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## *Terms of reference*

### *Consultancy services for the review and finalisation of the procurement regulations, operational manual and bidding documents*

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#### **A. Introduction**

1. The legal framework for procurement in Lesotho is the Public procurement Regulations, which were made in 2007 under the Finance Order 1988 and were subject to an amendment in 2018. The 2007 Regulations provided for a decentralised procurement system whereby the Central Tender Board was abolished and its functions devolved to Ministries, Departments and Agencies (referred to as Procuring Entities), with the Public Procurement Advisory Division of the Ministry of Finance providing advice and support and monitoring compliance with procurement policies and these Regulations. However, there have been concerns whether a fully-decentralised procurement system was best suited to a small country like Lesotho.
2. Significant weaknesses in procurement practices were identified in the recent reviews and procurement capacity assessment report. One of the recommendations of the consultants was that the 2007 procurement regulations are inadequate for the longer-term needs of procurement in Lesotho. This has been accepted by the Government of Lesotho, which has over a number of years been preparing a Public Procurement Bill to replace the 2007 Regulations. The question of how far the system should be centralized or decentralized would need to be resolved, together with various other issues, before the Bill could be finalized.
3. The consultants recommended that Lesotho should adopt a hybrid model from various systems in use in other African countries and utilise the following features:
  - a. The principle of decentralisation of procurement operations should be maintained for low-value procurement, with procurement above a threshold value carried out centrally. There should be arrangements for the sharing of procurement activities among smaller entities that do not have regular, substantial procurement needs.
  - b. The proposed Procurement Act should be accompanied by the supporting components of the procurement suite (Regulations, Operational Manual, Standard Tendering Documents, Forms and Templates). Together, they should prescribe the detailed procedures that PEs should follow in their procurement work and provide for the PPAD or its successor body to have the necessary powers of enforcement. The Act should include provisions against splitting of contract values to avoid the threshold for centralised procurement. There should also be legal provision for shared procurement among smaller entities.
  - c. The procurement suite should provide for framework agreements/contracts to be the normal means of acquiring the regularly-purchased items that are required by several MDA.
  - d. A Central Tender Board should be established at the central government level with the functions in respect of procurements above the threshold:
    - i. To receive the request for initiation of procurement and draft bidding documents from the PE and, subject to review of their suitability and after ensuring that funds have been allocated to meet the costs involved,

to proceed with subsequent stages of the procurement process. This would include forming an evaluation panel, which would include representation from the user MDA, and making the award of contract.

- ii. To make framework agreements/contracts<sup>1</sup> on behalf of all MDA.
  - iii. To operate an e-procurement system when the necessary infrastructure and facilities are in place, either directly or through a contracted agent.
- e. At the central government level, there should be an established regulatory body to monitor the procurement operations of the PEs, including the CTB. The regulatory body would be endowed with the necessary powers to enforce compliance with the law. The regulatory body would also have responsibility for system development, capacity building and making preparations for e-procurement. The regulatory body might be a continuation of the PPAD as a division of the Ministry of Finance or an executive agency with new functions, powers and responsibilities prescribed in the Bill.
- f. There were various other provisions in the 2018 draft of the Public Procurement Bill that should be reconsidered having regard to findings and recommendations in the report. In this regard, the draft Public Procurement Bill would require further revision to take account of the envisaged structure and other aspects of international good practice.
4. The Government of Lesotho is considering the organisational structure that should be provided for procurement in Lesotho and whether the model that the Consultant has recommended should be adopted or modified. It has been proposed that key officials should be supported on a study tour to Namibia and Botswana to learn more about the procurement system in these countries which are closest to the structure recommended for Lesotho.
5. The Ministry of Finance will form a Planning Committee including key stakeholders to take decisions on policy matters relating to provisions to be made in the Bill and other components of the procurement suite that are needed to provide an organised and properly regulated procurement system, including:
- a. Implementing Regulations that bring the principles, functions and powers in the Act into operational procedures;
  - b. An Operational Manual to guide users through the procedures to be followed;
  - c. Standard Tendering and Contracting Documents for each category of procurement (goods, works, consultancy and non-consultancy services) that would include
    - i. Standard rules for bidding
    - ii. Special requirements pertaining to the procurement to be made, including technical specifications, delivery requirements, etc.;

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<sup>1</sup> Framework agreement and framework contracts are agreements with one or more providers that set out terms and conditions under which specific purchases (call-offs) can be made throughout the period of the agreement. They are used to acquire supplies and/or general services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award. One or more providers are engaged through competitive bidding to supply the item or range of items in the contract or to provide a required service over a pre-determined period of one or more years. The price which they bid is made part of the contract terms. Prices would be fixed for the period of the contract unless the contract provides a mechanism for price adjustment.

- iii. General conditions of contract that apply to all contracts for that category of procurement;
- iv. Special conditions of contract that vary the general conditions to meet the special requirements of the procurement in hand;
- d. A consultant prepared in 2016 a set of standard tender documents that include general and special conditions of contract. Once the Bill is enacted and implementing Regulations have been made, the standard tender documents should be reviewed to ensure compatibility.
- e. Forms and Templates relating to key requirements, such as the annual procurement plan. Some such forms and templates were prepared by a consultant in 2016 and a procurement plan has been drafted recently by another consultant.

## **B. Objectives and Scope of work**

The Ministry of Finance is seeking a consultant to assist with the revision of procurement regulations, operational manual, and standing tender documents to ensure compatibility with international best practices.

The consultant will undertake but not limited to the following activities

Stage 1:

- Assist with the development of draft procurement Regulations with detailed provision for the implementation of the principles and policies prescribed in the Act. The Bill and Regulations would together provide for the structures of a regulatory system to be established.

Stage 2:

- Review/update the Operational Manual in accordance with the draft procurement bill and regulations
- Review/update/prepare the standard tender and contract documents as well as forms and templates to ensure compatibility with the Act and Regulations.
- Work with the Ministry in develop and propose the organisational structure and initial staffing needs and their respective job descriptions as well as other resources for the Central Tender Board and procurement regulatory body.

Stage 3:

- Organise and deliver training to the procurement cadre on the new procurement suite (including standard tender documents, operational manual and new provisions of the procurement bill and regulations as well as the role and functions of the central tender board and the regulatory body) and to develop skills required for the reformed procurement system.
- Training of trainers of procurement cadre to develop the special skills needed to carry out certain requirements that have been proposed for the procurement suite, such as preparation of a procurement plan, the making of framework contracts and the use of lifetime costing in evaluation. The correct use of standard bidding and contracting documents would need substantial coverage throughout the training programme.

### **C. Methodology and approaches**

- a. The timing of each stage would depend on the time needed by the Government of Lesotho to resolve the matters of policy that are to be included in the revision of the Bill and the preparation of Regulations. This work cannot be done by consultants alone. A problem in the past has been the engagement of consultants to produce reports, draft Bills and Manuals without the active engagement of Government officials, so that there was no ownership of the final product and limited use was made of it. In this regard a procurement reform planning committee will be established.
- b. The Planning Committee's terms of reference would be on the following lines:
  - i. To determine the most appropriate structure for procurement in Lesotho, having regard to the recommendations in the Report at Component 2 of the consultancy study that reviewed the 2018 draft of the Public Procurement Bill and provided a comparative analysis of the advantages and disadvantages of the decentralised and centralised procurement regime in Lesotho, together with other information.
  - ii. To oversee revision of procurement regulations and the preparation of other components of a procurement suite.
  - iii. To address remedial measures related to other issues that were identified as shortcomings under the MAPS assessment (Component 1) and to consider whether remedial action requires further regulation/guidance to be included in the procurement suite.
  - iv. To approve a training programme on the new procurement suite and to develop skills required for the reformed procurement system.
  - v. To determine the resources and other requirements needed for the new structure, including the establishment of a Central Tender Board and the staffing needs of the reformed Public Procurement Advisory Division.
- c. . The Consultant in Procurement Law would support the Planning Committee in making revisions to the Public Procurement regulations to include the recommended structure and other additions and amendments that the Government has decided upon. As there are various policy matters to be resolved and included in the Bill and Regulations, it is proposed that the Legal Consultant should make consultations with stakeholders in Lesotho and help them take the necessary decisions and then to carry out the necessary drafting in consultation with the Government's own law drafting team. He/she would also provide training on the use of standard tender documents, making use of the drafts provided by the consultant in 2016.
- d. i. During Stage 1, the Procurement Consultant would help resolve difficult issues as the need arises and ensure that all important points of good procurement practice had been included in the Bill and Regulations.
- e. During **Stage 2**, the work in preparing the operational manual and in reviewing the standard tendering and contracting documents, forms and templates would be mainly technical in nature. The Procurement Consultant would be primarily responsible for preparing the operational manual, while the Legal Consultant would be primarily responsible for reviewing the 2016 drafts of the Standard Tendering and Contracting Documents, Forms and Templates, to ensure that they are compatible with the Act and Regulations. During this stage they might also provide advice on the initial staffing needs and other resources for the reformed procurement structure.
- f. **Stage 3** would take place after all components of the procurement suite had been approved and brought into effect and there was need for the training of practitioners and other stakeholders on their use and related skills. The Consultant in Procurement Law and the Procurement Consultant would

both be involved in the training programme and would prepare and deliver a training programme to familiarise participants with each component of the procurement suite and how they should be used, in particular the use of standard bidding and contracting documents.

#### **D. Deliverables**

- a. Draft procurement regulations, which takes account of comments from the Ministry of Finance and other stakeholders
- b. Proposal for the organisational structure and initially staffing needs together job descriptions for the central procurement board and regulatory body
- c. Revised/updated procurement operational manual, standard bidding document for goods, works, consultancy and non-consultancy services as well as the contracts, template for annual procurement plan, and performance reporting
- d. Training plan and materials; and deliver training of trainers for 50 procurement cadre

#### **E. Qualification and Experience**

- a. The Firm will be selected through an international competitive selection process. All the consultants the firm assigns need to have at least Master's Degree level educational qualifications in relevant fields of study. The Firm is expected to demonstrate experience and expertise in the procurement reform including regulatory reforms, organizational development and implementation of procurement reform and capacity building initiatives.
- b. The need for consultants' expertise would comprises of a **Consultant in Procurement Law** who would be qualified and practising in law, with experience in the preparation of Bills, Regulations, Tendering and Contracting Documents relating to procurement in African countries and in carrying out training.
- c. **Key staff qualifications and competencies**

##### Legal expert / Consultant in Procurement Law

- At least a Master's/ Post-graduate degree (or its university equivalent) in Law and relevant discipline e.g.; Engineering, Architecture, Procurement.
- At least 10 years of relevant and progressive experience in the formulation of procurement regulations and regulatory frameworks in African or other developing countries.
- Demonstrate good knowledge of procurement system reforms and procurement legal framework in Africa.
- Experience in training, and capacity building of procurement officers in government and private sector.
- Ability to communicate and write effectively in English.

##### Procurement Consultant

- Masters or equivalent in Public Procurement or other relevant discipline e.g.; Engineering, Architecture, Procurement, Supply chain management, Law, Management, Commerce or related field.
- At least 10 years professional experience in the area of public procurement reform and improvement program/projects, especially in developing country contexts
- Demonstrate experience in preparation of standard bidding documents, procurement manual and templates and forms and in the building of key procurement skills among public sector practitioners.

- Proven familiarity with and experience in the practice of procurement of goods and works and the acquisition of consultancy services under donor funding conditions.
- Demonstrate knowledge and experience in multilateral institutions procurement procedures will be a distinct advantage;
- Experience in training, and capacity building of procurement officers in government and private sector.
- Ability to communicate and write effectively in English.

**F. The total number of consultancy days**

<b>Stage</b>	<b>Consultant in Procurement Law (working days)</b>	<b>Procurement Consultant (working days)</b>	<b>Total working days</b>
<b>1</b>	20	10	30
<b>2</b>	20	20	40
<b>3</b>	20	20	40
<b>All stages</b>	60	50	110

**G. Payment arrangements/schedule**

<b>Deliverables</b>	<b>Payment in percentage</b>
1. Draft procurement regulation; as well as the organisational structure and staffing needs together with job descriptions for the central tender board and the procurement regulatory bod	30%
2. Revised/update operational manual, standard bidding documents, templates and forms	40%
3. Completion of the delivery of the training program and final training report	30%
<b>Total</b>	100%