, and upon determination by the Employer and the Surety of the lowest responsive Tendering der, arrange for a Contract between such Tendering der and Employer and make available as work progresses (even though there should be a default or a succession of defaults under the Contract or Contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the Contract Price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "Balance of the Contract Price," as used in this paragraph, shall mean the total amount payable by the Employer to the Contractor under the Contract, less the amount properly paid by the Employer to the Contractor; or

(c) pay the Employer the amount required by the Employer to complete the Contract in accordance with its terms and conditions up to a total not exceeding the amount of this Bond.

The Surety shall not be liable for a greater sum than the specified penalty of this Bond.

Any suit under this Bond shall be instituted before the expiration of one year from the date of issuance of the Certificate of Completion.

No right of action shall accrue on this Bond to or for the use of any person or corporation other than the Employer named herein or the heirs, executors, administrators, successors, and assigns of the Employer.

In testimony whereof, the Contractor has hereunto set its hand and affixed its seal, and the Surety has caused these presents to be sealed with its corporate seal duly attested by the signature of its legal representative, this *[insert day]* day of *[insert month], [insert year]*.

Signed by *[insert signature(s) of authorized representative(s)]* on behalf of *[name of Contractor]* in the capacity of *[insert title(s)]*

In the presence of *[insert name and signature of witness]*

Date *[insert date]*

Signed by *[insert signature(s) of authorized representative(s) of Surety]* on behalf of *[name of Surety]* in the capacity of *[insert title(s)]*

In the presence of *[insert name and signature of witness]*

Date *[insert date]*

3. Bank Guarantee for Advance Payment

[Bank's Name, and Address of Issuing Branch or Office]

Beneficiary: _____ *[Name and Address of Employer]*

Date: _____

ADVANCE PAYMENT GUARANTEE No.: _____

We have been informed that *[name of Contractor]* (hereinafter called "the Contractor") has entered into Contract No. *[reference number of the contract]* dated _____ with you, for the execution of *[name of contract and brief description of Works]* (hereinafter called "the Contract").

Furthermore, we understand that, according to the conditions of the Contract, an advance payment in the sum *[amount in figures]* (_____) *[amount in words]* is to be made against an advance payment guarantee.

At the request of the Contractor, we *[name of Bank]* hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of *[amount in figures]* (_____) *[amount in words]* upon receipt by us of your first demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligation under the Contract because the Contractor used the advance payment for purposes other than the costs of mobilization in respect of the Works.

It is a condition for any claim and payment under this guarantee to be made that the advance payment referred to above shall have been received by the Contractor on its account number _____ at _____ *[name and address of Bank]*.

The maximum amount of this guarantee shall be progressively reduced by the amount of the advance payment repaid by the Contractor as indicated in copies of interim statements or payment certificates which shall be presented to us. This guarantee shall expire, at the latest, upon our receipt of a copy of the interim payment certificate indicating that eighty (80) percent of the Contract Price has been certified for payment, or on the ___ day of_____, 2___, whichever is earlier. Consequently, any demand for payment under this guarantee shall be received by us at this office on or before that date.

Yours truly,
Signature and seal:
Name of Bank/Financial Institution:
Address:
Date: