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Legal Notice No. 3 of 2009

COMESA Public Procurement Regulations

By Order of the Council and Authority

Sindiso N. Ngwenya
Secretary-General
COMESA

IT IS HEREBY NOTIFIED that the COMESA Council, at its Twenty-Sixth Meeting held from 2nd to 4th June, 2009 at Victoria Falls, Zimbabwe issued the following Legal Notice:

LEGAL NOTICE NO. 3 of 2009

HAVING REGARD to Article 10(1) of the Treaty establishing the Common Market for Eastern and Southern Africa, providing that Council may make Regulations;

NOW THEREAFTER, the Council of Ministers hereby makes the following regulations:

**COMESA PUBLIC PROCUREMENT
REGULATIONS**

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REGULATIONS**

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PREAMBLE

The Council of Ministers:

Conforming to the provisions of Article 151(2)(d) of the Treaty under which Member States undertook to encourage sourcing of purchases by governments and parastatals within the sub region;

Conscious of the provisions of Article 165 of the Treaty whereby Member states undertook to harmonize their policies in such other fields as they may from time to time consider necessary or desirable for the efficient and harmonious functioning and development of the Common Market;

Considering the COMESA Directive adopted by the Authority of COMESA at its eighth summit held at Khartoum, in the Republic of Sudan on the 17th March 2003 in which the Authority agreed on the basic elements for reform of the national public procurement laws and practices and the development of a regional public procurement framework;

Considering further the COMESA Competition Regulations as adopted by the Council;

Recognising the role of public procurement in the economic development of Member States;

Acknowledging that more transparent, competitive, economic, efficient and accountable procurement systems are essential to promoting good governance and financial management in Member States;

Recognising the need to harmonise the procurement laws of Member States in order to facilitate access into the procurement market of each Member State;

Acknowledging that more open and competitive procurement systems in Member States will promote regional economic integration;

Considering the contribution that regional procurement will make to the enhancement of intra COMESA Trade; and

Desirous of promoting the competitiveness of the manufacturing, construction and service sectors in Member States for regional and international trade;

Acting in accordance with the provisions of Article 10 of the Treaty, the Council makes the following Regulations:

:

CHAPTER 1 INTEGRATION OF PUBLIC PROCUREMENT IN COMESA

Article 1

Interpretation

In these Regulations, unless the context otherwise requires:

“**bid**” means a tender, an offer or a proposal given in response to an invitation to supply goods, works or services;

“**bidder**” means a natural or legal person submitting or seeking to submit a bid;

“**bidding documents**” means the tender solicitation documents or other documents for solicitation of bids on the basis of which bidders are to prepare their bids;

“**common market**” means the Common Market for Eastern and Southern Africa (COMESA) established by Article 1 of the Treaty;

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

“**Council**” means the Council of Ministers of the Common Market established by Article 7 of the Treaty;

“**Court**” means the Court of Justice of the Common market established by Article 7 of the Treaty;

“**e-procurement**” means the process of procurement using electronic medium such as the internet or other information and communication technologies;

“**framework agreement**” means an agreement between one or more procuring entities and one or more bidders, the purpose of which is to establish the terms governing procurement contracts to be awarded during a given period, in particular, with regard to price and where appropriate the quantity envisaged;

“**foreign bidder or supplier**” means a bidder or supplier who is not licensed or registered to undertake business activities in the Common Market;

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

“**goods**” means objects of every kind and description, including raw materials, products and equipment, supplies, automated data processing hardware and software, objects in solid, liquid or gaseous form, electricity and works and services incidental to the supply of the goods if the value of those incidental works and services does not exceed that of the goods themselves;

“**international competitive bidding**” means bidding open to all bidders, including nationals, local and foreign bidders or suppliers;

“**local bidder or supplier**” means a bidder or supplier who is licensed or registered to undertake business activities in a Member State, but who is not a national of that Member State;

“**national competitive bidding**” means bidding which is primarily limited, in a Member State’s domestic legislation, to nationals and local bidders or suppliers;

“**procuring entity**” means –

- (a) any entity which uses public funds to procure goods, services and works including a ministry, department,

agency or organ of a Member State or any statutory body, public enterprise or parastatal; and

- (b) a private entity acting for the Member State or using public funds, except that any procurement by a private entity using public funds shall be restricted to those public funds.

“public body” means anybody-

- (a) having legal personality; and
- (b) financed, for most part, by the State, or regional or local authorities or other bodies, except as otherwise excluded in a Member State’s domestic legislation;

“public funds” means –

- (a) any fiscal resources appropriated to procuring entities through budgetary processes;
- (b) aid, grants and credits made available to procuring entities by local and foreign donors, except for procurement under Article 2(6) ; and
- (c) revenues of procuring entities or other extra-budgetary funds;

“public procurement” means the acquisition, by any procuring entity, of goods, works or services or any combination of goods, works or services, by contractual means, in accordance with these Regulations and domestic legislation relating to public procurement;

“public procurement contract” means a contract between a procuring entity and a successful bidder resulting from public procurement procedures;

“public-private partnership” means investment through private sector participation by a contractual arrangement between a procuring entity and a private sector entity where the private sector entity –

- (a) undertakes to perform or undertakes any construction project or service or lease;
- (b) assumes substantial financial, technical and operational risks in connection with the performance of a public function or use of public property; and
- (c) receives consideration for performing a public function or utilising public property, by way of fees from any public funds, user levies collected by the private sector entity from users or customers for a service provided by it, or a combination of such consideration.

“regional bidder” means a bidder that is participating in regional competitive

bidding;

“regional competitive bidding” means any public procurement procedure that is within the threshold set by a Member State for procurement within the Common Market;

“regional threshold” means a threshold set by a Member State for public procurement within the Common Market and limited to regional bidders;

“supplier” means a natural or legal person who has entered into a public procurement contract with a procuring entity to supply goods, works or services and includes a potential party to such a contract;

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

“two-stage procedures” means those national procedures in which, following an open invitation to bid or to prequalify, bidders submit, in the first stage, preliminary technical bids, which are subject to technical review by the procuring entity, and bidders submit, in the second stage, final bids for evaluation;

“Treaty” means the Treaty establishing the Common Market for Eastern and Southern Africa;

“works” means all works associated with the construction, reconstruction, rehabilitation, demolition, maintenance or renovation of a building or structure, including –

- (a) site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing;
- (b) services incidental to works comprising drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the public procurement contract, if the value of those services does not exceed that of the work itself; or
- (c) building altering, repairing, improving, extending or demolishing any structure, building or highway, and any drainage, dredging, excavating, grading or similar works on real property; and

“writing” means any expression consisting of words or figures which can be read, reproduced and subsequently communicated and includes information which is stored and transmitted by electronic medium.

Article 2

Scope of Application

- (1) These Regulations apply to all regional competitive bidding, except as otherwise provided under these Regulations.
- (2) Where any provision of these Regulations conflicts with the procurement rules of a donor or funding organisation, which is not a public body, the application of which is mandatory pursuant to an obligation entered into by a Member State under any treaty or other form of agreement, those rules shall prevail.
- (3) Where there is a conflict between these Regulations and a condition imposed by a donor of funds, the condition shall prevail with respect to a regional public procurement that uses those funds and no others.
- (4) Where a treaty or agreement referred to in paragraph (6) contains provisions favourable to nationals of a Member State and local bidders and suppliers, full advantage shall be taken of these in the interest of promoting national capacity and development.
- (5) Where a Member State is required under the terms of any treaty or agreement to which the Member State is a party, to contribute from its own resources, in any form, to any public procurement activity within the Common Market, either in part or wholly, jointly or separately, procurement through such contributions shall be in discrete activities where possible, and shall be subject to the applicable provisions of the domestic legislation relating to procurement.
- (6) A Member State may, exclude from the application of these Regulations, or modify the rules and procedures provided for in the Member States' domestic legislation relating to public procurement, procurement for state security, military related production, defence or international relations of that Member State, to protect the public interest and shall notify Member States through the Secretary General of such exclusion or modification.
- (7) For the purposes of sub article (2) a Member State may specify in its domestic legislation relating to public procurement –
 - (a) the category of goods, works or services to be excluded or subject to the modified rules and procedures of procurement; and
 - (b) the modifications to be applied to the goods, works or services referred to under paragraph (a).
- (8) The category of goods, works or services subject to exclusion or modified rules and procedures of public procurement referred to in paragraphs (2) and (3), shall be reviewed and updated by the Member State on an annual basis, or as the need arises.
- (9) Any regional public procurement that has been excluded or subject to the modified rules and procedures of procurement under paragraph (2) shall

be subject to the most competitive method of procurement available in the circumstances and, shall be subject to a Member State's classified audit.

- (10) Nothing in these Regulations shall be construed as to prevent any Member State from adopting or maintaining measures –
- (a) necessary to protect public morals, order or safety;
 - (b) necessary to protect human, animal or plant life or health;
 - (c) necessary to protect intellectual property;
 - (d) relating to goods, works or services of handicapped persons or philanthropic institutions or prison labour; or
 - (e) necessary to protect small and medium enterprises.

Article 3

Objectives

The objectives of these Regulations include-

- (a) to foster competition and openness in public procurement procedures;
- (b) to foster fair management systems in procurement;
- (c) to promote accountability, transparency, and value for money in public procurement process for national development; and
- (d) promote harmonisation of public procurement laws and practices for the enhancement of intra COMESA Trade.

Article 4

General Procurement Principles

A Member State shall, in its domestic legislation relating to public procurement ensure and in conducting public procurement apply, the principles of –

- (a) competition and openness in public procurement proceedings;
- (b) fairness;
- (c) transparency, including disclosure of all relevant information for participation in, and oversight over, public procurement;
- (d) accountability; and
- (e) value for money.

Article 5
General Obligations of Member State

- (1) Member States shall, in accordance with Article 5(2)(b) of the Treaty, take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of these Regulations or resulting from any action taken under these Regulations.
- (2) Member States shall, in accordance with Article 5(1) of the Treaty, facilitate the achievement of the objects of the Common Market and shall abstain from taking any measure that could jeopardise the attainment of the objectives of these Regulations.
- (3) A Member State shall ensure that the provisions of its domestic legislation relating to any regional competitive bidding, are in conformity with these Regulations.
- (4) A Member State shall ensure that a procuring entity shall not structure a public procurement as two or more procurements for the purpose of avoiding regional competitive bidding.

CHAPTER II
THRESHOLDS, PREFERENCES AND RULES OF ORIGIN

Article 6
Regional Thresholds

- (1) A Member State shall set thresholds for regional competitive bidding under its domestic legislation relating to public procurement.
- (2) In calculating the value of a procurement for purposes of the regional threshold a Member State shall ensure procuring entities shall take into account the following:
 - (a) , all forms of remuneration, including premiums, fees, commissions, interest, other revenue streams provided for under a public procurement contract, and the value of the maximum permissible options provided for by the public procurement contract;
 - (b) except as provided for in paragraph (a), a procurement that is conducted in multiple parts, that may result in the award of public procurement contracts to more than one bidder or that may result in

the awarding of recurring public procurement contracts, the total estimated value of the procurement over its entire duration; and

- (c) the basis for calculating the value of a framework agreement shall be the estimated maximum value net of tax of all the public procurement contracts envisaged for the period in question.
- (3) Notwithstanding paragraph (1), the thresholds set by a Member State for national competitive bidding may be opened for regional competitive bidding.
- (4) A Member State shall notify the Secretary General, in writing, of the regional threshold set by that Member State, and shall post the regional threshold in its national procurement website.
- (5) Notwithstanding paragraph (1) Member States shall, collectively and progressively, within a period of 5 years from the date of adoption of these Regulations, work towards the establishment of a common financial threshold for regional competitive bidding to be adopted by Council.

Article 7 Regional Preferences

- (1) A Member State shall ensure that its domestic legislation on public procurement provide that, in international competitive bidding, procuring entities shall apply a preference in favour of regional bidders.
- (2) A Member State shall, in international competitive bidding, grant a margin of preference for goods, works or services manufactured or performed within the Common Market.
- (3) A Member State shall communicate the percentage of any margin of preference set by it to the Secretary General and shall post such margin of preference on its national procurement website.

Article 8 National and Most Favoured Nation Treatment

- (1) A Member State shall accord to goods, works or services of another Member State, and to the suppliers of such goods, works or services, treatment no less favourable than the most favourable treatment that it accords to-
 - (a) goods, works or services and suppliers of the Member State of the procuring entity; and
 - (b) goods, works or services and suppliers of any other Member State.
- (2) A Member State shall not –
 - (a) treat a national or local bidder or supplier less favourably than another national or local bidder or supplier on the basis of degree of affiliation or ownership in relation to, or the extent of involvement with, nationals of any other Member State; or
 - (b) discriminate against a national or local bidder or supplier if the goods, works or services offered by that national or local bidder or supplier for the particular public procurement are goods, works or services of any other Member State.
- (3) Paragraphs (1) and (2) shall not apply to duties and charges of any kind imposed on, or in connection with, importation, the method of levying such duties and charges, and other import regulations, including restrictions and formalities.
- (4) Notwithstanding any other provision of these Regulations, a procuring entity may deny to a bidder that is a supplier of goods, works, or services of another Member State the benefits of these Regulations if-
 - (a) any foreign bidder owns, produces or performs such goods, works or services or controls that bidder; and
 - (b) that bidder has no substantial business activities in the Member State under whose laws the business enterprise is constituted.

- (5) For the purposes of paragraph (4), “business activities” refers to business activities being undertaken by a bidder who has physical business presence in, and is ordinarily resident in, the Member State.

Article 9 Rules of Origin

A Member State shall not apply rules of origin to goods imported from another Member State during public procurement proceedings, undertaken in conformity with these Regulations, that are different from or inconsistent with the rules of origin the Member State applies in the normal course of trade and as required under Article 48 of the Treaty.

CHAPTER III PROCUREMENT PROCESS

Article 10 Procurement Planning

- (1) A Member State shall ensure, in its domestic legislation, that all procuring entities plan their regional public procurement, in a rational manner and in particular that they shall –
- (a) aggregate their requirements, wherever possible, both within a procuring entity soliciting regional competitive bidding and between other procuring entities, to obtain value for money and reduce procurement costs;
 - (b) make use of running contracts or framework agreements, wherever appropriate, to provide an efficient, cost effective and flexible means to procure goods, works, or services that are required continuously or repeatedly over a set period of time; and
 - (c) integrate its expenditure programme with their procurement plan.
- (2) A Member State shall submit its procurement plan to the Secretary General or post it on its national procurement website within 60 days after the commencement of its financial year.

Article 11 Procurement Requirements

- (1) A Member State shall ensure that any regional public procurement requirements, including the recording of the goods, works or services required and the estimated value, are documented prior to the commencement of any solicitation for regional competitive bidding
- (2) A Member State shall ensure that solicitation for regional competitive bidding is only initiated where funds for the procurement requirements are available and all necessary approvals, under domestic legislation relating to public procurement, to proceed with the procurement, have been given.
- (3) A Member State shall ensure that a statement of procurement requirements is included in the bidding documents soliciting regional competitive bidding and is prepared with a view to ensuring that the goods, works or services are fit for the purpose for which they are being procured and are of appropriate quality.
- (4) A statement of procurement requirements shall be based on the relevant and objective technical specifications and quality characteristics of the goods, works or services to be procured.
- (5) The technical specifications shall –
 - (a) relate to performance;
 - (b) refer to descriptive characteristics;
 - (c) be based on national or international standards;
 - (d) not refer to any particular trademark, brand name, patent, type, producer or service provider or to a specific origin unless-
 - (i) there is no other sufficiently precise intelligible way of describing the requirement; and
 - (ii) the requirements allow equivalents to what is referred to.

Article 12

Choice of Procurement Methods

- (1) The choice of procurement method relating to regional competitive bidding shall be determined in accordance with the conditions specified in domestic legislation relating to public procurement, which shall be in conformity with the provisions of these Regulations.
- (2) A Member State shall ensure that a procuring entity does not split up public procurement requirements with the intention of avoiding a particular method of procurement.

- (3) A Member State shall ensure that its domestic legislation relating to public procurement include the following procurement methods-
 - (a) international competitive bidding; and
 - (b) regional competitive bidding.

Article 13
Bidding Documents

- (1) A Member State shall ensure that the bidding documents to be used by procuring entities for regional competitive bidding are the appropriate standard bidding documents approved by Council.
- (2) The bidding documents referred to in paragraph (1) shall contain the requirements specified in these regulations to be provided for in bidding documents including-
 - (a) clear instructions on the management of the procurement process and the applicable rules;
 - (b) a clear description of the object of the procurement in the form of a statement of requirements; and
 - (c) the proposed form and conditions of contract or a statement of the form and conditions of contract which shall apply.

Article 14
Invitation of Bids

- (1) Solicitation for bids for regional competitive bidding shall be done in accordance with the provisions of domestic legislation relating to public procurement.
- (2) A Member State shall ensure its procuring entities-
 - (a) keep a record of all bidders to whom the regional competitive bidding documents are issued;
 - (b) where regional competitive bidding documents are issued to pre-qualified shortlisted bidders, issue the documents to all bidders at the same time.
- (3) In setting bidding deadlines, a Member State shall ensure its procuring entities-
 - (a) allow sufficient time as may be prescribed, for bidders to obtain bidding documents, to prepare complete bids and to submit them; and

- (b) comply with the minimum bidding periods as may be prescribed in the domestic legislation related to public procurement.
- (4) A Member State shall ensure that, where bid securities or performance bonds are required to be submitted by regional bidders, the manner and procedure for such submission is clearly specified in the Member State's domestic legislation relating to public procurement.

Article 15

General Obligations of Bidders

- (1) A bidder, participating in regional competitive bidding, shall submit with the bid –
 - (a) a statement verifying that the bidder has not been debarred from participating in public procurement under domestic legislation of a Member State in which the bidder is resident or bidding from and is therefore not debarred from participating in regional competitive bidding under these Regulations; and
 - (b) a declaration that the bidder shall not engage in any corrupt or fraudulent practice.
- (2) A bidder participating in regional competitive bidding shall -
 - (a) at all times abide by obligations under these Regulations, the domestic legislation relating to public procurement of the Member State soliciting for regional competitive bidding, contracts and other instruments applicable to conduct and activities related to public procurement; and
 - (b) not commit or abet corrupt, fraudulent, collusive or coercive practices

Article 16

Selection of Bidders

- (1) The method for selection of bidders in any regional competitive bidding shall be determined by the public procurement method used and shall be in accordance with the provisions of domestic legislation relating to public procurement.
- (2) A Member State shall ensure that its domestic legislation relating to public procurement prescribe the rules for publication of notices, pre-qualification requirements, and development of shortlists and selection of bidders for regional competitive bidding.

Article 17
Receipt of Bids

- (1) A Member State shall ensure that procuring entities clearly state the date and time of the regional competitive bidding deadline, and provide, in the bidding document, that late bids shall be rejected.
- (2) A Member State shall ensure that procuring entities –
 - (a) make available a bid box, or other means of receiving regional bids, such as e-procurement;
 - (b) keep regional bids confidential and, in the case of sealed bids, unopened until the time for opening of bids; and
 - (c) close regional competitive bidding at the precise date and time of the bidding deadline.

Article 18
Opening of Regional Bids

A Member State shall ensure that all regional competitive bidding shall include a public bid opening, in accordance with the procedures specified in domestic legislation relating to public procurement.

Article 19
Qualification of Bidders

- (1) A Member State shall ensure that its domestic legislation relating to public procurement provide for the qualifications of a regional bidder to be awarded a public procurement contract, based on the following criteria-
 - (a) the regional bidder has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;
 - (b) the regional bidder has legal capacity to enter into a contract for the public procurement;
 - (c) the regional bidder is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
 - (d) the regional bidder has not at any time during a period prescribed in the Member State's national legislative instruments preceding the start of the

regional public procurement proceedings, been convicted on final judgment of-

(i) corrupt and fraudulent practices;

(ii) any other offence specified in the Member State's legislative instruments that would disqualify the bidder from participating in public procurement proceedings.

(2) Domestic legislation on public procurement may provide that a procuring entity may require a person to provide evidence or information to establish that the criteria under paragraph (1) are satisfied, and in this respect, it may accept as sufficient evidence-

(a) a certificate issued by a competent authority in the Member State concerned relating to the issues in question;

(b) a solemn declaration made by the regional bidder, on oath or affirmation, testifying to the issues in question; or

(c) the production of an extract from the judicial record or an equivalent document issued by a competent judicial or administrative authority from the concerned Member State, relating to the issues in question.

(3) The criteria under paragraph (1) and any requirements under paragraph (2) shall be set out in the regional competitive bidding documents or the request for proposals or, if a two-stage procedure is used, in the bidding documents for that public procurement.

Article 20 Evaluation

(1) A Member State shall ensure that the choice of evaluation methodology shall be determined by the type, value and complexity of the public procurement requirement, and shall be done in accordance with domestic legislation relating to public procurement.

(2) A regional competitive bidding document shall clearly state the methodology and criteria to be used in the evaluation of bids and the determination of the best evaluated bidder.

- (3) Any methodology or criteria which are not stated in the regional competitive bidding documents shall not be taken into account during evaluation, and all criteria shall be applied equally to all bids.
- (4) A Member State shall ensure that the domestic legislation include a provision for the undertaking of a post qualification evaluation in accordance with the criteria specified in the bidding documents, to determine whether the best evaluated bidder has the capability and resources to effectively carry out the public procurement contract.

Article 21 Notification of Best Evaluated Bid

- (1) A Member State's domestic legislation relating to public procurement shall have provisions to the effect that –
 - (a) a procuring entity shall within a time prescribed in the Member State's domestic legislation, of deciding to award a public procurement contract, prepare a notice indicating the best evaluated bidder and the value of the proposed public procurement contract, and send the notice to all regional bidders who submitted bids; and
 - (b) an award of a public procurement contract shall not be made if a challenge is made by any other bidder within the period prescribed in the domestic legislation for making such challenge, and shall be awarded to the successful bidder in the absence of such challenge within the time prescribed in the Member State's domestic law of the notice in paragraph (a).
- (2) Notwithstanding paragraph (1), Member States shall, collectively and progressively, within a period of 5 years from entry into force of these Regulations, work towards setting unified time frames under paragraph (1) to be adopted by the Council of Ministers.

Article 22 Award of Contract

- (1) A Member State's domestic legislation relating to public procurement shall provide that a regional competitive bidding document shall state the procedure for award of a public procurement contract, which shall be-

- (a) by placement of a written public procurement contract; or
 - (b) by issue of a letter of bid acceptance, which shall be confirmed by a written public procurement contract.
- (2) No public procurement contract or other communication in any form conveying acceptance of a bid or award of a public procurement contract shall be issued prior to –
 - (a) an award decision by the designated authority of the Member State;
 - (b) publication and dispatch of the notice of best evaluated bidder;
 - (c) confirmation that the procurement is not subject to legal or administrative review;
 - (d) confirmation that adequate funding is available for the contract; and
 - (e) any other approvals required, in accordance with the provisions of the Member State's domestic legislation relating to public procurement.
- (3) A Member State shall ensure that a procuring entity submits a notice of all public procurement contracts under regional bidding to the COMESA Secretary General who shall post them on the COMESA website.
- (4) A Member State shall ensure that a procuring entity shall, after the award of a public procurement contract to the successful regional bidder and before the contract is signed, notify all regional bidders at the same time, of the results of the award.

Article 23 Debriefing of Unsuccessful Bidders

A Member State shall ensure that, upon request by an unsuccessful bidder, the procuring entities provide information to that bidder concerning the reasons for which its bid was unsuccessful within a period prescribed in that Member State's domestic legislation.

Article 24 Contract Management

A Member State shall ensure that a procuring entity sets up appropriate structures for the execution and monitoring of the public procurement contract in accordance with the procedures prescribed in the Member State's domestic legislation relating to public procurement, taking into account the skills, experience and functions required for management of the public procurement contract.

Article 25
Amendment of Public Procurement Contract

Any amendment to a public procurement contract shall be in accordance with the Member State's domestic legislation relating to public procurement which shall be determined by the original or revised value of the contract.

Article 26
Framework Agreements

A Member State may provide in its domestic legislation relating to public procurement for the conclusion of framework agreements in accordance with set out procedures based on the following-

- (a) for every public procurement contract to be awarded, the procuring entities shall consult all the original bidders who are party to the framework agreement, in writing;
- (b) the procuring entities shall fix a time-limit which is sufficiently long to allow bids for each specific contract to be submitted, taking into account factors such as the complexity of the subject of the contract and the time needed to send in bids;
- (c) bids shall be submitted in writing, and their content shall remain confidential until the time-limit for reply has expired;
- (d) procuring entities shall award each contract to the regional bidder who has submitted the best bid on the basis of the award criteria established in accordance with the provisions of the domestic legislation relating to public procurement; and
- (e) a framework agreement shall not be used so as to restrict or to distort competitive bidding.

Article 27
List of Suppliers

- (1) The provisions of the domestic legislation relating to public procurement of the concerned Member State pertaining to the establishment and maintenance of lists of suppliers shall apply to regional competitive

- bidding, except that regional bidders who are not on the list of suppliers shall be allowed to participate in the regional competitive bidding.
- (2) A Member State which has standing lists of suppliers shall regularly update such lists and submit the lists and the address of the agency to which applications for registration should be sent, to the Secretary General who shall inform the other Member States.
 - (3) Member States shall progressively eliminate the practice of keeping lists of suppliers within a period to be determined by Council.

Article 28
Assessment of Failed Bids

- (1) A Member State shall require in its domestic legislation, periodic assessments, at least bi-annually of cases where no responsive regional bids are received or bid proceedings are otherwise unsuccessful.
- (2) Such assessments shall consider all relevant matters, which may include whether-
 - (a) the bidding period was sufficient;
 - (b) the requirements of the bidding document and the terms and conditions of the proposed public procurement contract were reasonable and not so excessive as to deter competition;
 - (c) the statement of requirements was clear, reasonable and designed to encourage fair and open competition;
 - (d) any bid notice was published in an appropriate publication and on the required date;
 - (e) any shortlist included sufficient bidders and whether the regional bidders included were capable of providing the goods, works or services required;
 - (f) any amendments or clarifications to the bidding documents allowed sufficient time for bidders to take them into account in preparing their regional bids;
 - (g) there were other extraneous events or circumstances which may have affected the ability of bidders to respond;
 - (h) the evaluation process was conducted in accordance with these Regulations, the Member State's domestic legislation

relating to public procurement and the bidding documents, and whether staff responsible for the evaluation had adequate skills and resources;

- (i) there was any suspicion of collusion between or among potential bidders;
 - (j) the choice of procurement method was appropriate; and
 - (k) a procuring entity had made an appropriate recommendation, such as-
 - (i) the use of an alternative method of procurement;
 - (ii) amendments to the bidding document, including bidding requirements, the statement of requirements, the type of contract or the terms and conditions of the proposed public procurement contract;
 - (iii) alternative publication of any bidding document or a revised shortlist; and
 - (iv) the introduction of international competition.
- (3) A Member State shall post any report issued in connection with the assessment undertaken under paragraph (2) on its national procurement website and inform the Secretary General who shall inform other Member States within a period of fourteen days.

CHAPTER IV RECORDS AND INFORMATION

Article 29 Record of Procurement Proceedings

- (1) A Member State shall ensure that procuring entities:
- (a) maintain a record of all regional public procurement proceedings that summarises the key steps and actions in the procurement proceeding;
 - (b) preserve the documentation of the public procurement for at least a minimum period of time as prescribed in domestic legislation to enable implementation and completion of the

process; and

- (c) permit a comprehensive and effective oversight and auditing of the process by the competent authority.

(2) The record referred to in paragraph 1(a) may include the following:

- (a) a request to initiate procurement proceedings;
- (b) a copy of the published advertisement or shortlist;
- (c) a copy of the pre-qualification and solicitation documents and any other amendments or clarification;
- (d) a record of bid closing and bid openings;
- (e) a copy of all bids evaluated or clarifications requested and responses received;
- (f) the summary of the evaluation report, minutes of meetings on procurement, including pre-bid and negotiation meetings;
- (g) a notice of best evaluated bidder;
- (h) any letter of bid acceptance;
- (i) the contract document;
- (j) contract amendments; and
- (k) all correspondences between a procuring entity and a bidder or supplier.

(2) A Member State shall ensure that the domestic legislation relating to public procurement clearly specify the information to be included in a record to be maintained under paragraph (1).

- (3) The record provided for under paragraph (1) shall, on request, be made available to the Secretary General for the information of other Member States or an original regional bidder in the process.
- (4) A Member State shall ensure that a record, provided for under paragraph (1), shall be prepared, and disclosed, in a manner that avoids disclosure of proprietary commercial information.

Article 30

Information by Member States

- (1) A Member State shall post on its national procurement website and the COMESA website any domestic legislation relating to public procurement and judicial decisions, administrative rulings of general application to procurement and standard bidding and contract documents relating to regional public procurement.
- (2) A Member State shall make available information concerning its public procurement systems and proceedings to other Member States and to bidders from other Member States, by way of the following modalities-
 - (a) by giving to other Member States, on request, explanations about the Member State's procurement procedures;
 - (b) by giving to the Member State of an unsuccessful bidder, upon request, such additional information on the award of a public procurement contract as may be necessary to determine whether the procurement was made fairly and impartially, in particular with respect to unsuccessful bidders;
 - (c) by designating contact points and information centres to handle the above communications between Member States;
 - (d) by procuring entities responding promptly to requests from regional bidders for explanations of procurement practices and procedures;
 - (e) by ensuring that procuring entities, provide effective dissemination of its laws, regulations and administrative measures of general application on public procurement and providing the suppliers of other Member States with all necessary information for participating in a regional public procurement through the communications media specified in a domestic legislation relating to procurement;
 - (f) by ensuring that its procuring entities provide effective dissemination of its laws, regulations and administrative measures of general application

on public procurement and providing the suppliers of other Member States with all necessary information for participating in a regional public procurement through the communications media specified in domestic legislation relating to procurement; and

- (g) by providing to the Secretary General each year an annual report in accordance with the following reporting requirements-
 - (i) statistics on the estimated value of all regional public procurement contracts awarded, broken down by entities;
 - (ii) statistics on the number of regional public procurement contracts covered, broken down by entities, categories of goods, works or services according to uniform classification systems to be determined by the Council ; and
 - (iii) statistics, broken down by procuring entities, and by categories of goods, works, or services, on the number and total value of regional public procurement contracts awarded under each method of procurement referred to in Article 11 and to which Member state.

- (3) A Member State shall ensure that its procuring entities-
 - (a) do not provide any regional suppliers with information on a given procurement which will have the effect of preventing competition; and
 - (b) afford all regional suppliers equal access to information on a regional public procurement.
- (4) A Member State shall not disclose confidential information which would prejudice the legitimate commercial interests of a particular person or might prejudice fair competition between regional suppliers, without the formal authorization of the person that provided the information to that Member State.

CHAPTER V APPEALS PROCEDURES

Article 31 Challenge and Review Procedures

- (1) A Member State shall provide independent and impartial judicial or administrative procedures for allowing regional bidders, alleging violations of applicable procurement

rules provided for in domestic legislation and set out in these Regulations, to obtain a review.

- (2) A Member state shall ensure that the nature and principal features of the review referred to in paragraph (1), should include the following-
- (a) the challenge or review should be available at stages prescribed in the domestic legislation on public procurement;
 - (b) the proceedings shall be conducted in a transparent manner, consistent with predictable and written procedures that are readily available to all regional bidders in advance;
 - (c) there should be sufficient time for regional bidders to file applications for challenge or review which shall in no case be less than 10 days from the date of notification of the award;
 - (d) an independent authority empowered to award effective remedies, including the setting aside or ensuring the setting aside of, decisions taken unlawfully, the removal of discriminatory technical, economic or financial specifications in the bidding and contract documents;
 - (e) an opportunity for bidders and suppliers to be heard before an opinion is given or a decision is reached, with the right to be represented and the right to call witnesses;
 - (f) obliging procuring entities to respond in writing to a complaint and to disclose all relevant information and documents to the review body;
 - (g) providing an opportunity to a supplier that initiates a complaint to respond to the procuring entities' report prior to a decision being taken on the complaint;
 - (h) providing for a temporary suspension of the procurement process, subject to extension, unless urgent public interest consideration require the procurement proceeding to continue without interruption;
 - (i) providing for timely decisions to be taken on challenges by a bidder or supplier with an explanation given for the basis for each decision; and
 - (j) ensuring that decisions taken by authorities responsible for challenge and review procedures can be effectively enforced.

CHAPTER VI
STANDARDS OF CONDUCT AND ETHICS

Article 32
Standards and Rules of Conduct

- (1) A Member State shall ensure that standards and rules of conduct for regional bidders and suppliers are developed and incorporated into the domestic legislation and effectively published to all bidders and suppliers.
- (2) The standards and rules of conduct developed under paragraph (1) shall promote the objectives and principles of economy, efficiency, transparency, fairness and non-discrimination.
- (3) Member State shall ensure that standards and rules of conduct for public officials are developed and incorporated into the domestic legislation and effectively published to all procuring entities, providing for –
 - (a) impartiality of public officials involved in requisitioning, planning, preparing, and conducting public procurement proceedings, and administering the implementation of public procurement contracts;
 - (b) avoidance of conflict of interest, impropriety and mere appearance of impropriety;
 - (c) refraining from providing to any supplier information with regard to specific procurement in a manner that would have the effect of prejudicing competition;
 - (d) confidentiality in the handling of proprietary information in the procurement process; and
 - (e) prohibiting fraudulent and corrupt practices in public procurement.
- (4) A Member State shall ensure the existence of effective mechanisms for reporting, investigating and sanctioning violations and abuses in public procurement within the Common Market.

CHAPTER VII

PROCUREMENT REFORM IN MEMBER STATES

Article 33 Legislative Reforms

Member States shall, in order to support a harmonized and consolidated legal framework for regional competitive bidding, continuously review their domestic legislation relating to public procurement in order to ensure an efficacious legal framework that embraces technological advances, corporate governance systems and institutional capacity.

- (1) Member States shall endeavour to devise strategies for application of information and communications technology, by use of e-procurement, throughout the public procurement process and incorporate these in the legal framework relating to public procurement.
- (2) Member States shall enact the necessary legislative instruments so as to have in place a comprehensive and effective legal framework for all public procurement, including the promotion of public private partnerships.
- (3) Member States shall enact measures to ensure compliance with the COMESA Directive on Public Procurement.
- (4) For the purpose of undertaking the reforms under these regulations the principle of variable geometry shall apply.

Article 34 Organizational, Institutional and Procedural Measures

- (1) Member States shall ensure that adequate organizational and institutional measures are put in place to implement these Regulations and that will –
 - (a) give overall guidance to the development and practice of public procurement;
 - (b) serve as a contact point and information centre on public procurement in the Member States;
 - (c) monitor and report, nationally and within the Common Market, on procurement activities of procuring entities; and
 - (d) develop professional capacities in public procurement.

- (2) Member States shall establish transparent procedures for debarment of bidders and suppliers, for periods of time, from participating in public procurement proceedings, in response to serious violations of procurement rules, contractual obligations, or standards of conduct. The debarment procedure should protect the interests of the procuring entity and the wider public interest, while providing procedural protections for bidders and suppliers subject to such allegations, to ensure fairness, integrity and due process in the debarment procedure.
- (3) Member States shall establish and actively utilize effective means of investigating and prosecuting improper conduct in the procurement and related processes, including the offering of improper inducement to public officials in any Member State.

CHAPTER VIII SUPPORTING REGIONAL INSTITUTIONS

Article 35 Technical Committee of Procurement Experts

The Technical Committee of Procurement Experts established by Council under Article 15(3) of the Treaty shall be responsible for the preparation, implementation, monitoring and reviewing of programmes to be undertaken pursuant to these Regulations.

Article 36 Dispute Settlement

- (1) A Member State undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any written request for consultation made by another Member State concerning measures affecting these Regulations which measures shall include the following-
 - (a) if a request for consultations is made, the Member State to which the request is made shall reply to the request within 30 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 45 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member State does not respond within 30 days after the date of receipt of the request, or does not enter into consultations

within a period of no more than 45 days after the date of receipt of the request, or the consultation failed to reach a mutually satisfactory solution within 60 days after the date of commencement of consultation, then the Member State that requested the holding of consultations may proceed directly to resolution of the dispute before the Court of Justice in its arbitration jurisdiction; and

- (b) consultations shall be confidential, and without prejudice to the rights of any Member State in any further proceedings.

Article 37

Cooperation among Member States

- (1) Member States shall provide each other with technical cooperation and assistance, with a view to implementing these Regulations, fostering mutual understanding of the procurement systems of Member States, and building the capacity of both the public and private sectors in the procurement field, and identifying opportunities for further access to procurement markets.
- (2) A Member State shall, for the purposes of paragraph (1), provide to the Secretary General information concerning the following, for circulation amongst Member States-
 - (a) training and orientation programmes related to its public procurement systems and the availability of non-discriminatory access to any programme they conduct for officials from other Member States;
 - (b) possible opportunities for exchange programmes and study tours, in which officials would visit procurement operations and organizations in other Member States, including procuring entities as well as policy, monitoring and oversight bodies;
 - (c) sharing of experiences in both legal and institutional reforms in public procurement;

- (d) sharing of data and experience from pilot programmes, for example, in the introduction of information and communications technology in public procurement;
- (e) training in the different electronic programmes used by the Member States to process public procurement data and provide statistics on them;
- (f) training of suppliers interested in taking advantage of the business opportunities in public procurement and the availability of non-discriminatory access to any programmes they conduct for firms from other Member States;
- (g) explanation and description of specific aspects of the Member State's public procurement systems, such as their appeals mechanisms;
- (h) information on market opportunities for public procurements;
and
- (i) assistance or training opportunities with respect to setting up and operating a procurement website, and other information technology applications in public procurement.

Article 38
Entry into Force

These Regulations shall come into force on the date of their publication in the Official Gazette of the Common Market.

Sindiso Ngwenya
SECRETARY GENERAL

