

EFFECTIVE: December 04, 2019



LESOTHO MILLENNIUM DEVELOPMENT AGENCY

INTERIM BID CHALLENGE SYSTEM

Effective Date: _____

BACKGROUND

The Government of Lesotho (the “**Government**”) has applied for grant funding from the Millennium Challenge Corporation (“**MCC**”). The Government has designated the Lesotho Millennium Development Agency (“**LMDA**”) to oversee and implement the grant program in accordance with the terms of the Grant Agreement. The Grant Agreement requires the Government (including any designee) to ensure that it procures all goods, works and services to implement the grant program in accordance with the MCC Program Procurement Guidelines (“**PPG**”). The PPG further require that LMDA establishes and publishes a Bid Challenge System (“**BCS**”) that provides Bidders on LMDA procurements with the ability to challenge and seek review of LMDA procurement actions and decisions.

To comply with these requirements and until the period before the BCS has been adopted and becomes operational, the LMDA has established the rules and procedures set forth in this document, also referred to as its Interim BCS (“**IBCS**”), to govern the review of all challenged LMDA procurement actions and decisions, and which will be incorporated in all solicitation documents distributed to Potential Bidders.

Capitalized terms used in this IBCS have the meanings set forth in the Definitions section.

Protests

LMDA shall consider a Protest from any Bidder or Potential Bidder that claims to have suffered or that it may suffer loss or injury due to a breach of a duty by LMDA in the conduct of this procurement. The IBCS is not intended to examine or review the implementation or conduct of any contract once awarded. A Protest shall:

- (a) Identify the procurement out of which the bid challenge arises;
- (b) Describe the nature of the bid challenge and supporting facts, including the bidding documents or portion of the procurement process that was allegedly in non-compliance;
- (c) Identify the specific provision(s), as set forth in the PPG or the bidding documents, which were allegedly breached;
- (d) Indicate the requested remedy or relief, which may include (1) compensation for any reasonable and verifiable cost of bid preparation and Appeal, subject to a price reasonableness analysis in accordance with the PPG and excluding attorney fees or lost profits; (2) revision of the procurement proceedings to conform to the applicable guidelines; (3) termination of the procurement; or (4) order a new procurement

- (e) Explain why the bid challenge was timely; and
- (f) Include the name, address, telephone and facsimile numbers, as well as the email address of the Challenger.

The English language will be used for all documents filed or provided in accordance with this IBCS.

Any Bidder that claims to have suffered or that it may suffer loss or injury because of a Procurement Action may File a Protest, except that: (a) sub-contractors, sub-consultants and members of the general public are not permitted to File a Protest; (b) a Protest cannot be used to cure a deficiency in the Challenger's bid or proposal; (c) a Protest cannot be used to allege fraud, corruption or intent of wrong doing in the procurement process, which allegation must be processed in accordance with MCC's Policy on Preventing, Detecting and Remediating Fraud and Corruption in MCC Operations, a copy of which is available on MCC's website (www.mcc.gov).

The following Procurement Actions may not be the subject of a Protest:

- (i) the selection of a method of procurement (e.g., QCBS, QBS, etc.);
- (ii) the selection of the type of procurement (e.g., goods, works, non-consultant services, or consultant services);
- (iii) the decision by LMDA to reject all bids, proposals or quotations;
- (iv) scores assigned by the technical evaluation panel, unless the determination of such scores is alleged to have been arbitrary or capricious or characterized by an abuse of discretion; and

Bidders are strongly advised to request a Debriefing before initiating a formal Protest by submitting a written request for Debriefing to LMDA within two (2) Business Days after receipt of the notice of intent of award, notice of pre-qualification/shortlisting results, or (in the case of a two-stage selection process) notice of the results of the first stage. LMDA shall provide a written

explanation of why the Bidder was not selected within two (2) Business Days of receiving the request for Debriefing. Such a request is not a bid challenge.

The Secretariat shall no later than 5:00 p.m. SAST on the first Business Day after the date that a Protest is Filed:

- (a) Send a Notice of the Filing of the Protest; and
- (b) Send to the LMDA Procurement Director and all Bidders who submitted bids for the Challenged Procurement a copy of such Notice and instructions (if any), and if the automatic suspension of the Challenged Procurement was lifted by the Level 1 Authority prior to such Business Day, notice thereof. A copy of the Protest itself shall also be provided to the Interim Procurement Agent (IPA)/ Procurement Agent (PA), as applicable.

A Protest shall be submitted to LMDA in writing, within five (5) Business Days of the date of: 1. the issuance of the original bidding document, 2. the modification to the original bidding document, or 3. when the Bidder learned or should have learned of the results of the pre-qualification or short listing, technical evaluation or other decision or action including but not limited to the written explanation giving rise to the challenge.

Upon the Filing of a Protest, the Challenged Procurement will be automatically suspended (and a notice to the effect sent to all Interested Parties by the Secretariat) until a final decision with respect to the Protest is issued, unless the Level 1 Authority lifts the suspension after determining that:

- (a) the Protest does not clearly show that the Challenger will suffer irreparable harm if the Challenged Procurement is not suspended;
- (b) the claim is frivolous;
- (c) LMDA or Bidders other than the Challenger may sustain disproportionately greater harm by the suspension, compared to the harm to be possibly sustained by the Challenger;
- (d) the suspension of the Challenged Procurement will be detrimental to public interest, as agreed with MCC; or

- (e) there are urgent or compelling reasons not to suspend the Challenged Procurement, including potential harm to the LMDA, as agreed with MCC.

For the avoidance of doubt, any Protest that was not Filed in accordance with the procedures under Bid Challenges (a-f) or Appeals (a-e) and in a timely manner and that was rejected as a result of such failure, will not result in any suspension of the relevant Procurement Action.

For a Protest to prevail, a Challenger must prove by clear and convincing evidence that: (a) the Procurement Action (i) violates the Procurement Rules; or (ii) is arbitrary or capricious or characterized by an abuse of discretion; and (b) the Challenger has suffered or will suffer loss or injury because of the Procurement Action.

LMDA shall, within fifteen (15) Business Days after submission of the Protest, issue a written decision to the Challenger stating the reasons for the decision and, if the bid challenge is upheld in whole or in part, indicating the corrective measures that are to be taken. LMDA must submit a report of the handling and disposition of any bid challenge to MCC. The report must be submitted to MCC (a) if there is no Appeal, within 3 days after the deadline for Filing an Appeal.

Appeals

In certain cases, a Bidder or potential Bidder may seek review by MCC after it has exhausted all remedies with LMDA. MCC's review will be limited to claims that (a) LMDA failed to consider its Protest, (b) LMDA failed to issue a written decision on the Protest within the time specified in this system, or (c) LMDA violated the procedures set out in the solicitation documents. The appeal to MCC must be received in writing (may be in electronic form) within five (5) Business Days of the date the Bidder or Potential Bidder learned or should have learned of an adverse decision by the LMDA. MCC will issue a final decision within (15) Business Days of the submission of the Appeal.

A bid Appeal shall:

- a. Identify the procurement out of which the bid challenge arises;

- b. Describe the nature of the Appeal and supporting facts, including full correspondence and decision of the LMDA;
- c. Indicate the requested remedy or relief, which may include (1) compensation for any reasonable and verifiable cost of bid preparation and Appeal, subject to a price reasonableness analysis in accordance with the PPG and excluding attorney fees or lost profits; (2) revision of the Procurement Action to conform to the PPG; (3) termination of the procurement; or (4) order a new procurement;
- d. Explain why the Appeal is timely; and
- e. Include the name, address, telephone and facsimile numbers, as well as the email address of the Challenger.

The Appeal should be addressed to:

Millennium Challenge Corporation

Attention: Vice President, Department of Compact Operations
(with a copy to the Vice President and General Counsel)

1099 14th Street NW
Suite 700
Washington, DC 20005-3550

United States of America

Fax: (202) 521-3700

Email: VPOperations@mcc.gov (Vice President for Compact Operations)
VPGeneralCounsel@mcc.gov (Vice President and General Counsel)

Definitions

Appeal: a challenge to a Level 1 Authority decision and request for review of that decision by the Millennium Challenge Corporation.

Bidder: any consultant, contractor or supplier that (i) participates in an LMDA procurement process to provide goods, works or services in furtherance of the grant program or (ii) would have participated in an LMDA procurement process to provide goods, works or services in furtherance of the grant program but for an alleged mistake or violation of LMDA in the application of the Procurement Rules.

Business Day: means any day in Lesotho that is not a (i) public holiday, (ii) weekend, or (iii) day when work is suspended by public authorities due to natural calamities.

Challenged Procurement: the procurement out of which a Protest arises.

Challenger: A Bidder who Files a Protest.

Grant Agreement: The Grant Agreement between Lesotho and the United States of America, acting through MCC.

Debriefing: A mechanism by which Bidders have an opportunity to meet or discuss with LMDA to ascertain the grounds on which its bid was not selected.

Filed or Filing: means the receipt, either by mail services or other delivery services (fax and email), of any document by the addressee before the close of its Business Day.

Interim Bid Challenge System (IBCS): this Interim bid challenge system and the rules and procedures set forth herein.

Level 1 Authority: LMDA Chief Executive Officer. Each Protest decision will be issued by the LMDA Chief Executive Officer (in this capacity, the “**Level 1 Authority**”), and will be decided in consultation with the LMDA Procurement Director and Chief Legal Officer and such other technical experts as the Chief Executive Officer deems appropriate.

LMDA: Lesotho Millennium Development Authority

MCC: Millennium Challenge Corporation.

Notice: means a written communication sent to participating Bidders when a Protest is received by LMDA. The Notice shall contain the nature of the Protest, the name of the Challenger and if applicable, the issuance of any written instruction by the Level 1 Authority regarding the suspension of the Challenged Procurement.

Potential Bidder: The Bidders who would have participated in the solicitation process but for an alleged mistake of the LMDA.

PPG: the MCC Program Procurement Guidelines, as the same may be amended from time to time

Procurement Action: means any action or decision by LMDA relating to the process of procuring goods, works, or services in furtherance of the Grant Agreement.

Procurement Agent: means the natural or legal person engaged or to be engaged by LMDA as procurement agent in accordance with the Grant Agreement.

Procurement Rules: the PPG, or the solicitation documents applicable to the challenged Procurement Action, or both.

Protest: the initial challenge to a Procurement Action and request that such Procurement Action be reviewed in accordance with this IBCS.

Secretariat: LMDA personnel designated by LMDA CEO to act as the secretariat for proceedings under this IBCS.