TECHNICAL REPORT

Government Procurement

Assessment of the Government of Mozambique's Proposed Regulations for Public Works Contracts and Procurement of Goods or Services

NATHAN
ASSOCIATES INC.

www.nathaninc.com

SUBMITTED TO
USAID/Mozambique

SUBMITTED BY
Nathan Associates Inc.

PREPARED BY
Jeanmarie Meyer, JD, LL.M.

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Introduction

The Confederation of Mozambican Business Associations (CTA) requested technical assistance to evaluate the Government of Mozambique's proposed procurement policy: Regulations for Public Works Contracts and Procurement of Goods or Services.

This report reviews the Regulations for Public Works Contracts and Procurement of Goods or Services (Regulations) and provides CTA with a detailed analysis of the proposed law, comparing the law to international practices and standards. The report analyzes the potential effect of the law on the private sector and also provides answers to the following questions:

- How the law intends to address corruption?
- How transparent is the proposed law?
- How simple are the processes?
- How much discretion does the awarding body have?
- How does the law treat procurement from national and foreign firms?
- How does the proposal compare with best practices globally as well as within the SDAC region?
- How does the proposal affect Mozambique with regards to the cost and time of doing business?
- What is the expected impact on investments and foreign trade?

The report also:

- Looks carefully at clauses that favor local procurement and assesses the impacts (both positive and negative – e.g., corruption, higher costs, etc.) of favoring local procurement instead of procurement from foreign suppliers and provides insight into whether these clauses are in-line with international best practice.
- Provides insight into whether the proposed law would be in compliance with WTO, UNCITRAL and other international government procurement agreements and models.

Executive Summary

The draft Regulations under consideration make a serious attempt to provide the legal framework for establishing a fair and transparent public procurement system. However these Regulations also have a number of significant omissions, and contain aspects which serve to undermine the whole. Even if the rules and procedures in the Regulations were perfected, this would not guarantee procurement reform. It is not enough just to legislate change. The success of the Regulations will be in direct proportion to the degree of will and resources committed to implementation and enforcement.

POINTS OF MERIT

The major strengths of the draft Regulations include:

- The Regulations will establish uniform, mandatory rules and procedures for making purchases with public funds if the law is implemented.

- The Regulations contain many rules and procedures that will promote transparency in the procurement system if the institutions of transparency are established. The requirements to publish advanced notice of procurement opportunities, notice of awards to successful bidders and justification for using Direct Award procedures are particularly important.

- The Regulations promote fairness and transparency in mandating formal bidding documents that set out the bidder qualification requirements and award criteria in advance of bid submission.

- The Regulations will promote accountability in requiring officials to provide written justification for their decisions if the records of these decisions are transparent and easily accessible and officials are held accountable for their rationale.

- The Regulations promote accountability in granting bidders the right to appeal but the forum is a matter of serious concern.

- The Regulations promote accountability in establishing sanctions for illegal acts and improbity, but there is no clear provision for how these sanctions will be enforced.

- The Regulations promote transparency, accountability and fairness by mandating use of written contracts that conform to certain terms and conditions set out in the Regulations.

- The Regulations promote honesty and fairness in prohibiting officials with conflicts of interests to participate in the procurement decisions but the definition of conflicts of interests could be improved.

- The Regulations recognize the importance of financial discipline in budgeting and paying for procurements but more needs to be done to ensure that the discipline is implemented.

MATTERS OF CONCERN

The major weaknesses of the draft Regulations include:

- Lack of Institutional Framework

  The Regulations do not establish procurement institutions and lack guidance as to how the rules and procedures mandated in the Regulations will be implemented and enforced. There is no guarantee of further formal guidance and proper training of those in the Public Sector who will be involved in the procurement process. There is little protection from abuse of discretion and there is a real risk of incompetence in implementing the Regulations which will measurably increase the cost and time doing business with public administration. There is no provision for monitoring the system and no clear mechanisms of control.

- Lack of Process

  i. There is no mandate for making and maintaining a complete record of the procurement.
  ii. There is no provision for pursuing administrative sanctions.
  iii. The provisions for appeal fail to satisfy fundamental standards of fairness and due process.
  iv. There is no process or procedure for bidders disqualified from bidding or from admission to the Register.

- Lack of Clarity

  The Regulations are ambiguous and imprecise on several key points. As examples: Article 45 Par 2 leaves vague the deadline for submission of bids; the Bidding

Announcement (Article 48) provides insufficient information for bidders; the Limited Bidding procedures (Articles 79 to 82) have no clear beginning or way of proceeding. In many cases vague standards are proposed with no guidelines for interpretation as in Article 13 Par 1 which requires that the criteria for technical evaluation of projects be "objectively" defined.

- Discretion

i. The Awarding Entity has too much discretion in estimating the value of the contract as well as in choosing and applying technical award criteria (Article 9 Par 1.c).
ii. The Awarding Entity has too much discretion in providing or limiting market access of foreign firms and in demanding or ignoring local content requirements.
iii. The Awarding Entity has too much discretion to use definitive financial requirements in defining qualification standards. This not only invites abuse but also can discriminate against small businesses.
iv. The National Institute of Standards and Quality has too much control of the qualification process (Article 19 Par f) and Article 21 Par 2 gives the Awarding Entity total discretion to waive the same qualification requirements.
v. The Contracting Entity has too much discretion and power to amend and administer the procurement contract.
vi. The Contracting Entity has too much discretion and power to take over the contractor's tools, machinery etc. after calling the contract in default. (Article 132)

- Financial Burdens and Risks for Bidders

i. Bidders are not entitled to interest on cash guarantees except for the period that payment is overdue (Article 160). This encourages the Awarding Entity to drag out the procurement process and thus benefit from interest earned on the cash deposits it holds.
ii. The performance bonds for works projects are not returned until 5 years after completion of the project. (Articles 157 to 160) This increases the cost of doing business to such an extent that corruption may be the only means for the contractor to make a profit.
iii. Under the mandated terms and conditions of procurement contracts, the contractor bears most of the risks.

- Other

i. The conditions for using Direct Award procurement method are too broad and could render most of the other rules and procedures in the Regulations worthless.

ii. The Reverse Auction procurement method is an oral adaptation of electronic bidding techniques that is particularly vulnerable to abuse and should not be included in these Regulations.
iii. The Two-Stage Bidding procurement method will be difficult to apply and implement fairly.
iv. The standard of acceptable bid needs to be revised to include bids that exceed the specifications. Article 59 Par 7.c requires bids to be disqualified if they offer advantages not requested in the Bidding Documents. This provision should be deleted.

KEY RECOMMENDATIONS

- Designate in the Regulations the agency responsibility for leading the procurement reform and implementing the Regulations. List the duties and functions of this agency. This agency should be independent and responsible only to the highest level of government power. It is highly recommended to create a new agency, an Office of Public Procurement.

- Add a provision that mandates keeping and maintaining records of the procurement process. The provision needs to provide a list of minimum contents and needs to make clear that the record must be readily and easily accessible.

- Bring the definition and prohibition of conflicts of interests (Articles 16 and 106.) in line with the current requirements in the Public Administration Decree 30/2001 Article 17. This should also clarify how sanctions will be enforced.

- Add an anti-corruption provision that prohibits receiving commissions, favors and any other form of bribe or inducement as part of the procurement process.

- Define thresholds currently left blank.

- Add special procedures for contracting for services, especially professional services, designed to assure quality.

- Delete the Auction method of procurement.

1. How the law intends to address corruption?

The extremely large sums of money involved in public procurement make every public procurement system a fertile ground for corruption. Also, because of the breath and complexity of procurements, there are many forms of procurement fraud and corruption.

Some of the most common corruption schemes are: bribes and kickbacks, conflicts of interests, collusive bidding, bid rigging, false statements and claims, avoiding competition requirements, manipulation of bidding process by public officials, false or duplicate invoices by contractors, failure to meet contract specifications, and purchases for personal use or resale. To protect public procurement systems from these and other corruption schemes, States attempt to regulate procurement by establishing a procurement regime of detailed procedures designed to limit subjectivity and decrease the opportunity for abuse of discretion in the process of acquiring goods, works and services for public needs.

UNIFORM LEGAL FRAMEWORK OF MANDATORY RULES AND PROCEDURES

The proposed Regulations set out detailed procedures that incorporate various anti-corporation strategies. First, the Regulations create a uniform legal framework of mandatory rules and procedures. Second, there are many requirements that if applied properly will make the system and process of procurement transparent. These are discussed in Section 2 below. T*ransparency* is considered a most effective tool in the fight against corruption; therefore the strengths and weaknesses discussed in the following Section also apply in assessing how effective the law is in addressing corruption.

ACCOUNTABILITY

Holding public officials accountable for their decisions and actions also deters corruption since accountability increases the risk of being exposed. The Regulations consistently mandate that officials provide written justification for decisions. One example of a unique yet particularly good rule is at Article 12 Par 2 which requires written justification for using non-price award criteria. Another example is the rule at Article 9 Par 2 that requires justification for using exceptional methods of procurement. This rule is more common and found in many systems including the UNCITRAL Model Law.[1] Each of these rules plus several similar rules found in the Regulations are excellent tools to promote accountability but only if the records of these decisions are transparent and easily accessible. This "if "is key and on this point the Regulations are serious flawed.

The Regulations do not set out a clear mandate for maintaining a complete record of the procurement. Although it is implied in many provisions and even referred to in Article 12,

[1] The Model Law on Procurement of Goods, Construction and Services was developed by the United Nations Commission on International Trade Law (UNCITRAL) and adopted in its present form in 1994. The Model Law represents an attempt to harmonize national laws governing procurement rules and procedures for selecting public suppliers and contractors. These rules and procedures are intended to promote a range of policy objectives, including the promotion of international trade. It does not come into effect as a multilateral treaty like an international convention or the public procurement provisions of the World Trade Organization/Government Procurement Agreement, nor is it supported by a multilateral treaty like the binding standards to harmonize national laws set out in the public procurement directives of the European Union. Instead, UNCITRAL endeavored to achieve uniformity among national public procurement laws by offering a model procurement law for States to enact as part of their domestic legal systems. Since it was enacted, it has been the foundation of national law around the world. Its influence is clearly identifiable in these draft Regulations.

there is no clear rule for making and maintaining a record of the procurement. All rules of accountability will fail their purpose if there is no accountability for the record itself. Responsibility to keep and maintain the record must be definite and include responsibility to make the record readily and easily accessible to the private sector whose members need it to protect their rights. "Readily and easily accessible" means that the records should be free, available during regular and convenient hours, at a convenient location without unreasonable hassle and delays. A clear rule also is needed in order to ensure that breach of this responsibility, including meeting standards of accessibility, is subject to review and to the sanction set out in the Regulations.

Naturally, exposure alone does not deter corruption but must be followed by forms of remedies and penalty. Here again the Regulations attempt a strict stand. Title III sets out extensive provisions establishing sanctions for illegal acts and improbity. However, it is not clear who will pursue these sanctions and how it will be done. In other words, accountability seems to fail even in the pursuit of accountability.

RIGHT TO APPEAL

Public officials are also held accountable when the private sector has the right to appeal actions and decisions of public officials. Although the Regulations established a right to appeal, they do not create an effective system of appeal that would satisfy international standards such as that set out in the UNCITRAL Model Law or the WTO/GPA.[2] While the Regulations permit broad grounds for complaint, which is good, the forum is not independent and the process is minimal. The complaint goes to the Jury who makes the decision and then to the Competent Authority who appointed the Jury. A quick response is important, but under the Regulations each forum has only 3 days to decide. This is simply not enough time to provide due process. The complainant is not even granted an opportunity to rebut the Jury's decision. Further, the Regulations are not clear whether the decision of the Competent Authority is final or subject to appeal to another forum. This needs to be clear in the Regulations.

CONFLICTS OF INTERESTS

Rules addressing conflicts of interests decrease the opportunity and temptation to engage in corrupt activities. Conflicts of interests occur when a public official has a personal interest in the outcome of his/her professional decision. Even though the UNCITRA Model Law does not address conflicts of interests, the Regulations attempt to define and prohibit

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[2] The reference is to the 1994 Agreement on Government Procurement, a plurilateral agreement under the World Trade Organization umbrella. The GPA is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade.

circumstances of conflicts of interests. (Se Articles 16 and 106) Again, however, there is a question of how this will be enforced.

FAIRNESS

Rules that promote fairness also may deter corruption. The Regulations contain many rules to promote fair treatment. Most important, the same rules and procedures including the award criteria apply to all bidders and the technical specifications should not unfairly favor or exclude certain bidders. However, there are a few features of the Regulations that are vulnerable to abuse. Article 16 Par c excludes a bidder for bad past performance in a contract. This is a grave sanction yet it is not clear how the determination is made or whether the entity has a right to a fair process before being excluded. There is a similar problem with the sanctions set out Article 176 Par h and Article 177 Par 2.b. Each provision provides a grave sanction for corrupt action, but could this sanction be applied unfairly?

CONFIDENTIALITY

Bidders should also be concerned about the provisions of Article 21 that might allow for an unfair breach of confidential information. Leaking of confidential commercial information is a common form of corruption in procurement. Article 21 makes a bidder's qualification documents public with no provisions to protect confidential information. Although the provision seems well intended, it could result in unfair treatment and operate as an open invitation to corruption.

LOOPHOLES

The potential for abuse appears in other rules. Consider Article 25 Par 5. This provision allows an applicant for inclusion in the Register to participate in a Limited Tendering if it has not received an answer on its application within 5 days of submission. This is acceptable to this point as it prevents intentionally holding up the application to bar the applicant from an upcoming procurement. However, the rule goes on to require that the procedure be invalidated if the decision is not rendered by the time of award. Placing this power and control over the procurement outside of the process makes the process vulnerable to a fraudulent scheme. Similarly, Article 25 Par 7 enables an entity to automatically qualify for admission to the Register if it can get one contract, which might be won through bribery or other corrupt scheme.

PROCUREMENT CONTRACT

A key strength of this law in addressing corruption is the provisions governing the procurement contract. Clearly, many corruption schemes occur during contract performance or during the procurement proceeding in anticipation of corruption in contract performance. It is easy to submit the wining bid if one knows one will be able to substitute product or inflate the contract price after one wins. Nevertheless many procurement laws ignore the

contract and contract administration. Even the UNCITRAL Model Law ends with execution of the contract. In general these provisions of the law set up a framework that will make the most common corruption schemes considerably more difficult.

LACK OF INSTITUTIONAL FRAMEWORK

To deter corruption in procurement, detailed procedures are necessary, but the challenge of implementing them is demanding and the process is painful. Here the Regulations fail and fail miserably. New procurement regulations are not easily absorbed into the public administration and the Regulations do almost nothing to establish good procurement institutions. There are lots of good rules but no one responsible for leading the implementation. It establishes no control mechanisms. The Jury system that the law uses is no substitute for procurement professionals. There is no mention of the need for training yet proper implementation of the Regulations will require expert knowledge and skills. *Without this institutional framework, the system will remain vulnerable to corruption.*

2. How transparent is the proposed law?

Transparency means that law, regulations, rules and procedures governing procurement are clearly communicated and the information about the procurement is open and clear. Transparency encourages bidders to trust the public procurement system and builds the public's confidence in public administration. It is believed that increasing transparency also deters corruption because openness increases the risk of getting caught.

DETAILED AND OPEN RULES AND PROCEDURES

The Regulations contains numerous rules and procedures that mandate transparency. If compared to other procurement laws, it would rank high in number and range of rules promoting transparency. It contains most of the more common provisions plus it has several unique mandates. Significantly, the very detailed rules and procedures set out in the Regulations including even terms and conditions of contracts bring considerable transparency to the rules and procedures governing procurement. An example of the detailed nature of the Regulations is found in Article 14 defining precise rules for selecting the winner in the case of tie bids. This is excellent yet not always seen in basic procurement laws and is not set out in the UNCITRAL Model Law.

In addition, the need to make the rules and procedures transparent is pronounced throughout the Regulations. Where flexibility is permitted in applying rules and procedures, the Regulations at Article 3 Par 2 require that any special rules must be made clear in the bidding process. This rule could be improved if it stated that these special rules must be set out in the Bidding Documents. The Regulations also mandate the use of Bidding Documents. Article 44 presents a detailed list of what must be included in the Bidding Documents, and Article 43

mandates that these documents must be issued early in the procurement proceeding. Essentially, these documents inform the bidders about what is to be procured and tell them how to participate in the procurement proceeding.

AWARD CRITERIA

Transparency in the rules of game would be worthless without making known in the Bidding Documents how one wins. Accordingly, the Regulations mandate transparency in the criteria and methodology for selecting the winning bid. (See Articles 10 through 14) However, Article 13 Par 1.b might be considered over-regulating the selection process. In application, it may be challenging to define in every case sub-factor weighting for each award criteria.

QUALIFICATION REQUIREMENTS

Transparency in the requirements and procedures for qualifying bidders is another critical feature. If these are not made know in the Bidding Documents, the other rules of transparency become insignificant. Again the Regulations do not disappoint. In Articles 15 to 32, the Regulations set out exceptionally good provisions related to qualifying bidders including foreign bidders and participation of consortia. In these provisions, a few features stand out. Articles 22 and 23 set up a process to enable other bidders to challenge the validity of the qualifications of the successful bidder. If abuse of this process can be controlled, this could be an effective control on the qualification process.

Similarly, the rules and procedures for setting up and administering the Register promote transparency. The rule at Article 25 Par 7.b that require the semi-annual publication of a public invitation for enrollment in the Register is impressive. It is also significant that the Regulations at Article 28 grant applicants the right to appeal rejection of their application and even give others the right to appeal acceptance of an applicant.

Like all features of these Regulations, however, the value of these features will depend upon the procedures developed for implementation and the execution of those procedures. Again, this is where the Regulations are weak and should be improved.

NOTICE OF PROCUREMENT OPPORTUNITIES

In addition to clear and open rules, transparency means that the information about procurement opportunities is open and clear. The Regulations mandate that notices of procurement opportunities be announced in advanced. (See Chapter 5) The Regulations also require publication of award to the successful bidder. (See Article 11 Par 2.g) Although this rule of transparency is greatly encouraged and is becoming a recognized practiced, it is still worth recognizing as a significant feature of the Regulations. Another feature however stands out as exceptional. Article 112 Par 2 c mandates published notice of the justification for Direct Awards and Par 4 grants others the right to contest the action. Frequent use of Direct Awards is a problem common to all procurement systems and the problem is often hidden due to a

lack of transparency. Even the UNCITRAL Modal Law does not require publication of a notice like the one required in the Regulations. This is an excellent provision, if it is fully implemented. The private sector should be diligent in reviewing these notices.

WEAKNESSES IN PROMOTING TRANSPARENCY

Without diminishing the strengths of the Regulations in promoting transparency, it is also important to take notice of two serious weaknesses in the regulatory scheme. Both issues are extremely significant. First, Article 45 Par 2 leaves vague the deadline for submission of bids. This paragraph provides that the time period for submission of bids is calculated either from the date of the announcement or the date the Bidding Documents are available. In Open Bidding this deadline is a critical point in the procurement process. Any vagueness or uncertainty or flexibility surrounding this date is a major breach of transparency.

Another serious flaw in the Regulations is at Article 48, the contents of the Bidding Announcement. To be considered truly transparent, the Bidding Announcement should provide more information to bidders. The potential bidders should find enough information in the announcement to make a preliminary assessment of interest in the procurement. Giving a brief description of the object of the procurement and the estimated value is not adequate. Simply stated, it is not efficient or fair to require bidders to review the Bidding Documents to determine possible interest. At a minimum the Bidding Announcement should also describe the basic qualification requirements, the deadline for submission of bids, the guarantee requirements, and the anticipated timetable for performance of the contract, and whether the procurement is open to foreign bidders.

Despite these two flaws, which hopefully will be cured before the Regulations are enacted, the Regulations set out a very good regulatory scheme to promote transparency. However, without the institutional framework to implement and enforce rules, the lessons learned from attempts at procurement reform in many States around the world informs us that the reality of transparency will fall far short of expectations.

3. How simple are the processes?

A public procurement system built upon the fundamental principles of transparency, accountability, competition, and fairness is not simple for public officials to administer and poses many challenges for private participants too. In addition, accepting the extra cost that is important to preserve the competence and honesty of the system can sometimes seem difficult to justify. For example, it can seem wrong to reject on a technical point a high quality, low cost bid. Looking from the narrow perspective of only that particular procurement, the public interest is better served if the technicality is waived, but this would destroy the system at great cost to the public over time. Recognizing that there is a price to be

paid for a good procurement system however should not eliminate the need and desire to reduce the administrative burden as much as possible.

Modern procurement systems have introduced various contracting mechanisms that have achieved efficiencies without compromise to principles. One example is the framework contracting arrangements used in the European Union particularly for routine supplies. In works contracts, various forms of design/build contracting are increasingly used. While such mechanisms can reduce the administrative burden in procuring goods, works and services, and in some way simplify the procurement process, they generally require more skill and experience to implement properly. Thus, the key question is whether to introduce these mechanisms at the beginning of a radical reform of a procurement system or whether it is better to add innovative mechanisms gradually after the basic legal and institutional framework is fully developed and functioning. This is a key policy decision for lawmakers in each State, but under the conditions in most States it is hard enough to introduce procurement reform even in its most basic forms.

In general, it can be said that the Regulations, with some exception, begin with the basic. They demand a lot of process to conduct most procurements even small purchases but there are few short cuts which simplify the process. The qualification process is one of those short cuts. The Regulations introduce the possibility of qualifying only the successful bidder. This is a significant accommodation and could substantially reduce the burden on bidders. This sequencing of process is not widely used in other procurement systems, yet it can be very efficient especially for the private sector. Establishing the Register is another means to short cut the burden of qualification.

LOW VALUE PROCUREMENTS

The Register is used only for Limited Bidding. Under the conditions set out in Article 36, this method of procurement is used for purchases below a threshold value which is not yet determined. Since Limited Bidding requires less administrative process than Open Bidding, the level of this threshold is an important policy decision. A higher threshold will decrease the administrative burden of the Regulations. In making this decision, it is important to be clear about how the competition is structured for this method of procurement. The Limited Bidding procedure set out in Articles 79 to 82 seems to be an efficient and effective procedure for small purchases. It is not clear, however, how the procedure begins. Is the notice to be published and open to everyone registered or will it be by invitation to a few? If it is by invitation only, how will the shortlist be developed? If everyone on the Register is invited to participate in the procurement, then a higher threshold seems appropriate. If competition is limited, then a lower threshold may be more appropriate. In the alternative, two thresholds and two forms of notice could be established. If in any case competition is limited to a short list, the Regulations should provide a formal and fair procedure for developing the short list. Further, the procedures and thresholds determined for this procedure relate to the thresholds set in Article 39 Par 4 governing the use of Direct Award. Obviously, setting each of these

thresholds will involve trade-offs and balancing administrative burden against the benefits of process. Surely one should begin with the premise that the threshold for using Direct Award should be very, very, very low.

AUCTION PROCUREMENT METHOD

The Regulations take a step beyond the basics and increase complexity in introducing the Auction procedure. (See Article 92 to 98) It is important to recognize that this is really a reverse auction procedure. This procedure is difficult to execute properly and successfully. Although reverse auction purchasing has a long history in private contracting dating back at least to the early days of the Dutch flower auctions, it is a relatively new method of public purchasing coming into use with E-Commerce applications. Even in the context of electronic bidding, it is a complex procedure with few advocates but many skeptics in the international procurement community. The oral bidding contemplated in this Regulation is far more complex and very vulnerable to corruption schemes. The reverse auction procedure is not included in the UNCITRAL Model Law or the EU Procurement Directives. International development banks such as the World Bank do not use it. This author strongly believes that this method of procurement does not belong in these Regulations.

TWO-STAGE BIDDING METHOD

The Regulations take another step somewhat beyond the basics with the introduction of the Two-Stage Bidding Method. Unlike the Auction procedure, this method of procurement is set out in the UNCITRAL Model Law and is widely used by the World Bank. However, applying the procedure can be considerably more difficult than it seems and competent bidders may be dissuaded from participating because they fear technical leveling. If those conducting the procurement are not highly skilled, technical leveling can occur easily during the negotiations after the submission of the initial bid. Clearly no bidder wants to put the effort into developing a unique and elegant technical approach that is then used by other bidders to prepare their final bids. Further, while Two-Stage Bidding may be an effective method for procuring complex projects, it is not the only, or necessarily the best, method to procure these projects. In many circumstances it can be better to do one procurement for developing the approach and then a second procurement that provides price competition for implementing the approach.

In sum, introducing procurement reform is a tedious process and there is no way to avoid the pain. However, it is helpful to begin focused on the basics and initially avoid more difficult and unusual procedures. Also, it is important to realize that multiple procurement methods are no substitute for skilled procurement professionals. A professional can achieve the best value and do it efficiently under all conditions using only a few methods of procurement.

4. How much discretion does the awarding body have?

Every public procurement system is vulnerable to abuse of discretion. Throughout the procurement process every decision point becomes an opportunity for loss of public funds through corruption or incompetence. Clearly, the real challenge in regulating procurement is to create a legal framework that strictly limits subjectivity yet can adapt to all of the many circumstances and conditions of purchasing to satisfy the vast array of public needs. It is obvious that the Regulations attempt to find a proper balance between these competing objectives, yet as is always the case when dealing with procurement, the devil is in the details.

VAGUE STANDARDS

Consider Article 9 Par 1 setting out instructions to prepare for carrying out the contract process. Under Par. 1.b, the Awarding Entity is instructed to define the object of the future contract "precisely, sufficiently and clearly." Such standards are laudable but quickly become meaningless in the process of developing specifications. More definitive guidance will be needed to ensure these standards are followed. However, the guidance will go wanting without the institutional support that is neglected in these Regulations. Similarly, Article 9 Par 1.c provides that the Awarding Entity must determine the estimated price of the contract. Too much discretion here easily becomes the first step in a corruption scheme. Again, clear guidelines will be needed to limit the boundaries of discretion.

OBJECTIVE AWARD CRITERIA

Two processes most vulnerable to abuse of discretion and most difficult to regulate are the processes for developing and applying award criteria and qualification requirements. Articles 11 through 13 set out the rules for developing award criteria. Despite all of the many rule put forth in these Articles, the Awarding Entity has broad discretion in using, choosing and applying technical award criteria. Again the requirement stated in Article 11 Par 3 and in Article 13 Par 1 that the criteria be "objectively" defined is a standard without guarantees. Unfortunately, the brief guidance in the form of a list of possible award criteria that is state in Article 12 Par 3 is not even a good start. Without further formal guidance and proper training, there is little protection from the abuse of discretion. Nevertheless, there is one very special rule in these provisions that must be acknowledged. As noted in the discussion under question one above, the Regulations at Article 12 Par b require the Awarding Entity to provide written justification for the use of technical award criteria. If this record is fully transparent and officials are held accountable for their rational, this requirement may limit the abuse of discretion in the use of technical award criteria. It is important to note that easy accessibility is implied in "fully transparent".

NECESSARY QUALIFICATION REQUIREMENTS

Articles 15 through 23 set out rules for defining and applying qualification requirements. The standard set out in Article 15 Par 4 is exceptionally good. It clearly states that "irrelevant, excessive or unnecessary" requirements are forbidden. Unfortunately, this has the pitfalls inherent in any statement of standards without more guidance to back it up, yet this is truly an elegant and unique formulation. Meanwhile, throughout these provisions governing the qualification of bidders, there are little pockets of potential problems. Article 17 Par d refers to requirements that might be mandated by special legislation. Can this be used to set up artificial barriers to participation? Article 18 Par 2 requires, and Par 4 permits, use of definitive financial criteria. Definitive financial requirements are arbitrary qualification standards that simply invite abuse and discriminate against the small businesses that the State should be trying to encourage. Article 19 Par f in effect gives the National Institute of Standards and Quality unlimited control of the qualification process. Article 21 Par 2 grants the Awarding Entity discretion to waive qualification requirements. This begs abuse. Getting required certificates costs each bidder time and money. Waiving these requirements for any bidder is favoritism and in consequence undermines the entire process.

As this discussion illustrates, the necessary limits on subjectivity to protect the procurement system from abuse of discretion cannot simply be legislated out of the system. Success will be in direct proportion to the degree of will and resources committed to implementation and enforcement.

5. How does the law treat procurement from national and foreign firms?

Politicians everywhere try to keep public funds in the country and generally succeed. Despite the many international treaties and agreements designed to open the procurement markets, the statistics provide evidence that a large percentage of nationally funded procurements are won by national firms. That national firms usually have a fair competitive advantage only partially explains this reality. There are many indirect and direct means that create barriers to market access by foreign firms and give national firms what might be termed an unfair competitive advantage. Many familiar barriers are permitted in the Regulations.

INDIRECT BARRIERS TO DISADVANTAGE FOREIGN FIRMS

The indirect barriers are the little things States do to discourage foreign firms from competing in public procurements or to make it difficult for them when they try. Numerous provisions in the Regulations can be applied to disadvantage foreign firms. Article 8 requires all documents to be written in the Portuguese language and Article 29 makes clear that this rule applies even to foreign legal documents. This requirement could mean that foreign firms would need to submit all company documents and product literature in Portuguese. The cost and time to comply operates to exclude or at least restrict competition. The WTO/GPA and

the UNCITRAL Model Law prohibit this type of barrier by requiring that if the procurement is open to foreign bidders, the rules must permit use of a language used in international trade.

Requiring all bids to be formulated in the local currency also operates to disadvantage foreign bidders since it requires them to accept currency risks and conversion expenses. Although the Regulations are silent on this subject, there is reason to believe that this barrier will be used since all thresholds in the law are set out only in local currency. Instead, the WTO /GPA and UNCITRAL Model Law require use of a currency used in international trade when foreign bidders are invited to participate in a procurement.

Licensing requirements provide another mechanism frequently used to bar or disadvantage foreign bidders. Business licenses, professional licenses, labor licenses and any other type of licenses States can devise have been used somewhere at some time to bar or disadvantage foreign firms in a procurement. The Regulations lay the foundation for unrestricted use of licensing requirements to qualify bidders. The provisions of Articles 17, 18 and 19 would permit an Awarding Entity to set various local licensing requirements. Controlling the abusive use of licensing requirements has proven difficult even in international agreements. The WTO/GPA and the UNCITRAL Model Law address the problem only with general provisions that prohibit using any criterion, requirement or procedure for qualifying bidders that discriminate on the basis of nationality unless objectively justified. Admittedly these general non-discrimination provisions provide only limited protection from abuse of licensing requirements; however, the Regulations do not even attempt to prohibit such discrimination.

Another means of discriminating against foreign bidders is to use permanent lists of qualified bidders and limit participation to those on the list. The WTO/GPA does not prohibit the use of such lists but does require that suppliers not on the list should be given an opportunity to participate in the procurement. Although the Regulations establish such a list in the form of the Register, the Register is not a closed list and permits access even after a procurement is announced. Moreover, the WTO/GPA applies only to large procurements whereas the Register is used only for smaller procurements. In this issue, it seems that the Regulations do not offend the WTO/GPA.

Limited notice requirements and shorten deadlines are additional indirect tactics used to discourage foreign bidders. The WTO/GPA and the UNCITRAL Model Law require that if the procurement is open to foreign participants then the procurement notices should be published in a language customarily used in international trade and in a publication of wide international circulation. The Regulations have no requirements for international publication of notices. The WTO/GPA also sets minimum time periods for setting the deadline for receipt of bids depending upon the methods of procurement. For Open procedures, the minimum period is 40 days from the date of publication of the notice. This is 10 days more than the minimum of 30 days set out for Public Bidding Contests at Article 45 of the Regulations.

DIRECT BARRIERS TO DISADVANTAGE FOREIGN FIRMS

Outright exclusion of foreign firms, granting a margin of preference to national firms, or granting a preference for local content are direct barriers commonly applied to disadvantage foreign firms participating in public procurements. The Regulations provide wide discretion for using each and all of these tactics. Article 108 permits Awarding Entities to exclude completely foreign entities from any procurement funded with budget funds and also permits unrestricted use of margins of preference for national firms or for local content. The percentage of margin is also within the discretion of the Awarding Entity. This range of discretion is extraordinary and far greater than this author has seen anywhere.

POSSIBLE DISADVANTAGES FOR NATIONAL FIRMS

Given all of these possible direct and indirect barriers to foreign participation in public procurements, how can national firms lose to foreign competitors? One major problem area for national firms can be the use of payment terms as a basis of award. National firms often cannot afford to extend payment terms and thus cannot compete with foreign firms who may have easier access to capital and on cheaper financing terms. Article 11 Par 3 of the Regulations specifically permits taking account of payment terms in the assessment of price. This is even more surprising given that the Regulations at Article 9 seem to require the Awarding Entity to be sure it has the funds covered in the budget before it proceeds with the procurement. It is simply bad practice for a public procurement system to request payment terms or to be habitually slow paying its contractors. First, the public is definitely paying for the privilege in higher prices and/or lower quality. Second, these practices can cause financial hardship to national firms, which is not economically good for the country or its citizens.

Two other financial related issues can also hurt national firms in competition with foreign firms. One is meeting definitive financial qualification requirements. As discussed at Section 4 above, the Regulations encourage use of such requirements. However, in practice such requirements can often disadvantage national companies and the small businesses that the State wants to foster.

Second, the guarantee requirements can sometimes disadvantage national companies over the foreign companies, especially those with access to less expensive means to provide guarantees. The Regulations require bidding and performance guarantees. With one exception, the provisions in the Regulations are similar to what is set out in the UNCITRAL Model Law and incorporated into procurement laws and practice around the world. Nevertheless, these requirements raise many problems especially in developing countries. Sadly, many States ignore the problems instead of working with the private sector to develop cost-effective mechanisms for bidders to obtain guarantees without tying up large amounts of working capital. The Regulations, however, make this problem worse. Articles 157, 158 and 160 together provide that the guarantee period on works contracts will extend 5 years after

the completion of the works. Curiously, the contractor who has put up a cash guarantee receives interest only for any period of late payment which period begins to run 20 days after the final acceptance, which occurs 5 years after completion. These provisions are extreme and would and should discourage any competent contractor from participating in a procurement system with such requirements.

Finally, it is important to recognize that local content requirements can be as difficult for national firms as for foreign firms. The challenges of dealing with local content requirements are often underestimated. While it makes a good political sound bite, the issues can be very complex and the calculations a huge administrative burden. Add to this the vast opportunity for fraud. Few products today are of 100% local origin and consequently, local content requirements are usually a minimum percentage, such as "more than 50%". Consider the example of a piece of machinery assembled locally but made of raw materials and parts from many countries including the procuring country. To calculate the local content, the value of the various parts and labor needs to be determined. That is difficult and time consuming. Now complicate this by adding a part that was assembled in a foreign country by a national firm and made of raw material that was mined locally. With today's global economy, this is still just a simple example. This administrative time, effort and frustration is no less for national firms as for foreign firms.

In sum, the Regulations are definitely not friendly to foreign firms. Awarding Entities are equipped with numerous indirect and direct tactics to discriminate against foreign firms. Every ordinary and even some extraordinary means of creating unfair barriers are permitted in the Regulations. Moreover, the Regulations have several features that could raise real problems for national contractors too.

6. How does the proposal compare with best practices globally as well as within the SDAC region?

"International best practices" in the context of procurement is still a subjective reference. The bible of best procurement practices does not yet exist even though the one encounters the reference frequently. However, four major sources are influencing global procurement reform today: The UNCITRAL Model Law, the WTO/GPA, the European Union Procurement Directives and the procurement guidelines of The World Bank. Add to this various regional and bilateral treaties plus the procurement guidelines of regional international financing institutions. With the exception of the various bank guidelines, the other documents are essentially trade documents and are written with the intent of increasing market access in public procurement. All of the documents are in the form of guidelines, except the UNCITRAL Model Law. It takes the form of a procurement law with rules and procedures

built upon trade law experiences. Despite its limitations and flaws, it has been a major instrument in the global procurement reform revolution of the past decade.

Since the early drafts of the UNCITRAL Model Law began circulating among the international community in the 1980's, it has inspired hundreds of new procurement laws throughout the world, from Russia, to Chile, to Uganda, to Slovenia, to Mongolia and the list goes on. The Asian Pacific Economic Cooperation (APEC) drew upon the Model Law in developing the non-binding procurement principles it developed for its members. The Model Law is also the backbone of the Common Market for Eastern and Southern Africa (COMESA) public procurement reform project aimed at harmonizing public procurement rules and regulations as well as building the capacity of national procurement systems in the region. While the South African Development Community (SDAC) has not taken on a similar initiative, several Members States are proceeding with procurement reform under The World Bank programs. Again the Model Law serves as the starting point for legal reform. While trade is an important objective of procurement reform, it is not the whole story. The UNCITRAL Model Law, the WTO/GPA, the European Union Procurement Directives and The World Bank procurement guidelines each may be a chapter in a bible of "international best practices" but the book it still being written. This is the context in which we compare the Regulations to these documents and consider the provisions in the light of lessons learned.

COMPARISON WITH UNCITRAL MODEL LAW ON PROCUREMENT

Like many other new procurement laws, the Regulations are adapted from the UNCITRAL Model Law. The influence is easily recognized, even though the Regulations deviate significantly from the Model Law. Some of the deviations improve upon the Model Law. The Regulations add provisions to govern procurement planning (Articles 41 and 42) and the procurement contract (Title II, Articles 113 to 169). These additions are critically important for establishing a public procurement system. On the other hand, some of the deviations are questionable. Authorization of the Auction method of procurement that is discussed in Section 3 above falls squarely into this category. There it is already noted that this author strongly recommends that this procurement method be deleted from the Regulations. Following are additional points not covered in other sections of this report.

PROCUREMENT METHOD FOR SERVICES

The Regulations lack a special procurement method for procuring services. Many procurement professionals believe that when contracting for services, especially professional services, special procedures are needed to assure quality. The method for service contracting that is set out in the UNCITRAL Model Law is similar to The World Bank procedures for procuring consulting services. This method was not taken into the Regulations. Admittedly, the method as defined in the Model Law is somewhat confusing especially because it includes three alternative selection procedures. Nevertheless, a modified version of this procurement method should be considered for inclusion in the Regulations.

CONDITIONS FOR USING DIRECT AWARD

Like the UNCITRAL Model Law Single Source Procurement method, the Regulations include a non-competitive procurement method, Direct Award. The Regulations permit use of Direct Award under circumstances generally in line with the conditions set out in the Model Law except for one important deviation. The Regulations at Article 39 Par 2.g can be applied to permit unlimited additional purchases from an existing supplier. The Model Law version of this provision contains several limitations for buying additional goods or services from existing suppliers. Without these limitations, this condition for using Direct Award could render most of the other rules and procedures in the Regulations worthless. Without a doubt, there is potentially a lot of devil in this detail. Unfortunately, experience teaches us that this problem is not hypothetical. In every procurement system, the temptation to use non-competitive contracting is great. One of the major problems in implementing new laws adapted from the Model Law has been the abusive use of methods like Direct Award. As a result, some States have chosen to amend their laws to narrow the exceptions they had adopted from the Model Law. That the Regulations have expanded upon the already broad conditions in the Model Law is not a healthy sign. To avoid similar problems, the conditions for using Direct Award should be considerably narrower than currently drafted.

BIDS OFFERING ADDITIONAL BENEFIT

Article 59 Par 7.c sets out a seemingly harmless rule yet it creates a serious problem in circumstances that occur frequently. The rule requires bids to be disqualified if they offer advantages not requested in the Bidding Documents. This is an ineffective way to manage this issue. If the bid offers everything required, than it should be accepted even if it provides something extra unless this changes in some negative way the product or service that was requested. If the bid wins on price, than there is no additional cost for the added benefit. Suppliers need this flexibility as it is often more expensive and difficult to unbundled a particular feature or service than to just include it in the products and services offered. This rule at Article 59 Par 7.c should be eliminated.

CONTRACT TERMS AND CONDITIONS

Further, there are a couple of rules governing contract conditions that might be reconsidered. Articles 121 and 131 allow the Contracting Entity to change the contract unilaterally. This right should be limited to a change *within the scope* of the original contract. In principle a contractor should not be expected to accept an amendment to his/her contract that is outside or beyond the boundaries of the original contract. For example, if the contract is to repair the plumbing in the school kitchen, the contractor may be asked to repair the plumbing in another room in the school, but the contractor should not be vulnerable to changes for repair of the electrical wiring in the library. This is not fair to the contractor.

Article 140 also could result in trouble for a contractor. This allows the Contracting Entity to request additional work and if the contractor cannot do this work for a sum not to exceed 25% of the original contract amount, the contract is cancelled. This puts unfair pressure on the contractor to keep its price below the amount in order not to suffer cancellation of the entire contract. Another unfair situation arises for the contractor under Article 132. This provision seems to allow the Contracting Entity to call a default on the contractor and then take over all of his/her tools, machinery etc. This rule is not only unfair; it invites abuse.

WEAKNESSES OF THE REGULATIONS

Certainly there are many features of the Regulations as drafted that are good and some even excellent and innovative, but there are also some serious technical flaws that predictably will lead to significant problems as the rules and procedures meet the reality of purchasing. Admittedly, no law is perfect and every State needs to be prepared to amend procurement laws regularly. This rational, however, should not serve as an excuse to adopt provisions that experience elsewhere tells us are problematic at best and at worst can undermine the objectives and functions of a law. In particular, these Regulations have some serious defects in the provisions for Auctions, in the conditions for using Direct Award, and in many provisions that can be used to discriminate against foreign firms. We have also seen that there are some big problems lurking in many words or phrases tucked into provisions throughout the Regulations. Most can easily be cured and changes should be considered before the Regulations are finalized.

7. How does the proposal affect Mozambique with regards to the cost and time of doing business?

A tightly regulated public procurement system increases the time and administrative cost of purchasing for both buyer and seller. For this effort, vast benefits can realized: value for money for the buyer, increased marketing opportunities for the seller, and for everyone there is reduced loss of public funds through corruption and improved public services. Procurement reform also can bring numerous less tangible benefits including increased public trust and confidence in the public administration. Again there are many nuggets in the details of procurement regulations that can substantially affect the administrative cost and time of doing business. With only a few exceptions, the issues discussed here are not unique to Mozambique or the draft Regulations. In fact, on balance the Regulations are good, and the true time and cost of doing business under these Regulations will be determined in implementation.

COST OF FORMAL QUALIFICATION REQUIREMENTS

The time and money invested in obtaining formal certificates and documents to provide qualification requirements present a major burden for bidders. When these pieces of formal paper need to be obtained from official sources, there is increased opportunity for bribery and other corruption schemes. This increases the burden considerably. The UNCITRAL Model Law contemplates a process that requires all bidders to submit all certifications and documents with their bids and the decision on qualification would be made for each bidder before consideration of the bids. This approach has proven to be a challenge to implement in numerous States and has brought considerable consternation from the private sector around the globe. The Regulations permit another approach, which focuses on qualifying only the successful bidder. If the public sector administers this properly and fairly, the private sector should welcome this approach.

COST OF GUARANTEES

Requirements for bidding and performance guarantees can present major, even prohibitive, costs for bidders and contractor. In many highly industrialized countries, surety firms provide guarantees at little cost to the bidders. Additionally, some governments even have special programs to help small and medium sized businesses obtain bonds and guarantees at reasonable rates. Unfortunately, these alternatives are seldom available in developing countries where often the only means of guarantee are cash deposits. Obviously, this is counterproductive for all parties. Tying up cash during the bidding process limits the number of procurements in which a firm can participate at any given time. This in turn reduces the procurement competition. Providing guarantees also decreases available working capital, which in turn increases the risk of delays and defaults in performance of a procurement contract. While these problems can be found in many places, the Regulations compound the pain to bidders. Bidders do not earn interest on cash guarantees unless the Contracting Entity's contract payments are overdue. (See Article 160) This is unfair and actually encourages the Awarding Entity to drag out the procurement process so it can benefit from interest earned on the cash deposits it holds. While this scheme is bad, another is far worse. Articles 157 to 160 set up a scheme that will tie up the performance bond for 5 years after completion of the works project. This scheme so increases the cost of doing business that corruption may be the only means for the contractor to make a profit in these circumstances.

COST OF PAYMENT TERMS

Payment terms and practices are also a major factor in the cost of doing business. The grave problems of selecting the successful bidder on the basis of the payment terms it offers the Awarding Entity are discussed in Section 4. However, the topic is broader than this issue. First, bureaucracies can be notoriously slow in fulfilling payment obligations. This forced extension of credit can substantially increase the cost of doing business. The Regulations seem to make some effort to improve payment disciplines. Article 9 Par 1.d calls for the need to assure that funds for the procurement are in the budget before proceeding. This is a positive step if it is strictly enforced. The contract provisions also include provisions for

payment terms. Article 164 requires that the contract provide a period for payment of goods and services. This is positive; however it permits the Awarding Entity discretion to set the payment period within a minimum number of days. This standard is not defined in the draft but it is important to the private sector to keep this time period short. Unfortunately, the Regulations do not set a penalty for late payment. Curiously, Article 155 provides a similar provision for works contacts but allows the Awarding Entity unlimited discretion is setting the time period. On the positive side, the works contract at Article 154 does provide for a system of progress payments. This is common practice and very helpful in works contracts in use locally. Notwithstanding the various features of the Regulations, experience tells us that regulatory provisions often do little to change a culture of slow payment. Change generally occurs only when other forces bring attention to the problem and demand improvement.

COST OF BREACH OF CONTRACT

While the contract provisions may give the Contracting Entity a free pass for slow or late payment, the contractor in breach of its contract obligations does not get off so easily. In fact, the sanctions and penalties set out in Article 165 for non-compliance in performance of contracts for good and services seems excessive. These terms deserve close scrutiny and should be compared with similar provisions in private contracts. The potential liabilities here substantially increase the risk and cost of doing business.

COST OF INCOMPETENCE

Finally the biggest risk these Regulations pose to the cost and time of doing business will likely be the cost and effort paid for incompetence in implementing the Regulations. Sadly, this cost is often under appreciated and neglected, yet it is potentially huge. How many times will poorly drafted technical specifications cause delays and waste time and effort? How many times will procurements need to be cancelled and started over again because of mistakes in conducting the process? How often will the best bid lose because the evaluation criteria was flawed or the methodology defective? The questions are nearly endless. While there is growing recognition and concern in the global community about the cost of corruption in procurement, the cost of incompetence is still widely ignored. The Regulations do nothing to address this challenge of overcoming incompetence in implementation. Yet, incompetence may be the biggest administrative cost factor of participating in procurements governed by these Regulations.

8. What is the expected impact on investments and foreign trade?

One would anticipate that the Regulations will have a mixed impact on foreign investment and foreign trade. As discussed in Section 5, the Regulations are not friendly to foreign

competitors. In point, by point, issue, by issue they fall short of the trade standards set out in UNCITRAL Model Law and in the WTO/GPA. However, since most of these indirect and direct barriers are used at the discretion of Awarding Entities, the real impact on foreign participation and trade remains uncertain until a pattern of implementation emerges once the Regulations come into effect. Nevertheless, in procurements of works these trade barriers may be non-issues. The requirement in the Regulations to hold the performance guarantee for more than 5 years after completion of the contract probably will be a non-starter for many foreign firms.

While there are many aspects of the Regulations to discourage foreign trade and investment, the Regulations also have many features that if properly implemented should cause foreign firms to take notice and look for ways to participant in public procurements. The Regulations have many rules and procedures that can operate to create a transparent system in which corruption is discouraged. This can be evidence of a political will to create an administrative environment that is friendly to business. Business also likes the predictability of uniform, mandatory rules, but without any central institutional authority, the key question will be whether there is uniform interpretation and application of the Regulations.

Foreign firms also seek systems where they can rely on the fair enforcement of rules, procedures and contract conditions. The Regulations raise several doubts on matters of due process. The appeal procedure in particular lacks an independent forum and offers a very limited opportunity to be heard. While the transparency of the contract conditions is a plus, the obligations and risks fall to an extreme degree upon the contractor while the Awarding Entity absorbs the benefits. It is also not apparent how the contractor might enforce the few rights he/she has under the contract.

Finally, it can be expected that foreign firms will quickly lose patience if incompetence reigns in conducting procurements under the Regulations. In general, the cost and time lost through delay, mistakes, and deficiencies are magnified for foreign firms and the potential benefits of investment and opportunities for trade are soon absorbed.