

Public Procurement in Mozambique



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I. Introductory Note

The Mozambican Public Procurement legal framework is regulated by Decree no. 54/2005 of 13/12, which approved the Regulations for Public Works Contracts and Supply of Goods and Services to the State (henceforth referred to as the "Regulations").

Approval of these Regulations by the Mozambican government seeks to address the most important issues related to Public Procurement in a unitary and systematic manner and is essentially a clear effort to make Public Procurement rules more suited to Public Procurement market demands, both in Mozambique and abroad.

II. Scope and Principles

The Regulations define the main rules and principles applicable to public works contracts and the supply of goods and services to the State, including consulting services and granting of concessions.

The Regulations enshrine the traditional principles of Public and Administrative Law that govern Public Administration, which should always comply with principles of legality, finality, reasonableness, proportionality, pursuit of the public interest, transparency, equality and publicity.

The Regulations apply to all State bodies

and institutions and are extendible to lower levels that have to execute a budgetary schedule, including Municipalities and Public Companies (all of those in which the State holds a 100% stake).

In formal terms, all documents related to procurement must be drafted in Portuguese; however, the Awarding Entity may decide to simultaneously draft them in another language. In this situation, the Portuguese version will always prevail.

Procurement that simultaneously involves a public works contract, supply of goods and services and leasing shall be subject to the Regulations that are in force in relation to the part of the subject of the contract that is more economically significant.

III. Legal Frameworks of Public Procurement

The Regulations provide for three separate legal frameworks for procurement, namely: the General Regime, the Special Regime and the Exceptional Regime.

(i) General Regime:

The General Regime for public works contracts and supply of goods and services to the State is the Public Tender.

The Public Tender is the procurement



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method via which any interested party can participate, providing it satisfies the requirements established in the Tender Documents.

The Public Tender unfolds according to a logical set of steps. The process comprises the following phases: (i) Preparation; (ii) Launch; (iii) Submission and opening of the proposals and qualification documents; (iv) Assessment of the proposals and qualification documents; (v) Curative actions; (vi) Classification; (vii) Selection Board Recommendation; (viii) Decision; (ix) Complaints and appeal; (x) Awarding of the contract.

The Tender Documents may require the pledging of guarantees as a condition of acceptability of the proposal. These guarantees can be permanent or temporary and the maximum limit of their values is stipulated in the Regulations. The following forms of guarantee shall normally be accepted by the Awarding Entity: (i) bank guarantee; (ii) cash bond; (iii) certified cheque; (iv) public debt securities; and (v) insurance-guarantee. However, the Tender Documents can provide for other forms of guarantee.

The price proposal shall be submitted in Mozambican currency, namely the Metical, except in cases stipulated in the Tender Documents.

(ii) Special Regime:

In contrast to the General Regime (Public Tender) there is the Special Regime, which allows the Awarding Entity to adopt criteria that are different from those defined by the Regulations.

The special criteria shall be listed in the Tender Notice and Tender Documents and shall be admissible in cases where the Awarding Entity wishes to:

- Undertake procurement by virtue of a treaty or international agreement between Mozambique and another State or international organisation requiring adoption of a Special Regime, or;

The Public Tender is the procurement method via which any interested party can participate, providing it satisfies the requirements established in the Tender Documents.

- Undertake procurement within the scope of financed projects with resources originating from an official foreign cooperation agency or multilateral financial body, whenever the adoption of distinct criteria is a condition of the respective agreement or contract.

iii) Exceptional Regime:

Lastly, there is an Exceptional Regime that on the basis of "Public Interest" allows the Public Awarding Entity to select any one of the following pre-contractual procedures:

- Tender with Prior Qualification;
- Limited Tender;
- Tender with Two Stages;
- Tender according to Segments; and
- Direct Agreement.

It should be pointed out that procurement conducted under the Exceptional Regime shall be subsidiarily governed by the Public Tender criteria stipulated in the Regulations.

IV. Bidders

All individual or legal persons, from Mozambique or abroad, are eligible to bid for public works contracts or supply of goods and services to the Mozambican State providing they demonstrate that they are legally, economically-financially and technically qualified and their tax situation is in good standing.

Within the scope of this "qualification" there is the need for the proposals to include the following documents, among others: (i) certificate of commercial registration and updated articles of association; (ii) statement signed by the bidders indicating that they do not exhibit any of the various common "impediments" (cf. Art. 19 of the Regulations); (iii) consortium project or consortium incorporation agreement (in the case of corporate groupings); (iv) periodic income statement and annual statement of accounting and tax information; (v) certificate attesting to registration or enrolment in a professional activity compatible with the object of the procurement in question, license or equivalent document issued by the relevant authority (in the case of activities subject to such documents).

The documents referred to above (necessary for proper legal, economic-financial and technical qualification) can

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be dispensed with, fully or partially, when dealing with a works contract or supply of goods or services on a small scale.

Mozambican Bidder vs. Foreign Bidder

For the purpose of the Regulations, a Mozambican bidder is defined as follows: (i) an individual person with Mozambican nationality; and (ii) a legal person that has been established under Mozambican law, whose shareholder capital is more than 50% held by an individual Mozambican person or legal person whose shareholder capital is more than 50% held by an individual Mozambican person.

The Awarding Entity may restrict the Tender to Mozambican bidders, whenever the value of the procurement is less than 5,250,000,000.00 Metical for public works contracts and 2,625,000,000.00 Metical in the case of acquisition of goods and services.

It should also be pointed out that the Awarding Entity may establish "national preference margins" (10% of the value of the contract, before tax, for works; and 15% of the value of the contract, before tax, for goods and services), as well as minimum margins for "incorporating national factors" (30% of the factory door price of the finished product, the Finance Minister being allowed to adjust this percentage).

Foreign bidders shall satisfy the criteria established by the Regulations, specific legislation and the tender documents, subject to submission of documents equivalent to those required from Mozambican bidders.

Foreign bidders (whether or not they are authorised to exercise their activity in Mozambique) shall also comply with the following: (i) have a proxy residing and domiciled in Mozambique with special powers to receive summons, legal notices and to respond administratively

Bidders that are part of consortiums or associations are always permitted to participate in tenders.

and judicially for their acts, requiring submission of the applicable proxy instrument together with the documents stipulated in the Regulations; (ii) provide evidence of their legal, economic-financial, technical and taxation good standing in their country of origin; (iii) provide evidence no bankruptcy claim or certificate exists either in Mozambique or in the country of origin and lastly; (iv) submit documents drafted in Portuguese.

Bidders that are part of consortiums or associations are always permitted to participate in tenders.

Members of a consortium or association may not participate – individually or within a consortium or association – in the same tender.

V. Publication

It shall be obligatory to publish the Tender Notice in the press or head office of the Awarding Entity and in the case of an “International Tender” it shall be disclosed via the Government Gazette and/or Internet site.

As a general rule, all documents included in the administrative procedure of the procurement are open to public consultation, barring the exceptions provided for in the Regulations.

VI. Assessment Criteria and Decision on the Proposals

As regards the assessment criteria, i.e. awarding criteria, it should be pointed out that the guiding criterion is that of the “lowest price.” As such, in general, the proposal offering the lowest price is the one chosen for awarding of the contract. In the event of a tie, the final classification of the Proposals shall be determined by a “lottery.”

The Regulations also stipulate that, exceptionally, the awarding criterion can be a “combined criterion,” i.e. a criterion that takes into account the technical assessment of the proposal and respective price, requiring, however, due justification. If there is tie in assessing the

Proposals, the best technical proposal shall win. If the tie in the classification of the Proposals persists, a “lottery” shall take place during a public session.

VII. Decision Criteria for Concession Tender

The decision of the tender for concession of works or supply of public services can be taken by complying with the following criteria, individually or jointly:

- Best price offer for the concession;
- Lowest rate or price to be applied in relation to users;
- Best quality of services or goods made available to the public; and
- Best service and satisfaction of demand.

VIII. On Contracts – Applicable Rules

The contracts governed by the Regulations are of an administrative nature with all the ensuing legal implications. That is to say, execution of contracts for public works and supply of goods and services signed by State bodies and institutions is governed by Section IX of the Regulations, by the clauses of said contracts and by the general criteria of Public and Administrative Law, subject to the principles of the general theory of contracts and additionally to the provisions of private law.

The contracts provided for under the Regulations shall be formulated in writing and shall follow the formats indicated in the Tender Documents. The contracts must also be submitted to the Administrative Court for prior inspection within 5 days of being signed.

Because of the administrative nature of the Contracts in question, the Regulations consider certain clauses to be essential, namely (i) identification of the parties; (ii) Object of the contract; (iii) Date of commencement and expiry; (iv) Guarantees; (v) terms and conditions of payment; (vi) Estimate of total charges; (vii) Applicable sanctions; (viii) Legal venue or other venue for settling disputes; (ix) Anti-corruption clause; and (x) Other conditions that the parties consider essential to proper execution of the contract.

Important from the point of view of the foreign investor/bidder is inclusion of a clause that provides for independent arbitration to resolve conflicts resulting

from the interpretation and execution of the contract, which is to take place in Mozambique and in the Portuguese language (in compliance with specific legislation on this matter).

When provided for in the Tender Documents, the Awarding Entity shall require that the Contractor provide a permanent guarantee suited to proper and timely compliance with its obligations, and its submission shall be a pre-requisite for signing the contract, payment of advances shall not be permitted without pledging a guarantee in the same amount, excepting rare situations provided for by the Regulations and subject to certain pre-requisites on admissibility.

IX. Amendment and Termination of Contracts

Contracts governed by the Regulations can only be amended or changed on the appropriate grounds apostille when changes must be introduced to (i) the project or specifications; (ii) the contractual value; (iii) the framework for executing the works or supplying the service or the method of supplying the goods; (iv) the terms of payment.

Mozambican law provides for unilateral amendments or modifications of initial contract conditions (cf. art. 52). As such, the Awarding Entity shall be obliged to accept, under the same contractual conditions, any additions or deletions made to the works, goods or services, up to 25% of the initial value of the contract.

The Regulations also establish (cf. art. 54) the reasons for which the Awarding Entity and the Contractor may freely cancel the contract unilaterally. The party who

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wishes to unilaterally cancel the contract (on one or more grounds) shall notify the other party of its intention to cancel, precisely indicating the causes and respective grounds. The notified party – within a period not exceeding thirty days – shall remedy the causes attributed to it and after said period the notifying party may unilaterally cancel the contract on the grounds set out in the notification.

The Regulations clearly and precisely establish the consequences of unilateral cancellation from the point of view of the Awarding Entity and the Contractor (cf. art. 55).

One last note regarding the obligation to submit these contracts to the Administrative Court visa.

Indeed, Law no. 5/92, of May 6th 1992, sets forth, in Article 30, paragraph 2, that under the supervision of public expenses of the State, the Section of Public Expenses Fiscalization and Administrative Court Visa is the responsible entity for verifying the compliance of the contract' laws in force, regardless of their nature, when entered into by the

entities subject to the jurisdiction of the Court. There are subjected to trial of public expenses, according to Article 32, paragraph a), the central bodies of State and Public services, custom or not, with administrative and financial autonomy, including autonomous funds. Moreover, the only exemptions from the visa are those set forth in Article 31, paragraph 1, a), b) and c), ie, the legal statutes of appointments issued by the President of the Republic, the legal statutes related to elective posts and any other legal statutes, orders or contracts especially foreseen by law. In addition, the law sets forth, in paragraph 2, that despite the exceptions, it is necessary to note down, where the law requires.

Generally speaking, these are the main characteristics of the Public Procurement framework of Mozambique, a country with great potential and rapidly evolving economic development that has grown and will continue to grow significantly in terms of Public Procurement, particularly public mega projects, involving energy, infrastructure construction, exploration of natural and rail resources.