

Continuous
cash flow
analysis

9.—(1) The Secretary to the Treasury shall carry out continuous cash flow analysis on a quarterly, monthly, weekly and daily basis.

(2) In carrying out the continuous cash flow analysis, the Secretary to the Treasury shall—

(a) carry out consultations with key stakeholders on short-term cash requirements and short-term borrowing requirements; and

(b) update cash flow forecast matrix by adding projected future outflows, prospective principal and interest repayments and projected inflows to be received.

(3) The cash flow analysis shall be used to inform the decisions on adjustments to the annual cash flow matrix for the proper implementation of the budget.

Made this 27th day of October, 2023.

S. CHITHYOLA

(FILE NO. PFMS/2/1)

Minister of Finance and Economic Affairs

GOVERNMENT NOTICE NO. 58

PUBLIC-PRIVATE PARTNERSHIP ACT

(No. 23 OF 2022)

PUBLIC-PRIVATE PARTNERSHIP REGULATIONS, 2023

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IN EXERCISE of the powers conferred by section 97 of the Public-Private Partnership Act 2022, I, SIMPLEX CHITHYOLA, Minister of Finance and Economic Affairs, on the advice of the Commission, make the following Regulations—

PART I—PRELIMINARY

Citation

1. These Regulations may be cited as the Public-Private Partnership Regulations, 2023.

2. In these Regulations, unless the context otherwise requires—

“Bid” means proposal document or documents including inter alia technical proposals and financial proposals submitted by any person in response to a procurement request for a proposed PPP arrangement;

“Bid Bond” means any written legal undertaking including, inter alia bid securing declaration, bank guarantees, surety bonds, cheques on which a bank is primarily liable, cash deposits, promissory notes, and bills of exchange made by a bidder to PPPC or the Contracting Authority guaranteeing compensation to the Contracting Authority if the bidder fails to sign a PPP Contract if awarded;

“Commercial Close” means the date on which the PPP Contract is signed between the Contracting Authority and the Special Purpose Vehicle or the Private Party;

“Compendium” means the compendium prepared and published by the Commission in accordance with section 41(3) of the Act;

“Competitive Dialogue” means the dialogue entered into by the Evaluation Committee with the Pre-Qualified Bidders during the two-phase procurement process to discuss solutions for the desired outcome of the proposed PPP arrangement;

“Consortium” means an association or joint venture of two or more entities;

“Contract Manager” means a nodal officer appointed by the Contracting Authority responsible for implementation of the Contract Management Plan of a PPP Arrangement;

“Contract Management Plan” means the plan developed by the Contract Manager in accordance with regulation 51;

“Contract Management Team” means a team of multi-disciplinary experts, inter alia including those having expertise in technical, legal, financial, administration or knowledge management aspects, led by the Contract Manager;

“Due Date” means the date and time for submission of Bids in accordance with the RFP document;

“EOI” means the Expression of Interest document prepared by the Commission in conjunction with the Contracting Authority which invites Prospective Bidders to submit relevant documentation to submit their interest in a proposed PPP arrangement;

“Evaluation Committee” means the committee constituted in accordance with section 49 of the Act and regulation 10;

“FCCL” means fiscal commitments and contingent liabilities;

“FCCL Framework” means the fiscal commitments and contingent liabilities framework for PPP projects prepared and published by the Commission from time to time in accordance with regulation 60;

“Financial Close” means the date on which all the conditions precedents to the financing agreements for a PPP project are fulfilled;

“Fund” means PPP Project Financing Fund established by the Minister in accordance with section 90 of the Act;

“Fund Manual” means the manual prepared and published by the Commission from time to time in accordance with regulation 66;

“Funding Agreement” means an agreement entered into between the Commission and the eligible entity receiving an allocation from the Fund;

“Independent Expert” means the independent advisor or a firm or Consortium engaged in accordance with the provisions of the PPP Contract in relation to the performance of works, or services pertaining to the PPP arrangement;

“Letter of Award” means an official notification to the Successful Bidder containing the information specified in regulation 30(12);

“PPP Fiscal Risk Committee” means the committee constituted in accordance with regulation 53;

“PPF Manual” means the governance and operational manual of PPP project financing fund as published by the Commission;

“Pre-bid Meeting” means a meeting the Project Committee may schedule upon releasing an RFP and designed to give bidders the chance to request or obtain clarifications regarding the proposed PPP arrangement;

“Pre-Feasibility Study” means the preliminary feasibility analysis report undertaken for determining the suitability of a proposed project for implementation as a PPP arrangement;

“Preferred Bidder” means the Pre-Qualified Bidder or the Prospective Bidder, as the case may be, whose Bid has been adjudged by the Tender Committee to be the best offer in accordance with the evaluation criteria set out in the RFP, and with whom the Commission, in conjunction with the Contracting Authority, may hold negotiations in accordance with the provisions of the RFP;

“Pre-Qualified Bidder”: means a Prospective Bidder who has been pre-qualified to participate in the Request for Proposal phase for a project;

“Priority List” means a list of projects with a high likelihood of success, that are considered most likely to attract private sector interest prepared by the Commission in accordance with regulation 4;

“Procurement Process” means the process for selection of a Private Party for a proposed PPP arrangement commencing on the date of issuance of the EOI, RFPQ or RFP, as the case may be, and expiring on the date of Financial Close or such other date as may be determined by the Commission;

“Project Committee” means the committee constituted in accordance with regulation 9;

“Prospective Bidder” means any entity or consortium of entities that submits a response to the EOI, RFPQ or RFP, as the case may be;

“Pre-Feasibility Study (PFS)” means the preliminary feasibility analysis report undertaken for determining the suitability of a proposed project for implementation as a PPP arrangement;

“PSAT” means the PPP project screening and analytics tool developed by the World Bank;

“Reserve Bidder” means the second ranked Pre-Qualified Bidder or the Prospective Bidder whose evaluated bid is the second best offer pursuant to the technical and financial proposal evaluation and who also meets all the terms and conditions of the Tender Documents;

“RFP” means the Request for Proposal documents prepared by the Commission in conjunction with the Contracting Authority which aims to select a Private Party from shortlisted Pre-Qualified Bidders or the Prospective Bidders through Procurement Process for a proposed PPP arrangement;

“RFPQ” means the Request for Pre-Qualification document prepared by the Commission in conjunction with the Contracting Authority which invites Prospective Bidders to submit relevant documentation that aims to pre-qualify Prospective Bidders for a proposed PPP arrangement;

“SFT” means the strategic filter tool for early screening of projects to determine their potential suitability for PPP procurement;

“Successful Bidder” means a Bidder to whom a Letter of Award is issued;

“Tender Documents” means documents prepared by the Commission or the relevant Contracting Authority in accordance with section 48 of the Act, including inter alia the RFP, draft PPP Contract and its schedules, for the selection of a Private Party for implementation of a PPP arrangement;

“Transaction Advisor” means any independent third party consultant or advisor engaged to provide advisory services on matters related to PPP arrangements;

“VFM” means Value For Money, a process used by the government as a decision making tool in the context of public investment through a comparison of implementing a project using PPP arrangement against an alternative public procurement method; and

“Viability Gap Funding” means a payment to a PPP arrangement whether by way of loan, grant, equity or other financial instrument to promote the financial capability of a PPP arrangement.

PART II—PROJECT IDENTIFICATION AND PRIORITY LIST

Project
Identification

3.—(1) Without prejudice to the provisions of section 39 (2) of the Act, in assessing the suitability of any proposed project as a PPP arrangement, the Ministry responsible for economic planning, in consultation with the Commission, shall for purposes of determining suitability ensure that the proposed PPP arrangement—

(a) shall not permanently transfer ownership of the project assets or service to the Private Party;

(b) is a long-term contract between the Contracting Authority and a Private Party for the development or significant upgrade or renovation and management of a public asset or service, in which the Private Party—

(i) bears the significant risk and management responsibility throughout the life of the PPP contract;

(ii) provides a significant portion of the finance at its own risk; and

(iii) remuneration is significantly linked to performance of the asset or service, so as to align the interests of the parties to the PPP contract; and

(c) shall not have a capital cost, excluding land cost, less than the amount as determined and notified by the Commission from time to time.

(2) Subregulation (1) (c) shall not apply to projects related to operations and maintenance of public assets.

(3) The Ministry responsible for economic planning shall evaluate the projects, in consultation with the Commission, on various qualitative parameters including, inter alia, strategic suitability, technical, economic, financial, legal, environmental, climate change resilience, using SFT or any other tool or methodology, for early screening of projects to determine their suitability to be procured as a PPP arrangement.

4.—(1) The Commission shall prepare a Priority List from the approved projects published in the Gazette in accordance with section 38(5) and 40(1) of the Act, respectively in coordination with the respective Contracting Authorities and the Commission may use the PSAT or any other tool or methodology to screen the projects to determine their suitability to be included in the Priority List.

Priority List
and
Compendium

(2) The Commission shall, from time to time, update the Priority List.

(3) The Commission shall publish the Priority List, along with basic information of the respective projects, on its website and other websites of Government as it may deem fit.

(4) The Commission shall conduct comprehensive feasibility study for each project in the Priority List to determine viability of respective projects in conjunction with the Contracting Authorities.

(5) The Commission shall publish a Compendium of viable PPP arrangements in accordance with section 41(3) of the Act.

PART III—TRANSACTION ADVISORS

5.—(1) The Commission either on its own or in consultation with the Contracting Authority, may engage local or foreign Transaction Advisors or consultant for provision of consultancy or advisory services related to any or all aspects of preparation and procurement of a PPP arrangement, including inter alia—

Rules of
engaging
Transaction
Advisors

(a) preparation of feasibility studies;

(b) due diligence activities;

(c) preparation of Tender Documents;

(d) structuring the Procurement Process; and

(e) managing such other technical, legal or financial matter as the Contracting Authority may require in relation to a PPP arrangement.

(2) Prior to undertaking the process of engagement of the Transaction Advisor or the consultant the Commission or the Contracting Authority in consultation with each other, shall prepare a procurement plan for consultancy or advisory services which shall deal with the following—

(a) detailed and clear terms of reference of the consultancy services;

(b) duration of the consultancy services;

(c) milestones and schedule of tasks to be completed as part of the consultancy services;

(d) skills, expertise, knowledge and qualifications required;

(e) estimated budget for the consultancy services;

(f) procurement schedule; and

(g) any other matter the Commission or the Contracting Authority deems necessary.

(3) The Commission or the Contracting Authority, in consultation with each other may, depending on the size, scale and complexity of a proposed PPP arrangement, engage one single Transaction Advisor or separate Transaction Advisors to carry out the feasibility study or any part thereof, to prepare the Tender Documents and provide any other services necessary for the Procurement Process up to Financial Close of a PPP arrangement.

(4) The services of the Transaction Advisor shall be procured through a competitive public tender process in accordance with the provisions of the Public Procurement and Disposal of Public Assets Act.

Cap. 37:03

PART IV—FEASIBILITY STUDY

Feasibility
study

6.—(1) The Commission either on its own or in consultation with the Contracting Authority, through the Project Committee, shall conduct a feasibility study of the proposed PPP arrangement in accordance with section 42 of the Act.

(2) The Commission or the Contracting Authority may appoint a Transaction Advisor to carry out the comprehensive Feasibility Study.

(3) In addition to the matters provided in section 42 of the Act, the feasibility study shall address technical solution option analysis for the proposed project, project due diligence covering legal, economic, environmental, social and climate change resilience dimensions, project structuring, risk assessment and allocation, financial analysis, value for money and FCCL and fiscal affordability assessment and shall include a term sheet and project procurement plan.

(4) The Commission shall, using the PSAT or any other tool or methodology, review the feasibility study of the proposed project to assess its suitability, completeness and fiscal affordability.

Fiscal
affordability
assessment

7.—(1) The Commission shall submit the feasibility study along with its fiscal affordability assessment to the PPP Fiscal Risk Committee for its review.

(2) The PPP Fiscal Risk Committee shall prepare the FCCL report in accordance with regulation 57 and submit it to the Commission.

(3) The PPP Fiscal Risk Committee shall provide clear recommendations on the fiscal affordability of the proposed project including confirming availability of the funding towards the fiscal commitments and contingent liabilities which may arise from the proposed project in its FCCL report.

Approval of
Feasibility
Study

8.—(1) Based on its appraisal of the feasibility study including fiscal affordability assessment by the PPP Fiscal Risk Committee, the Commission shall formulate its recommendations on the suitability of the project for implementation as a PPP arrangement and shall submit these to the Minister, along with the FCCL report prepared by the PPP Fiscal Risk Committee.

(2) The Minister shall examine the feasibility study, the conclusions of the review by the Commission and the findings of the PPP Fiscal Risk Committee within fourteen days from submission by the Commission, and shall, in writing—

- (a) approve the feasibility study with or without any amendments;
- (b) return the feasibility study to the Commission for reconsideration and re-submission for approval; or
- (c) reject the feasibility study.

General principles

(3) The Commission shall, promptly, notify the Contracting Authority of the Minister's decision.

(4) If, at any time after the Minister has approved a feasibility study for a project, and subsequently any assumption in the feasibility study is materially revised in respect of fiscal affordability and VFM, the Commission shall, in coordination with the Contracting Authority, immediately—

- (a) provide the Minister with details of the intended revision including a statement regarding the purpose and impact of the intended revision on the fiscal affordability, VFM and risk transfer evaluation contained in the feasibility study; and
- (b) ensure that a revised feasibility study is submitted to the PPP Fiscal Risk Committee and the Minister for its review and consideration in accordance with these Regulations.

PART V—PPP COMMITTEES

9.—(1) Following publication of a proposed PPP arrangement in the *Gazette* in accordance with section 40(1) of the Act, the Commission shall form a specialized committee for each PPP arrangement, to be called the Project Committee.

Project Committee

(2) The Project Committee shall assist the Commission or the Contracting Authority with the following—

- (a) procurement of Transaction Advisor(s);
- (b) preparation of the feasibility study for the proposed PPP arrangement, in accordance with the provisions of the Act, these Regulations, and any PPP Guidelines;
- (c) making recommendations on issues concerning land acquisition, utility relocation, environmental clearances, climate change mitigation and resilience, resettlement and rehabilitation, social safeguards, fiscal affordability, government support and other related matters pertaining to the proposed PPP arrangement;
- (d) prescribing and recommending technical and output specifications pertaining to the proposed PPP arrangement;
- (e) submission of the feasibility study to the Commission, for its review and further recommendation thereon to the Minister for final decision;
- (f) review and appraise unsolicited bids;
- (g) updating the financials and fiscal affordability sections of the feasibility study to provide for effluxion of time or reflecting changes based on the Procurement Process;

(h) preparation of the project implementation schedule for the proposed PPP arrangement including an outline of the Procurement Process through to Commercial Close and Financial Close, an outline of the construction schedule and target operation date, and any phasing that is planned for project extensions or ongoing development;

(i) preparation of the procurement documents including but not limited to the EOI, RFPQ, RFP and the Tender Documents;

(j) preparation of the advertisement or procurement notice;

(k) managing EOI or RFPQ process including, inter alia, receiving and registering applications for pre-qualification and issuing clarifications to the Prospective Bidders;

(l) managing RFP process including, inter alia, conducting Pre-bid meetings, issuing clarifications to the Pre-Qualified Bidders or the Prospective Bidders, conducting Competitive Dialogue process where applicable, selection of the Preferred Bidder and making recommendations regarding the Successful Bidder to the Commission for its review and final decision on award of the proposed PPP arrangement, in conjunction with the Contracting Authority;

(m) managing the procurement process in the case of Unsolicited Bids;

(n) managing the post-award activities related to Commercial Close and Financial Close; and

(o) undertaking any responsibilities assigned to it by the Commission, in coordination with the Contracting Authority.

(3) The Project Committee shall consist of—

(a) a chairperson of the Project Committee, (hereinafter referred to as “chairperson”) to be nominated by the Commission;

(b) two senior representatives of the Contracting Authority;

(c) two senior representatives of the Commission;

(d) two senior representatives of the Ministry of Justice; and

(e) two senior representatives of the Ministry of Finance.

(4) The Project Committee may also include, as need arises persons with specialisation in the following areas—

(a) sector expertise related to the proposed PPP arrangement;

(b) public-private partnerships;

(c) engineering and construction;

(d) financial analysis, and funding;

(e) law, in particular procurement law and practices;

(f) public relations, communication, and marketing;

(g) project management; and

(h) environment, climate change and social safeguards.

(5) Any person with a personal or fiduciary interest in a proposed PPP arrangement, shall not be eligible to be a member of the Project Committee and where a person nominated as a member of the Project Committee has an interest in the arrangement, such person shall, immediately, declare any such interest in the proposed PPP arrangement to the Commission and recuse himself or herself, accordingly.

(6) The conduct of business and affairs of the Project Committee shall be as follows—

(a) the Project Committee meetings shall be convened by the chairperson; and it shall meet at such place in Malawi and in such manner as the chairperson may determine;

(b) the Project Committee shall hold at least one meeting in every month and as and when necessary, for the purposes of carrying out its functions as prescribed by the Act, these Regulations and any PPP Guidelines;

(c) notice of a meeting of the Project Committee shall be given in writing to each member of the Project Committee and to any other person who may be entitled to participate in the meeting at least three days before the day of the meeting, provided that if the urgency of any particular matter does not permit the issuance of such notice, a special meeting may be called with a shorter notice;

(d) the chairperson may, at his discretion or within seven days of a written request by at least half of the members of the committee a, convene an extraordinary meeting;

(e) meetings shall be presided over by the chairperson or in his absence by a member of the Project Committee nominated by the chairperson;

(f) the Project Committee may invite any person or expert to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Project Committee and any such person with a personal or fiduciary interest in a proposed PPP arrangement, shall declare the same to the chairperson and shall not be eligible to attend the meetings of the Project Committee;

(g) a simple majority of the members of the Project Committee shall form a quorum at a meeting of the committee;

(h) questions arising at any meeting of the Project Committee shall be decided by a simple majority of the votes and in the case of an equality of votes, the chairperson or his nominee shall have a second or casting vote;

(i) the Project Committee shall cause to be recorded and kept minutes of all proceedings of its meetings and the minutes shall be signed by the chairperson pursuant to the confirmation of the minutes by members of the Project Committee attending the meeting; and

(j) except as otherwise expressly provided by these Regulations, the Project Committee may prescribe its own procedure for the conduct of its business.

Evaluation
Committee

10.—(1) The Commission, in conjunction with the Contracting Authority, shall empanel an Evaluation Committee.

(2) The Evaluation Committee herein created shall be responsible for—

(a) scrutiny and evaluation of documents submitted by Prospective Bidders in response to EOI or RFPQ;

(b) recommending a shortlist of Pre-Qualified Bidders;

(c) scrutiny and Evaluation of Bid and making recommendations regarding the Preferred Bidder and the Successful Bidder; and

(d) preparing evaluation reports.

(3) The Commission, in conjunction with the Contracting Authority, shall appoint the following persons to the Evaluation Committee—

(a) at least Director rank official, as the chairperson;

(b) a procurement officer of the Commission as a member secretary;

(c) a qualified lawyer working for the Commission or the Contracting Authority as a member;

(d) an official knowledgeable in field of finance as a member;

(e) representatives, not exceeding three, of the Commission as members;

(f) representatives, not exceeding three, of the Contracting Authority as members;

(g) officials, not exceeding three, possessing relevant expertise, knowledge and skills with respect to the proposed project, as may be required during pre-qualification process and RFP process, respectively, as non-voting members; and

(h) representatives of the Transaction Advisor as advisors, who shall be non-voting members.

(4) Any person with a personal or fiduciary interest in a proposed PPP arrangement or the Prospective Bidder or Pre-Qualified Bidder, shall not be eligible to be a member of the Evaluation Committee and if nominated as a member of the Evaluation Committee, such person shall immediately declare any such interest to the Commission and recuse himself or herself.

(5) The Evaluation Committee shall preserve the confidentiality of an EOI, RFPQ or RFP evaluation process and shall not be influenced or directed by any person regarding the evaluation of an EOI, RFPQ or RFP, except in accordance with the Act and these Regulations.

(6) The Commission may prescribe the procedure for the conduct of the business of the Evaluation Committee.

PART VI—PROCUREMENT PROCESS:
PRE-QUALIFICATION PHASE (PHASE ONE)

11.—(1) The Commission or the Contracting Authority in consultation with the Commission, pursuant to approval of the feasibility study, shall formally start the Procurement Process through issuance of an advertisement along with EOI or RFPQ Document on the websites of the Commission and the Contracting Authority, and by any other means as the Commission may determine, inviting Prospective Bidders to express their interest to bid for the proposed PPP arrangement.

Pre-qualification phase

(2) The advertisement referred to in subregulation (1) shall be published in at least two newspapers of national circulation.

(3) The EOI or RFPQ Documents referred to in subregulation (1) shall, at the minimum, contain the information as provided under regulation 13.

12. Preparation of EOI or RFPQ Documents—

Expression of Interest or Pre-qualification documents

(a) the Project Committee, with the support of the Transaction Advisor, shall prepare the EOI or RFPQ documents along with notice or advertisement inviting the applications for pre-qualification; and

(b) the Project Committee shall ensure that—

(i) the EOI or RFPQ documents contain sufficient information to allow Prospective Bidders to form a view on whether they have sufficient capabilities and to identify potential partners for the proposed PPP arrangement; and

(ii) the information requested from the Prospective Bidders is such that the Evaluation Committee can evaluate the applications for pre-qualification without any subjectivity.

13. The EOI or RFPQ shall, *inter alia*, contain the following information—

Contents of EOI or pre-qualification by a Consortium

(a) a brief description of the proposed PPP arrangement, its objectives and the project structure;

(b) the type of contract and its duration;

(c) estimated project cost;

(d) conditions of eligibility for pre-qualification, number of members comprising a Consortium allowed and information sought for pre-qualification;

(e) description of parameters and methodology for evaluating applications;

(f) format that shall be adopted by the Prospective Bidders to submit their respective applications;

(g) schedule of EOI or RFPQ proceedings;

(h) the conditions and criteria for disqualification of applications such as conflict of interest, national security and other relevant considerations;

- (i) contact details for further information; and
- (j) stipulated time and place for submitting applications.

Application
for pre-
qualification
by a
Consortium

14.—(1) A Prospective Bidder wishing to bid for the implementation of a PPP Arrangement may apply for the pre-qualification phase as a single bidder or in the form of a Consortium.

(2) In the event of the submission of response to an EOI or RFPQ by a Consortium, the lead member and a legal representative of the Consortium thereof shall be identified to represent them in the pre-qualification procedures, and no member of the Consortium may apply for pre-qualification through participation in another Consortium or as a single bidder.

(3) In the process of evaluating the submitted responses to an EOI or RFPQ by a Consortium, the qualifications and the capabilities of each member of the Consortium shall be examined, and whether or not all of them satisfy the criteria and the requirements of the qualification as stipulated in the provisions of the EOI or RFPQ.

(4) The scrutiny of the responses to an EOI or RFPQ shall be based on the role of each member of the Consortium, in accordance with the scope of work to be performed by each.

(5) The information required from members of the Consortium to demonstrate their qualifications shall be specified in the EOI or RFPQ.

(6) After submission of the response to an EOI or RFPQ by a Consortium, no change in the lead member of the Consortium shall be allowed, however, in case a Prospective Bidder has submitted its response to the EOI or RFPQ before the deadline for submission of the application, such Prospective Bidder may be allowed to change the composition of the Consortium before the deadline for submitting the response to the EOI or RFPQ.

(7) The Commission, through Project Committee and in coordination with the Contracting Authority, may hold a pre-qualification meeting with the Prospective Bidders to explain the objectives and description of the proposed PPP project, brief description of the Procurement Process, conditions of the EOI or RFPQ and other matters related thereto.

Pre-
qualification
meeting

15.—(1) The Prospective Bidders may request any clarification about the proposed PPP arrangement or the Procurement Process during the pre-qualification meeting or seek clarification from the Commission in writing on or before the deadline stipulated in the EOI or RFPQ.

(2) The Project Committee shall respond to the queries raised by the Prospective Bidders and upload the same on its own website as well as the Contracting.

Evaluation of
EOI or pre-
qualification
application

16.—(1) The responses to the EOI or RFPQ shall be evaluated by the Evaluation Committee, on the basis of objectivity, equity, and fairness, using the qualifying criteria and conditions included in the EOI or RFPQ.

(2) The Prospective Bidders shall be assessed on the basis of their respective aggregate experience in accordance with the qualifying criteria as specified in the EOI or RFPQ.

(3) The Prospective Bidders with aggregate experience equal to or beyond the pre-specified minimum threshold based on the evaluation of the EOI or RFPQ shall be eligible for submission of Bids as Pre-Qualified Bidders.

(4) Where, pursuant to the evaluation process, the number of Pre-Qualified Bidders is two or less than two, the Commission may, pursuant to the review of the evaluation report and considering the market dynamics—

(a) proceed with the next phase of the Procurement Process, being the request for proposal phase;

(b) repeat the process of pre-qualification of Prospective Bidders for the proposed PPP arrangement with a fresh circulation of an EOI or RFPQ; and

(c) keep bidders who have qualified as Pre-Qualified Bidders during the repeat process of pre-qualification of Prospective Bidders and such Pre-Qualified Bidders may not be required to submit responses to the EOI or RFPQ again, provided, the eligibility and evaluation criteria for pre-qualification shall remain the same or below the thresholds as it was during the earlier pre-qualification process the repeat pre-qualification process shall contain the information regarding retained Pre-Qualified Bidders during the earlier pre-qualification process.

(5) In case there is only one Prospective Bidder who has passed the pre-qualification phase, the provisions of section 52 of the Act shall apply.

(6) The Evaluation Committee shall submit their report on evaluation of all applications received for the pre-qualification and shall recommend the short-list of Pre-Qualified Bidders to the Commission for its review and approval.

(7) Where the Commission or the Contracting Authority disagrees with the recommendation of the Evaluation Committee, the Commission or the Contracting Authority shall refer the matter to the Evaluation Committee for re-consideration and shall specify the ground on which it disagrees with the recommendation of the Evaluation Committee, but the Commission or the Contracting Authority shall not have the authority to overturn or vary the recommendation of the Evaluation Committee.

(8) The Evaluation Committee shall consider the objections of the Commission or the Contracting Authority and shall, subject to the evaluation criteria applied in relation to the pre-qualification, review its decision and may address the objections of the Commission or the Contracting Authority.

(9) The Evaluation Committee shall resubmit the pre-qualification evaluation report to the Commission or the Contracting Authority.

(10) Upon its satisfaction the Commission or the Contracting Authority shall proceed with next phase of the Procurement Process, being the request for proposal phase.

Notification of
pre-
qualification

17.—(1) The Commission or the Contracting Authority shall promptly notify each Pre-Qualified Bidder, in writing, of their pre-qualification.

(2) The Commission or the Contracting Authority shall inform all other Prospective Bidders who were not shortlisted of their failure to pre-qualify stating reasons for such failure.

(3) The Commission or the Contracting Authority shall make public the names of all Pre-Qualified Bidders on its website, as well as the website of the Contracting Authority, including other means as it deems fit.

(4) Only Pre-Qualified Bidders shall be entitled to participate further in the Procurement Process.

Verification of
bidder's
information and
confidentiality
of qualification
information

18.—(1) The Evaluation Committee reserves the right to verify at any time during the Procurement Process all the information and documents submitted by the Prospective Bidders in response to an EOI or RFPQ.

(2) The Prospective Bidders, when so required and requested by the Evaluation Committee, in writing, shall make available all such information, evidence or documents as may be necessary for the verification within the deadline prescribed by the Evaluation Committee for responding thereto.

(3) The Evaluation Committee may also call up any representatives of a Prospective Bidder to present or explain the requested clarification by the Evaluation Committee.

(4) All the information received from the Prospective Bidders for pre-qualification shall be kept sealed until the closing date for the submission of response to the EOI or RFPQ, and all such information shall be opened simultaneously on the prescribed date and time in accordance with specific procedures outlined in the EOI or RFPQ.

PART VII—PROCUREMENT PROCESS: REQUEST FOR PROPOSAL PHASE (PHASE TWO)

Preparation
of Tender
Documents

19.—(1) The Commission or the Contracting Authority shall, through the Project Committee and with support from the Transaction Advisor, prepare Tender Documents for the proposed PPP arrangement.

(2) The Commission or the Contracting Authority shall ensure that the provisions of the Tender Documents are clearly written without any ambiguity and contain sufficient information related to the proposed PPP arrangement to allow Pre-Qualified Bidders or the Prospective Bidders to provide detailed response to the Tender Documents.

(3) The Tender Documents shall include provisions regarding a Bid Bond to be provided or in the alternative a bid securing declaration to be signed by the Pre-Qualified Bidders or the Prospective Bidders, as the case may be.

(4) Without prejudice to the provisions of section 33 of the Act, the draft PPP Contract shall include provisions and conditions regarding change in ownership of the Private Party or the Special Purpose Vehicle including approval of the Contracting Authority in consultation with the Commission, for applicable events, during the term of the PPP Contract.

20.—(1) Pursuant to finalization of the Tender Documents the shortlisted Pre-Qualified Bidders or the Prospective Bidders shall be issued the Tender Documents by the Commission or the Contracting Authority, through the Project Committee, inviting them to submit Bids in response to the RFP.

Issuance of
Tender
Documents

(2) The Commission or the Contracting Authority may set a price for purchase of the Tender Documents that might be applied as specified in the notification of the RFP.

21.—(1) The Commission or the Contracting Authority, through the Project Committee, may invite Pre-Qualified Bidders or Prospective Bidders, as the case may be, at any time before the Bid submission date to hold a Pre-Bid meeting to discuss their inquiries about the proposed PPP arrangement.

Pre-Bid
meeting and
amendment of
Tender
Documents

(2) Pursuant to the Pre-Bid meeting the Commission, through the Project Committee may amend the Tender Documents before the Due Date, provided that Pre-Qualified Bidders or the Prospective Bidders are granted a sufficient period of time to take these amendments into consideration before submission of their Bids.

(3) The amendments made pursuant to subregulation (2) shall be issued to all the Pre-Qualified Bidders or the Prospective Bidders by way of addenda stamped with the seal of the Commission.

22.—(1) The Consortium shall be formed prior to the submission of Bid and by virtue of an authenticated and approved Consortium agreement by the authorized entities in Malawi.

Submission of
Bid by a
Consortium

(2) The Consortium agreement shall name a legal representative of the Consortium who shall be fully authorized to sign the PPP Contract, receive correspondences, legal notifications, and deal with other issues of administrative and legal nature.

(3) The Consortium agreement shall detail the scope of work or obligations of each of its members.

(4) The Consortium agreement shall specify that the members of the Consortium are severally and jointly liable regarding the implementation of all works connected with the PPP Contract.

(5) The Consortium agreement shall be submitted along with the Bid, on condition that no modification or change shall be allowed in the Consortium agreement after its submission, except with the permission of the Commission or the Contracting Authority as stipulated in the RFP.

(6) No member of a Consortium shall submit more than one Bid whether directly or indirectly or through another Consortium or a company.

23.—(1) The Evaluation Committee shall evaluate the technical proposals of the respective Pre-Qualified Bidders or the Prospective Bidders on the basis of objectivity, equity, and fairness, using the technical proposal qualifying criteria and conditions included in the RFP.

Technical
proposal
evaluation

(2) The technical proposals meeting the technical proposal qualifying criteria shall be qualified for next phase of the Procurement Process being the

opening of the financial proposals subject to provisions of regulation 24, provided that the number of Pre-Qualified Bidders or the Prospective Bidders whose technical proposal have been qualified shall not be less than three.

Technical
proposal
evaluation
report

24.—(1) The Evaluation Committee shall prepare a report on the evaluation of technical proposals and submit the report along with its recommendations to the Project Committee for its review.

(2) Where the number of Pre-Qualified Bidders or the Prospective Bidders whose technical proposals have been qualified is less than three, the Project Committee, pursuant to the review of the evaluation report and considering the market dynamics, may decide—

(a) to repeat the Procurement Process for the proposed PPP arrangement with a RFPQ;

(b) to keep the already Pre-Qualified Bidders as Pre-Qualified Bidders for the proposed PPP arrangement during the repeat of the Procurement Process and such Pre-Qualified Bidders may not be required to submit the pre-qualification documents again, provided, the eligibility and evaluation criteria for pre-qualification shall remain same or below the thresholds as it was during the earlier Procurement Process and the repeat Procurement Process shall contain the information regarding retained Pre-Qualified Bidders during the earlier Procurement Process;

(c) to proceed with the next phase of the Procurement Process in case the number of Pre-Qualified Bidders or the Prospective Bidders is two who have passed the technical proposal evaluation stage; or

(d) in case there is only one Pre-Qualified Bidder or the Prospective Bidder who has passed the technical proposal evaluation, the Commission, in consultation with the Contracting Authority, may decide to go ahead with the next phase of the Procurement Process.

(3) Where the Project Committee disagrees with the recommendation of the Evaluation Committee, the Project Committee shall refer the matter for re-assessment to the Evaluation Committee and shall specify the grounds on which it disagrees with the recommendation of the Evaluation Committee, but the Project Committee shall not have the authority to overturn or vary the recommendation of the Evaluation Committee.

(4) The Evaluation Committee shall consider the objections of the Project Committee and shall, subject to the evaluation criteria applied in relation to the technical proposal evaluation, review its decision and may satisfy or incorporate the objections of the Project Committee.

(5) The Evaluation Committee shall resubmit the technical proposals evaluation report after addressing the objections of the Project Committee.

(6) Upon satisfaction of the technical proposal evaluation report by the Project Committee, the Commission or the Contracting Authority shall proceed with the next phase of the Procurement Process, being the opening of the financial proposals.

25.—(1) The Commission or the Contracting Authority, through the Project Committee, shall promptly notify each Pre-Qualified Bidder or the Prospective Bidder whether or not the technical proposal submitted by it has passed the minimum technical criteria established in the RFP pursuant to submission of the final technical proposals evaluation report by the Evaluation Committee.

Notification
of results of
technical
proposal
evaluation

(2) The Project Committee, shall inform, in writing, every other applicant whose technical proposal did not passed the minimum technical criteria in accordance with terms of the RFP along with reasons for disqualification.

(3) The Commission or the Contracting Authority shall make public, the names of all Pre-Qualified Bidders or the Prospective Bidders that have passed the technical proposal on its respective website, including other means as the Commission deems fit.

(4) The Commission or the Contracting Authority shall return any Bid Bond provided and unopened financial proposal of any Pre-Qualified Bidder or the Prospective Bidder whose technical proposal does not pass the technical evaluation after declaration of results of technical proposal evaluation, within fourteen days from the date that the final technical proposals evaluation report has been submitted to the Commission.

(5) Only Pre-Qualified Bidders or the Prospective Bidders whose technical proposals have been passed shall be entitled to participate further in the Procurement Process.

26.—(1) The financial proposals shall be opened at a time and at a place designated in the RFP by the Evaluation Committee.

Financial
proposal
opening and
evaluation

(2) The Evaluation Committee shall invite every Pre-Qualified Bidder or the Prospective Bidder whose technical proposal has been evaluated successfully to the session at which the financial proposals shall be opened.

(3) Where a Pre-Qualified Bidder or the Prospective Bidder or its representative attends the session for the opening of the financial proposals, that Pre-Qualified Bidder or the Prospective Bidder or its representative shall sign an attendance sheet kept and maintained by the Evaluation Committee.

(4) The chairperson of the Evaluation Committee shall announce the financial bid of each financial proposal at the session where the financial proposals are opened.

(5) Pursuant to announcing the financial bids the Evaluation Committee shall inform Pre-Qualified Bidders or the Prospective Bidders or its representatives that it shall undertake a detailed evaluation of other parameters, inter alia, the financial model, overall project deliverability, etc., if any, of the financial proposal in accordance with the criteria stipulated in the RFP.

(6) The Evaluation Committee shall evaluate the financial proposals of the respective Pre-Qualified Bidders or the Prospective Bidders on the basis of objectivity, equity, and fairness, using the financial proposal evaluation criteria and conditions included in the RFP.

(7) The financial proposals meeting all the terms and conditions of the RFP shall be ranked in accordance with the evaluation criteria specified in the RFP.

(8) The Pre-Qualified Bidder or the Prospective Bidder whose Bid has been evaluated as best offer shall be named as the Preferred Bidder.

Financial
proposal
evaluation
report

27.—(1) After a detailed evaluation of the financial proposals, the Evaluation Committee shall prepare a report on the evaluation of the financial proposals and recommendations on determination of the Preferred Bidder and submit it to the Project Committee, for its review.

(2) The financial proposal evaluation report shall also include inter alia—

(a) VFM analysis;

(b) affordability assessment;

(c) assessment on Government support required;

(d) considerations and recommendations on the options for the Reserve Bidders and negotiation plan; and

(e) summary of the Procurement Process till date and its findings.

(3) Where the Project Committee disagrees with the recommendation of the Evaluation Committee, the Project Committee shall refer the matter to the Evaluation Committee for re-assessment and shall specify the grounds on which it disagrees with the recommendation of the Evaluation Committee, but the Project Committee shall not have the authority to overturn or vary the recommendation of the Evaluation Committee.

(4) The Evaluation Committee shall consider the objections of the Project Committee and shall, subject to the evaluation criteria applied in relation to the financial proposal evaluation, review its decision and may satisfy or incorporate the objections of the Project Committee.

(5) The Evaluation Committee shall resubmit the financial proposals evaluation report after addressing the objections of the Project Committee.

Selection of
the Preferred
Bidder

28.—(1) Upon its satisfaction of the financial proposal evaluation report, the Project Committee shall promptly notify the Pre-Qualified Bidder or the Prospective Bidder, in writing, that its Bid has been ranked best that it has been declared as Preferred Bidder.

(2) The Project Committee shall notify in, writing, the Pre-Qualified Bidder or the Prospective Bidder who has been declared as the Reserve Bidder.

(3) The Project Committee shall ask the Reserve Bidder to extend the validity of its Bid as it may deem fit.

(4) The Project Committee shall inform every other applicant, in writing, whose financial proposal did not pass the evaluation criteria, in accordance with terms of the RFP along with reasons of disqualification.

(5) The Commission or the Contracting Authority shall make public, the names of all Preferred Bidder and the Reserve Bidder on its website, including other means as it deems fit in consultation with the Commission.

(6) The Commission or the Contracting Authority shall return any Bid Bond provided by a Pre-Qualified Bidder or the Prospective Bidder whose financial Bid has been disqualified within fourteen days from the final financial proposal evaluation report received by the Commission.

29.—(1) The Evaluation Committee, reserves the right to verify at any time during the Procurement Process all the information and documents submitted by the Pre-Qualified Bidders or the Prospective Bidders in response to the RFP. Verification of Bid information

(2) The Pre-Qualified Bidders or the Prospective Bidders, when so required and requested by the Evaluation Committee, in writing, shall make available all such information, evidence or documents as may be necessary for the verification within the deadline prescribed by the Evaluation Committee for responding thereto.

(3) The Evaluation Committee may also call the representative of the Pre-Qualified Bidder or the Prospective Bidder, to present or explain the requested clarification by the Evaluation Committee.

(4) All the received information in the Bid of the Pre-Qualified Bidders or the Prospective Bidders shall be kept sealed until the closing date for the submission of applications in response to the RFP, and all such information shall be opened simultaneously on the prescribed date and time in accordance with specific procedures outlined RFP.

30.—(1) Pursuant to notification of the Preferred Bidder, the Evaluation Committee shall invite the Preferred Bidder for the negotiations on its Bid or reservations and conditions to the Bid in accordance with the provisions of the RFP. Negotiations and selection of successful Bidder

(2) The Evaluation Committee may seek assistance of the Transaction Advisor or any other requisite expertise for the purpose of negotiations.

(3) Subject to subregulation (4), the negotiations carried out pursuant to subregulation (1) and the resolution of the parties to the negotiations shall not result in an increase in pricing and shall not affect—

(a) the non-negotiable terms and conditions specified as non-negotiable conditions in the RFP;

(b) the financial structure; or

(c) the conditions of the Tender Documents in respect of which there were no reservations raised by the Preferred Bidder in its Bid.

(4) Where an increase in price is as a result of taxes or other mandatory charges, such increase shall be allowed.

(5) The parties to a negotiation under this section shall not amend the negotiated terms and terms upon which the Bid has been evaluated.

(6) Where the negotiations carried out with the Preferred Bidder is unsuccessful, the Evaluation Committee shall enter into negotiations with the Reserve Bidder and notify and declare it as the Preferred Bidder.

(7) The provisions of subregulations (2), (3), (4) and (5) shall apply to negotiations with the Reserve Bidder.

(8) Minutes of the meeting of negotiations shall be recorded and such minutes shall be duly signed by the chairperson of the Evaluation Committee and the Preferred Bidder.

(9) Pursuant to successful negotiations with the Preferred Bidder, the Evaluation Committee shall prepare a report on the negotiations including its recommendations and submit the same to the Commission for its review.

(10) The Commission, in parallel, shall submit the negotiations report to the PPP Fiscal Risk Committee for its review and recommendations as described in Part XIV of these Regulations.

(11) The Commission, upon its satisfaction of results of the negotiations, shall submit the negotiations report and its recommendations, along with the PPP Fiscal Risk Committee's recommendations and draft PPP Contract, to the Minister for consideration and approval.

(12) Pursuant to approval of the negotiations report by the Minister, the Commission or Contracting Authority shall notify and declare the successful Bidder, within five days, through a Letter of Award.

(13) The Letter of Award shall contain post-award requirements or conditions precedent to the signing of the PPP Contract including the deadline for meeting of the conditions precedent or the post-award requirements and signing of the PPP Contract, in accordance with provisions of the RFP.

(14) Simultaneous with the selection of Successful Bidder, the Commission or the Contracting Authority shall notify other Pre-Qualified Bidders or the Prospective Bidders in writing of the selection of the successful Bidder, and its intention to execute the PPP Contract with the successful Bidder by a specific date.

(15) Upon achieving the Commercial Close, any Bid Bonds collected shall be refunded to non-selected Reserve Bidder.

Procedure
regarding
equal Bids

31.—(1) In the event that two or more Bids are equally advantageous in accordance with the terms of the RFP, the Commission or the Contracting Authority shall identify the successful Bidder by asking the respective bidders to submit their best and final offer.

(2) A public meeting, to which the two bidders shall be invited, shall be set to open the bids and the value of each bid shall be read out in an audible voice, without prejudice to the Commission's or the Contracting Authority's right to cancel the Procurement Process or resubmit the project for fresh tender without any responsibility, after the approval of the Commission.

(3) If the above approach is not successful, the Commission or the Contracting Authority through the Evaluation Committee shall identify the successful Bidder by taking into account the aggregate experience score of each bidder from the EOI or RFPQ phase, wherein the bidder with the higher score or experience shall be adjudged the successful Bidder.

(4) If the above approach is not successful, the Commission or the Contracting Authority through the Evaluation Committee shall identify the Bid with the highest value of local participation, greater technology transfer, or any other measure as deemed most appropriate by the Commission or the Contracting Authority and established as part of the RFP.

(5) The bidder with the most favorable proposed value, based on the measure established above, shall be adjudged the successful Bidder.

(6) If the tie persists, the Commission or the Contracting Authority shall refer to the Minister through the Commission to make a final determination as to whether to initiate fresh Procurement Process.

32.—(1) Subject to fulfilment by the successful Bidder of the requirements specified in the Tender Documents, and in the Letter of Award, the Contracting Authority shall execute the PPP Contract with the successful Bidder. Commercial and Financial Close

(2) The Successful Bidder shall achieve the Financial Close for the PPP arrangement within the timeframe and conditions stipulated in the PPP Contract.

PART VIII—SINGLE PHASE PROCUREMENT PROCESS

33.—(1) The Commission or the Contracting Authority, subject to subregulation (2), may combine the pre-qualification phase and the request for proposal phase as stipulated under Part VI and VII, respectively in case warranted by the nature of the proposed PPP arrangement. Use of single phase procurement process

(2) Without prejudice to section 44(5) of the Act, the Commission or the Contracting Authority shall consider single phase procurement process for a PPP project, in case it considers that—

- (a) the project is not of a complex nature; and
- (b) there is enough interest in the market for the project.

(3) The Commission or Contracting Authority shall conduct a market sounding exercise to determine the appetite of the market for the project before considering the single phase procurement process.

(4) The Prospective Bidders shall be asked to submit information in response to the qualification criteria along with their technical and financial bids in the Tender Documents.

(5) The Commission or the Contracting Authority shall follow the similar process in accordance with Part VII.

PART IX—COMPETITIVE DIALOGUE

34.—(1) The Commission or the Contracting Authority may decide to use the Competitive Dialogue, as referred under section 49 of the Act, while conducting the Procurement Process. Procedure to conduct Competitive Dialogue

(2) The Competitive Dialogue may be used in any of the following cases—

(a) a proposed PPP arrangement is of complex or innovative nature and the Contracting Authority does not have an identified solution for the desired outcome, to satisfy the public interest, from the implementation of the proposed project;

(b) the Contracting Authority is not able to describe the requirements without discussing possible solutions with the potential private sector; or

(c) the Contracting Authority is not sure how the procurement will work from a financial or legal point of view.

(3) Where a decision is taken to use the Competitive Dialogue, the Commission or the Contracting Authority, through the Project Committee, shall select the Private Party using the two phase Procurement Process described under Part VI and VII, respectively, subject to the following—

(a) the contents of the EOI or RFPQ shall categorically mention that Procurement Process shall include the Competitive Dialogue;

(b) the Tender Documents shall include the Competitive Dialogue procedure including, inter alia, the aims and objectives of the Competitive Dialogue, number of successive stages of the Competitive Dialogue and its time schedule, Contracting Authority's requirements and kind of solution or outputs the Contracting Authority is looking for through the PPP arrangement, treatment of intellectual property of a Pre-Qualified Bidder, who will own any intellectual property or solution developed during the Competitive Dialogue procedure, requirements for submitting non-binding Bids by the Pre-Qualified Bidders during the Competitive Dialogue, procedure of disqualification of the Pre-Qualified Bidders during the Competitive Dialogue, if applicable, and procedure for Pre-Qualified Bidders to submit their final Bids post Competitive Dialogue, and the draft PPP Contract containing basic terms of the PPP arrangement;

(c) the Pre-Qualified Bidders may seek the clarifications on various aspects of the Tender Documents or the proposed PPP arrangement and the Commission or the Contracting Authority, through the Project Committee, shall endeavor to respond to all reasonable queries of the Pre-Qualified Bidders and responses or clarifications to such queries shall be provided by the Project Committee to all the Pre-Qualified Bidders without disclosing the identity of the Pre-Qualified Bidder who may have made such queries; and

(d) the Commission or the Contracting Authority, through the Project Committee, shall not provide information in a discriminatory manner which may give a Pre-Qualified Bidder an advantage over others.

(4) The Commission or the Contracting Authority may follow any of the following variant of the Competitive Dialogue—

(a) interactive Competitive Dialogue; and

(b) competitive Dialogue with best-and-final-offer (hereinafter referred to as “BAFO”).

(5) Under the Interactive Competitive Dialogue, subject to provisions of subregulation (3)—

(a) the short listed Pre-Qualified Bidders shall be invited to participate in the Competitive Dialogue through series of one-on-one meetings to be held with each Pre-Qualified Bidder, individually, to discuss the technical, commercial, legal and financial aspects of the PPP arrangement and the Tender Documents;

(b) the Commission or Contracting Authority, through the Project Committee, at its discretion, may discuss the technical, commercial, financial and legal aspects of the PPP arrangement together in one session or in separate sessions to discuss one or more of these aspects with each Pre-Qualified Bidder;

(c) prior to each session of one-on-one meetings, the Pre-Qualified Bidders may submit in writing to the Project Committee their queries, comments, proposals and suggestions on any issue relating to the project or the Tender Documents or the revised Tender Documents, as the case may be, which they intend and propose to discuss with the Project Committee during such session;

(d) the Project Committee shall endeavour to respond to all reasonable queries, comments, proposals and suggestions and the responses to queries, comments, proposals and suggestions and any modifications to the Tender Documents pursuant thereto shall be made in writing, on a non-attributable basis and made known to Pre-Qualified Bidders through addendum published by the Commission or the Contracting Authority, and such addendum shall be deemed to be incorporated in and shall become an integral part of the Tender Documents;

(e) upon completion of each session of one-on-one meetings with all Pre-Qualified Bidders, the Project Committee may carry out such amendments to the Tender Documents as it deems fit. The revised Tender Documents shall be issued to the all the Pre-Qualified Bidders; and

(f) the Project Committee may conduct multiple sessions of one-on-one meetings. Upon being satisfied that no further rounds of one-on-one meetings are required and that the Tender Documents adequately define the technical, commercial, financial, legal and other aspects of the project to its satisfaction, the Commission or the Contracting Authority shall issue the final Tender Documents to all the Pre-Qualified Bidders for the submission of their Bid.

(6) Under the Competitive Dialogue with BAFO, subject to provisions of subregulation (3)—

(a) the short listed Pre-Qualified Bidders shall be invited to participate in the Competitive Dialogue, individually, to discuss their solution to the requirements defined by the Commission or the Contracting Authority through the Project Committee and the technical

solutions may be discussed first followed by the commercial or financial solutions related to the proposed PPP arrangement;

(b) the Project Committee, during the Competitive Dialogue, may ask the Pre-Qualified Bidders to submit their binding Bid providing their solution to the requirements of the Contracting Authority;

(c) the binding Bids shall be further discussed to develop or refine the presented solutions and development of its commercial and contractual aspects while considering the affordability of the potential solutions provided by the Pre-Qualified Bidders;

(d) the Project Committee shall ensure equality of treatment to all the Pre-Qualified Bidders including not revealing the solutions offered by a Pre-Qualified Bidder during the Competitive Dialogue or in the binding Bid to other Pre-Qualified Bidders;

(e) the Evaluation Committee may disqualify a Pre-Qualified Bidder, pursuant to evaluation of the binding Bids, in accordance with the criteria set in the RFP;

(f) the Evaluation Committee shall select two binding Bids from the evaluation process of binding Bids of all Pre-Qualified Bidders in accordance with the provisions of the RFP;

(g) the Evaluation Committee shall hold negotiations with both selected Pre-Qualified Bidders with binding Bids on their solutions proposed for the PPP arrangement;

(h) after the negotiations, the two selected Pre-Qualified Bidders shall be asked to submit their new offers i.e. BAFO in terms of financial proposal on the basis of the risk allocation and technical terms that have been developed with the respective selected Pre-Qualified Bidders in parallel during the negotiations;

(i) the BAFO shall not be subject to change and shall not contain any reservations or conditions;

(j) the BAFO shall be allowed only once in a Procurement Process;

(k) the BAFO of the selected Pre-Qualified Bidders shall be evaluated based on the criteria stipulated in the final Tender Documents including the conditions for evaluation for selection of the best offer; and

(l) the Pre-Qualified Bidder whose Bid has been evaluated the best offer shall be declared as the Preferred Bidder along with the other bidder declared as Reserve Bidder.

PART X—UNSOLICITED BIDS

Requirements
of a valid
Unsolicited Bid

35.—(1) The Commission may accept an unsolicited bid from the private sector in accordance with section 54 of the Act.

(2) Before an unsolicited bid can be submitted to the Commission, the following conditions shall be satisfied—

(a) the unsolicited bid shall be aligned with the national development plan, national vision or sector development plans of the Government;

(b) the submitted unsolicited bid shall not be part of the Compendium;

(c) preparation of the Unsolicited Bid shall not be subjected to any supervision, direction, control, or participation on the part of the Commission, or any public body;

(d) the proposed PPP arrangement to which the unsolicited bid pertains, involves a new concept or technology, whether unique or not, including but not limited to engineering practice, design, financing, legal framework or the project implementation structure;

(e) the unsolicited bid shall include the Pre-Feasibility Study of the proposed PPP arrangement;

(f) the unsolicited bid shall include the details of the technical, commercial, managerial, and financial capability of the prospective Private Party submitting the Unsolicited Bid;

(g) the person or entity who submitted the Unsolicited Bid shall not be a Governmental official or an appointed Transaction Advisor by any public body to render consultancy services relating to the prospective PPP arrangement, which is the subject matter of the unsolicited bid;

(h) the prospective Private Party who submitted the unsolicited bid shall bear the cost of the study, evaluation and preparation of the unsolicited bid; and

(i) submission of an unsolicited bid shall be in line with the provisions of the Act, these Regulations and any PPP Guidelines.

36. Without prejudice to the requirements of regulation 37(2), the unsolicited bid shall include—

Contents of
Unsolicited
bid

(a) prospective Private Party's legal status, address, tax registration certificate or taxpayer identification number (TPIN), company registration certificate and company profile;

(b) title and description of the proposed PPP arrangement;

(c) prospective Private Party's qualifications including prior experience and financial capacity to implement the proposed PPP arrangement;

(d) a statement of the objectives, approach and scope of the proposed PPP arrangement;

(e) a declaration on integrity of the prospective Private Party confirming that—

(i) the prospective Private Party does not appear on any globally-recognised procurement sanction lists;

(ii) the prospective Private Party is not insolvent, in administration, in receivership, or bankrupt;

(iii) the prospective Private Party has fulfilled its obligations to

pay taxes and social-security contributions in its country of origin;

(iv) the prospective Private Party has not, and its directors or officers have not, been convicted of any criminal offence of moral turpitude; and

(v) a public officer or public body does not have a financial or any other interest in the prospective Private Party.

(f) a statement describing any confidential information or proprietary rights;

(g) a Pre-Feasibility Study of the proposed PPP arrangement including inter alia—

(i) a preliminary technical description of the proposed PPP arrangement, including project delivery approach, high level construction schedule and any requirements for connections to existing assets or infrastructure or services;

(ii) a preliminary assessment of financial feasibility, including costs and revenues, and a preliminary funding and financing plan;

(iii) a preliminary assessment of economic feasibility or a cost-benefit analysis;

(iv) a preliminary assessment of the legal feasibility of the proposed PPP arrangement, including a statement as to the conformity of the project with legal requirements and an assessment of project-related legal risks and uncertainties;

(v) a preliminary description of the environmental and social safeguards for the proposed project, including the proposed PPP arrangement's resilience to climate change;

(vi) a preliminary service and operating plan for the proposed PPP arrangement; and

(vii) a preliminary assessment of project risks and proposed risk allocation.

(h) a statement describing how the proposal is innovative and unique, supported by evidence that the proponent is the sole provider and owner of the innovation;

(i) a statement on anticipated benefits to the Commission or the Contracting Authority;

(j) a statement showing how the proposed PPP arrangement supports or aligns with the national development plan, national vision or sector development plans of the Government; and

(k) a statement outlining expected government support or guarantee or government participation in the execution of the PPP arrangement.

Treatment of
more than one
Unsolicited
Bids for same
similar project

37.—(1) The Commission, in coordination with the Contracting Authority, shall review and evaluate the unsolicited bid and confirm its validity in accordance with the subregulation (2).

(2) A valid unsolicited bid in respect of a PPP arrangement may be accepted on a provisional basis, provided—

(a) that the prospective Private Party proposing the unsolicited bid has deposited the USB processing fee and USB bond as provided under regulation 38 and 39, respectively; and

(b) the Unsolicited Bid is a valid Unsolicited Bid in accordance with the provisions of regulation 34(2) and 35, respectively.

(3) The Commission, in conjunction with the Contracting Authority, shall upon satisfaction of completeness of the Unsolicited Bid in accordance with subregulation (2), conduct a review and appraisal of the Unsolicited Bid including the Pre-Feasibility Study and the Commission may use PSAT or any other tool or methodology for determining the suitability of the proposed project as a PPP arrangement.

(4) Where, upon review and appraisal of the Pre-Feasibility Study, the proposed PPP arrangement under an Unsolicited Bid is suitable for implementation as a PPP arrangement, the Contracting Authority shall seek the approval of the Ministry responsible for economic planning to conduct a feasibility study in accordance with section 54(3) of the Act.

(5) Upon approval of the Ministry responsible for economic planning, the proposed PPP arrangement under unsolicited bid shall be published in the *Gazette* in accordance with section 40(1) of the Act.

(6) After publication of the proposed project as a PPP arrangement, the Commission shall inform the proposer of the unsolicited bid, in writing, regarding acceptance of the unsolicited bid on a provisional basis.

(7) Where the unsolicited bid is not in conformity with the subregulation (2), the Commission in consultation with the Contracting Authority shall reject the unsolicited bid and inform the proposer, in writing, sighting reasons for rejection of the unsolicited bid.

(8) The Commission or the Contracting Authority shall return the unsolicited bid and related documents thereto to the proposer of unsolicited bid.

38.—(1) In the case where the Commission or the Contracting Authority receives more than one unsolicited bids involving the same or similar project, the Commission, in consultation with the Contracting Authority, may reject all such unsolicited bids or instead, bid out the project as a solicited project through Procurement Process in accordance with the Part VI and VII, respectively.

USB
processing
fee

(2) The Commission, in consultation with the Contracting Authority, shall evaluate the unsolicited bid using a first in time approach and under this approach, the first complete valid unsolicited bid, in accordance with this regulation, shall be reviewed, evaluated and decided upon.

(3) The second complete valid unsolicited bid shall only be entertained if the first one is rejected and the second complete valid unsolicited bid shall be considered only if there is a failure of the first complete valid unsolicited bid during the Procurement Process.

USB bond 39. Each valid unsolicited bid shall be accompanied by a non-refundable USB processing fee, for an amount and to be paid in a manner to be determined by the Commission from time to time.

USB project development agreement 40.—(1) Each unsolicited bid shall be accompanied by a USB bond for an amount as be determined and notified by the Commission from time to time.

(2) The USB bond shall be submitted by way of an unconditional and irrevocable bank guarantee or any other payment method deemed appropriate by the Commission for the requisite amount issued in the name of the Commission.

(3) The USB bond shall be initially valid for a minimum period of twelve months, provided however the proposer of unsolicited bid shall be subsequently obliged to extend the validity period of the USB bond up to the period requested by the Commission through the Contracting Authority.

(4) The USB bond shall be returned to the proposer of the unsolicited bid upon submission of a Bid Bond or the signing of a bid securing declaration, based on the requirements specified in the Tender documents.

(5) The USB bond shall be forfeited by the Commission if the prospective Private Party proposing the unsolicited bid fails to participate in the process of selection of the Private Party.

Registration of USB in the Compendium 41.—(1) Upon provisional acceptance of the unsolicited bid, the Commission in conjunction with the Contracting Authority shall prepare a USB project development agreement (hereinafter referred to as “PDA”) to be executed between the Contracting Authority and the proposer of unsolicited bid.

(2) A PDA shall contain, inter alia—

(a) the purpose of the PDA;

(b) obligations of the proposer of the unsolicited bid and the Contracting Authority;

(c) ownership of intellectual property rights associated with the unsolicited bid;

(d) decision regarding preparation of the feasibility study for the proposed project;

(e) provisions regarding compensation or incentive to proposer of the unsolicited Bid;

(f) provisions regarding indemnification of the Contracting Authority and the Commission by the proposer of the unsolicited bid proposer from any liability or claim for damages; including recovery of cost and the evaluation fees incurred by the prospective Private Party in preparing the unsolicited bid; and

(g) provisions regarding transparency, accountability and confidentiality.

42.—(1) Upon provisional acceptance of a valid unsolicited bid, the Commission in conjunction with the Contracting Authority, shall take steps to prepare a feasibility study.

Right to determine contents of Tender Documents

(2) The feasibility study shall be prepared, reviewed and approved in accordance with the section 42 of the Act and Part IV of these Regulations, respectively.

(3) The Commission, in coordination with the Contracting Authority, may decide whether the feasibility study shall be prepared by the proposer of the unsolicited bid in accordance with section 43 of the Act or by the Commission.

(4) Where, the Minister approves the feasibility study in accordance with the section 42(3) of the Act, the Commission in consultation with the Contracting Authority shall proceed with the process of selection of Private Party in accordance with the Act, these Regulations and any PPP Guidelines.

(5) The Commission shall invite the proposer of the unsolicited bid to participate in the process of selection of Private Party for the proposed PPP arrangement related to the unsolicited bid.

(6) Where the Minister rejects the feasibility study, the Commission shall, promptly, inform the proposer of the Unsolicited Bid of the decision of the Minister, in writing.

43. Where a feasibility study in respect of an unsolicited bid is approved by the Minister, the Commission shall register the proposed PPP arrangement under unsolicited bid into the Compendium in accordance with section 41(3) of the Act.

Selection of Private Party for Unsolicited Bid

44. The Commission or Contracting Authority, through the Project Committee shall, at all times, retain the right to determine the contents of the Tender Documents including the qualification criteria for the bidders other than the proposer of the unsolicited bid who intends to participate in the Procurement Process.

Procedure to conduct Direct Negotiations

45.—(1) The Commission, in conjunction with the Contracting Authority, through the Evaluation Committee may select the Private Party either through—

Selection of Private Party for Unsolicited Bid

(a) Procurement Process as described under Part VI and VII of these Regulations; or

(b) through direct negotiation with a Private Party in accordance with section 52 of the Act.

(2) The proposer of an unsolicited bid may be entitled to award of extra score during the Bid evaluation in accordance with section 56 of the Act.

(3) The proposer of the unsolicited bid shall be compensated, in accordance with the section 43(3) of the Act, for the reasonable costs for undertaking the feasibility study as determined by the Commission in consultation with the Contracting Authority only in case where—

(a) the feasibility study in respect of an unsolicited bid has been approved by the Minister; and

(b) a Successful Bidder has been determined for the proposed PPP arrangement.

Procedure to
conduct Direct
Negotiations

46.—(1) Without prejudice to the provisions of section 52 of the Act, the Commission and the Contracting Authority shall utilise the procedure described in this Regulation 46 for implementing direct negotiations with a Private Party.

(2) The Contracting Authority shall submit the relevant documents to the Commission in support of its decision to implement a PPP arrangement through direct negotiations.

(3) The Commission shall approve or reject the justification for using the direct negotiations method, in accordance with the criteria specified in section 52(2) of the Act.

(4) Where the Commission rejects the use of the Direct Negotiations method, the Private Party shall be procured using other methods of procurement in accordance with provisions of the Act and these Regulations.

(5) Where the Commission is satisfied with the justification of the Contracting Authority to use the direct negotiations, the Commission shall submit its recommendations along with justification for using the direct negotiations method to the Minister for approval to implement the proposed PPP arrangement through direct negotiations method.

(6) Where the Minister approves the direct negotiations method, the Commission shall conduct a Feasibility Study and its approval shall be in accordance with Part IV.

(8) Upon approval of a Feasibility Study by the Minister, Commission in consultation with the Contracting Authority shall prepare the Tender Documents, through the Project Committee, including listing of the non-negotiable terms.

(9) The Commission shall submit the Tender Documents including the non-negotiable terms and credentials of the sole bidder with respect to the proposed PPP arrangement to the Minister for approval to enter into negotiations with the sole bidder.

(10) The Commission shall issue the Tender Documents to the sole bidder upon approval from the Minister and invite it to prepare and submit its Bid.

(11) The Commission, through the Evaluation Committee, shall evaluate the Bid of the sole bidder and invite it for the direct negotiations.

(12) Based on the negotiations, the Commission in consultation with the Contracting Authority may revise or amend the Tender Documents, through the Project Committee, except the non-negotiable terms and invite the sole bidder to prepare and submit its revised Bid.

(13) Where upon evaluation and negotiations the Bid is acceptable, the Commission in coordination with the Contracting Authority shall conduct subsequent phases of Commercial and Financial Close for the PPP arrangement.

(14) Save the provisions of sub-Regulations (1) to (13) above, the Commission or the Contracting Authority shall adhere to other provisions of the Act and these Regulations applicable to the PPP arrangement.

PART XII—GOVERNMENT’S EQUITY PARTICIPATION IN SPECIAL PURPOSE VEHICLE

47.—(1) The Government of Malawi may only hold equity stake in the Special Purpose Vehicle, subject to the provisions of the Act and these Regulations.

Equity participation by the Government

(2) The Government shall only hold equity in the Special Purpose Vehicle, under the following conditions—

(a) that there is prior written approval by the Minister, upon recommendation of the Commission, authorizing the holding of such equity by the Government in the Special Purpose Vehicle of a PPP arrangement;

(b) the intention to hold equity is expressly stated in the Tender Documents specified as a condition by the Commission or the Contracting Authority;

(c) the total equity as a proportion of the issued shares of the total issued ordinary shares of the Special Purpose Vehicle shall be in accordance with the notification or guidelines issued by the Commission, from time to time; and

(d) the equity is held under an agreement including a shareholders’ agreement between the Private Party who are the shareholders of the Special Purpose Vehicle and the Government which as a minimum shall stipulate—

Notice of end of company reorganization when purposes achieved (s. 53(1) of the Act)

(i) the Government equity shall not be diluted in any future recapitalization of the Special Purpose Vehicle in which shares are held without prejudice to the rights of the Government to exit on its own subject to approval of the Minister;

(ii) that Government shall have voting rights proportionate to the paid up capital subscribed by it; and

(iii) that the Government shall have right to nominate as many directors in the Special Purpose Vehicle as are proportionate to its percentage of shareholding.

48.—(1) The Contracting Authority, in coordination with the Commission, shall assign a Contract Manager with support from financial, technical, and legal experts within the Contracting Authority, together called the Contract Management Team.

Contract Manager

(2) The Contract Manager shall be assigned on, or prior to, the date of issue of the Letter of Award to the Successful Bidder.

(3) The Contract Manager shall have access to all the documents and communications, including the Procurement Process report in relation to the PPP arrangement.

Responsibility
of the
Contract
Manager

49.—(1) The Contract Manager shall be responsible for formulation and monitoring of the Contract Management Plan, in accordance with Regulation 51.

(2) The responsibilities of the Contract Manager shall, inter alia, include ensuring—

(a) adherence to timelines and other obligations specified in the PPP Contract;

(b) adherence to the performance standards specified in the PPP Contract;

(c) adherence to reporting procedures between the Private Party and the Contracting Authority;

(d) periodic measurement and testing as required under the PPP Contract;

(e) coordination with various relevant agencies of the Government for facilitating various permits, approvals, etc. required during implementation and operations of the PPP arrangement amongst other aspects;

(f) conflict management;

(g) tracking the events that could lead up to additional Contracting Authority liabilities;

(h) monitoring and providing information on FCCLs;

(i) proactive fiscal risk management in order to reduce the incidence of occurrence of fiscal risks;

(j) remedial measures and action plan for curing defaults;

(k) imposition of penalties or deductions in the event of default;

(l) levy and collection of user charges based on approved principles;

(m) implementation of Contract Management Plan; and

(n) progress of on-going disputes and arbitration proceedings, if any.

(3) The Contract Manager shall provide a periodic report to the Contracting Authority and the Commission on issues covered under regulation 49(2).

Appointment
and role of
Independent
Expert

50.—(1) The Contracting Authority shall appoint an Independent Expert when the capacity and expertise to supervise construction or monitor operations of a PPP project does not exist within the Contracting Authority and such an appointment may be done through the use of monies under the Fund in accordance with Regulation 61 and the Fund Manual.

(2) The Independent Expert shall have the responsibility of supervising the facility and services to be provided under the PPP Contract which shall include, *inter alia*, as applicable—

(a) reviewing, inspecting and monitoring of construction works, examining the designs and drawings and conducting tests and issuing completion certificates during the construction period;

(b) reviewing and inspecting the operations and maintenance arrangements, and monitoring compliance with the performance and maintenance standards, during the operations period;

(c) monitoring environment and social safeguards;

(d) monitoring climate change and its impact on the project and recommendations on proactive measures to be taken;

(e) reviewing and inspecting the capacity of the Special Purpose Vehicle to continue to fulfill its obligations under the PPP Contract;

(f) identifying delays and lapses that require action on the part of the Contracting Authority for enforcing the PPP Contract terms;

(g) determining the reasonableness of costs for any works or services, as required under the PPP Contract;

(h) determining the period or extension thereof, for performing any duty or obligations, as required under the PPP Contract;

(i) determining the penalties, deductions or incentives for the performance of the Special Purpose Vehicle in accordance with the PPP Contract; and

(j) carrying out such responsibilities as are assigned under its contract.

(3) The Independent Expert shall prepare and submit to the Contract Manager a monthly progress report in accordance with its contract.

51.—(1) The Contract Manager shall prepare a Contract Management Plan which, *inter alia*, shall—

Contract
Management
Plan

(a) define the processes that enable both parties to the PPP Contract to meet their obligations;

(b) monitor performance by the parties of their respective obligations under the PPP Contract;

(c) manage any differences between the parties through proactive relationship management;

(d) manage unanticipated developments, events or circumstances and mitigating risks through efficient risk management;

(e) plan for proactive management of the events that could lead up to additional Contracting Authority's liabilities;

(f) planning and managing budget for FCCL of a PPP project in coordination with the Ministry responsible for finance and other public bodies; and

(g) resolve disputes in an expeditious manner, with minimal impact on service delivery.

(2) The Contract Management Plan shall serve as a repository of management procedures and a resource tool, and shall include *inter alia*—

- (a) the PPP Contract and its schedules;
- (b) all financing agreements as well as financial models;
- (c) the names, roles and contact details of key individuals of parties to the PPP Contract;
- (d) implementation plan during development, construction, operations, handback, and exit phases, as the case may be;
- (e) performance management plan;
- (f) risk management plan;
- (g) financial and contract administration plan;
- (h) relationship management and contingency plan; and
- (i) early termination and hand back plan of the PPP Contract.

PART XIV—RESUBMISSION OF EXPIRED PPP ARRANGEMENTS

Procedure for
expiry PPP
arrangement

52.—(1) The Commission, in coordination with the Contracting Authorities, shall twelve months before the expiry or upon early termination of a PPP Contract, evaluate future course for managing or implementing the said PPP arrangement including—

- (a) project asset handback requirements in accordance with the provisions of the respective PPP Contract including, *inter alia*—
 - (i) testing and valuation of the assets;
 - (ii) assessment of operations and maintenance and service quality; and
 - (iii) assessment on need for asset upgradation prior to handback of the project assets; and
- (b) making a decision on an option to ensure project service continuity upon expiry of the PPP Contract and the options may be—
 - (i) providing project services by the Contracting Authority;
 - (ii) procurement of Private Party to provide operations and maintenance services;
 - (iii) procurement of Private Party to upgrade the project assets as well as operations and maintenance services; or
 - (iv) any other option as commission may decide in coordination with the Contracting Authority.

(2) For the purpose of subregulation (1), the Commission may seek the assistance of whoever it deems necessary, including consulting firms or Transaction Advisors.

(3) PPP arrangements that have devolved to the Government may be resubmitted for Procurement Process, in accordance with the provisions of the Act and these Regulations, and after approval of the Minister, upon recommendation of the Commission.

PART XV—DISCLOSURE OF INFORMATION

53.—(1) The Commission through the Minister shall formulate guidelines, in accordance with section 99 of the Act, regarding in particular the proactive disclosure of information by the Commission or Contracting Authority related to public-private partnerships, including the elements of information to be disclosed, timelines, confidential information, forms and responsibilities for disclosure, validation of information to be published. Disclosure framework

(2) The guidelines formulated pursuant to subregulation (1) may be reviewed and amended, from time to time.

PART XVI—FCCL MANAGEMENT

54.—(1) There shall be a committee to be called the PPP Fiscal Risk Committee which shall consist of members appointed by the Minister, from time to time. PPP Fiscal Risk Committee

(2) The PPP Fiscal Risk Committee shall consist of—

(a) the Secretary to the Treasury or his or her representative, who shall be the chairperson;

(b) the Director of the Department of Economic Affairs or his or her representative;

(c) Director of Public Finance Management or his or her representative;

(d) Director of the Economic Planning and Development or his or her representative;

(e) Director of the Debt and Aid or his or her representative;

(f) Director of the Budgeting or his or her representative;

(g) Director of Audit or his or her representative; and

(h) any other members, not exceeding three (3), as determined by the Minister for supporting on technical matters related to the project as required, however, such members shall not be allowed to vote.

(3) The representatives from the Commission and the Contracting Authorities may be invited to the PPP Fiscal Risk Committee meeting to present the project and provide clarifications.

(4) The chairperson shall designate a secretary of the PPP Fiscal Risk Committee and the secretary shall not be representative of the Contracting Authority.

(5) The PPP Fiscal Risk Committee shall meet periodically or whenever needed by an invitation from its chairperson and the resolutions and recommendations of the PPP Fiscal Risk Committee shall be executed unanimously or by the majority of votes of the members thereof, and in case of a tie in vote, the side of which the chairperson has voted for shall prevail.

(6) The PPP Fiscal Risk Committee shall be entitled to invite experts and technical people to be guided by their opinion on the issues presented to it without having the right to participate in the voting.

(7) A member of the PPP Fiscal Risk Committee shall not be allowed to abstain from voting on any issue, and he or she shall be required write a dissenting decision.

(8) The PPP Fiscal Risk Committee's secretary shall undertake the following tasks—

(a) organizing the schedule of the PPP Fiscal Risk Committee's meetings and invitations for the meetings, recording the session's minutes, keeping the records and any documents related to the PPP Fiscal Risk Committee or its members;

(b) preparing the meeting agenda and distributing it to the members of the PPP Fiscal Risk Committee;

(c) follow-up signing of the minutes of the PPP Fiscal Risk Committee meetings, documenting and keeping them properly; and

(d) any other tasks assigned to him by the chairperson.

Functions of
PPP Fiscal
Risk
Committee

55. The PPP Fiscal Risk Committee shall—

(a) evaluate, following up and monitor the fiscal commitments of each PPP arrangement and any updates to it, and monitoring any government support provided in accordance with the FCCL Framework and providing the same to the Minister and the Commission for listing in the records;

(b) monitor the impact of any contingent liabilities on public finances and public debt, updating their financial effect on fiscal commitments, and proposing suggestions to avoid their potentially negative effects;

(c) ensuring the inclusion of financial resources necessary for the development and implementation of PPP arrangements when preparing the general budget by the Ministry, including the medium-term expenditures framework;

(d) following-up on the allocations in the general budget for the instalments which are directly due and fiscal commitments realized during the implementation of PPP projects and the government support needed for such projects in accordance with the Fund Manual;

(e) ensure that any installment to be made by the Contracting Authority is consistent with the allocated resources to such Contracting Authority in the general budget;

(f) review any proposed government support for a PPP arrangement whether direct or indirect and aligning such support with the Government's ability to sustain it; and

(g) conduct a comparison between the PPP Contracts that have been agreed upon and the amendments that made to them after execution to ensure that there has been no material change to allocation of risk, fiscal commitments, contingent liabilities or the proposed government support.

56. The Contracting Authority shall collect and analyze information on fiscal commitments, including direct liabilities and contingent liabilities, during all phases of the PPP arrangement, and prepare a report on this and submit it to the Commission, for referral to the PPP Fiscal Risk Committee. Data gathering

57.—(1) The PPP Fiscal Risk Committee shall prepare the FCCL report Contracting Authority, provided that it includes, as a minimum, the following— FCCL report

(a) brief description of the PPP arrangement;

(b) review and analysis of the sensitivity indicator of the PPP arrangement cash flows to demonstrate the extent of its capacity to fulfill its direct and indirect financial obligations (FCCL) in the Feasibility Study;

(c) evaluation of contingent liabilities;

(d) review the value for money analysis in the Feasibility Study;

(e) financial risk matrix of the PPP project for the quantitative and qualitative assessment of the main financial risks;

(f) review of the financial assumptions included in the Feasibility Study;

(g) recommending a ceiling for the FCCL of each PPP arrangement;

(h) following up the budgetary allocations for the PPP arrangement; and

(i) tasks in accordance with any other provision of the Act and these Regulations.

(2) The PPP Fiscal Risk Committee can request for additional information from the Contracting Authority or the Commission to help them with the assessment.

(3) The PPP Fiscal Risk Committee shall submit the FCCL Report at Feasibility Study phase, including its recommendations, to the Commission and the Minister, within twenty five days from the date of receiving the referral from the Commission.

(4) The PPP Fiscal Risk Committee shall submit the updated FCCL Report, within twenty days, to the Commission and the Minister at other phases of the PPP project, including at—

(a) finalization of Bid Documents;

(b) after the negotiations with the Preferred Bidder, before the notification of the Successful Bidder;

- (c) at Financial Close;
- (d) during construction phase of the PPP project on an annual basis;
- and
- (e) during operations phase of the PPP project on an annual basis.

Amendments 58.—(1) When any amendments are proposed to the PPP Contract after the Commercial Close or in the Bid Documents, these proposed amendments shall be referred by the Contracting Authority, through the Commission, to the PPP Fiscal Risk Committee.

(2) The PPP Fiscal Risk Committee shall review the proposed amendments and shall compare between the PPP Contract and the amendments that will be made to it to ensure that there is no material in risk allocation or FCCL and review the quantitative and qualitative risks in consultation, with the Contracting Authority through the Commission.

(3) The PPP Fiscal Risk Committee shall submit the FCCL Report and its recommendations to the Contracting Authority and the Commission within fifteen days from the date of receiving the referral from the Contracting Authority through the Commission.

(4) In light of the review of the FCCL Report and the recommendations of the PPP Fiscal Risk Committee, the Commission shall submit its recommendations on the Report to the Minister along with the FCCL Report.

Annual FCCL ceilings 59. At the beginning of each financial year, upon the PPP Fiscal Risk Committee's recommendation, the Minister shall issue a decision setting a ceiling for the overall fiscal commitments that the Ministry can allocate to cover any fiscal commitments arising from PPP Projects, in accordance with any of the following—

- (a) a percentage of the gross domestic product;
- (b) a percentage of the public revenues; and
- (c) any other method that the Minister may determine, upon the recommendation of the PPP Fiscal Risk Committee.

FCCL Framework 60. The Commission shall prepare and publish, from time to time, a FCCL Framework providing guidance on estimating and managing the fiscal and contingent liabilities arising from the PPP projects during various stages of PPP project lifecycle.

PART XVII—PPP PROJECT FINANCING FUND

Fund and its functions 61.—(1) In relation to the PPP Project Financing Fund, the monies may be used for the following functions—

- (a) supporting the Contracting Authorities and Commission in preparation, tendering and management of PPP projects via third parties, including transaction advisory and related consultancy services, advertisement and marketing of the PPP projects;

(b) supporting the Commission, including for transaction advisory and related consultancy services, public awareness and marketing, capacity building activities, knowledge management, and recurring expenses of the Commission;

(c) supporting the Private Party in the provision of Viability Gap Funding for PPP projects including capital grants during construction or operations of the project, recoverable advances to the PPP project, and any other category of support to the PPP projects as may be advised by officer administering the Fund, in consultation with the Commission; and

(d) provision of a source of liquidity to meet contingent liabilities arising from a PPP project.

(2) Additional sources of monies to the Fund may be appropriated by the Parliament, in consultation with the Commission.

(3) The Commission may establish subcommittees for better governance and operations of the Fund.

62. In relation to the Fund—

Fund
accounts

(a) the monies paid into the Fund shall be paid into bank accounts opened for the purposes of the Fund;

(b) Accounts shall be opened in the banks recognized by the Reserve Bank of Malawi; and

(c) different bank accounts may be opened for the purposes of the Fund's functioning, if needed.

63.—(1) The Fund shall be subject to both internal and external audits in accordance with the provisions of the Public Audit Act.

Audit of the
Fund
Cap. 37:01

(2) The internal audit shall be conducted by the Central Internal Audit and shall comply with international Professional Practices Framework as issued by the Institute of Internal Auditors.

(3) The external audit of the Fund shall be carried out by the Office of the Auditor General or another external auditor appointed by the Commission, subject to approval of the Auditor General.

64.—(1) The Chief Executive Officer of the Commission shall be designated as the officer administering the Fund.

Officer
administering

(2) The functions of officer administering the Fund shall be—

(a) act as a secretary and technical arm to the Commission;

(b) supervise and control the administration of the Fund;

(c) prescribe all forms and prepare all funding documentation necessary for proper administration of the Fund;

(d) prepare estimates of annual revenue and expenditure of the Fund relating to the public private partnerships program and the Fund's operational expenses and submit it to the Commission for adoption;

(e) establish proper systems of control and oversight over the operations of the Fund;

(f) advise and consult the Commission on matters relating to the administration of the Fund;

(g) advise and consult with the Secretary to the Treasury on matters relating to the administration of the Fund as may, from time to time, be necessary;

(h) keep and maintain complete financial records of all projects supported under the Fund;

(i) advise the Commission on trends and projections relating to the financing requirements under the Fund;

(j) prepare non-financial performance reports of the Fund and submit it to the Commission for adoption;

(k) cause to be kept proper books and records relating to the Fund and to the activities financed under the Fund;

(l) prepare, monitor the budget of the Fund in accordance with guidelines provided in the Fund manual;

(m) prepare, sign and submit to the Auditor General in respect of each financial year and within three months after end of each financial year, a statement of accounts relating to the Fund in the form prescribed by the Public Finance Management Act and file a copy to the Treasury and the Commission on Revenue Allocation;

(n) furnish any additional information which is proper and sufficient for proper discharge of the mandate of the Auditor General; and

(o) any other function as may be entrusted by the Commission.

No.4 of 2022

Secretariat
of the Fund

65.—(1) The Commission shall establish a secretariat for the Fund with appropriate resources as may be designated on the Fund manual.

(2) The functions of the secretariat in relation to Fund are to—

(a) support officer administrating the Fund in the administration of the Fund;

(b) notify every eligible entity of the Fund and the Fund's mandate;

(c) develop and publish standardised forms for use by eligible entities;

(d) develop and publish the procedures for the managing applications made by eligible entities;

(e) prepare an annual budget in accordance with—

(i) the provisions of the Act;

(ii) the budget preparation guidelines as per the Government Financial Regulations and Procedures; and

(iii) the annual budget guidelines issued by the Treasury;

(f) prepare every Funding Agreement between the Fund and eligible entity;

(g) ensure that every eligible entity that has received an allocation from the Fund reports adequately on the use of the allocation; and

(h) monitor the progress of projects that have received an allocation from the Fund.

66.—(1) The Commission shall prepare and publish, from time to time, a manual for governance and operations of the Fund. Fund Manual

(2) The manual shall provide for, among other things—

- (a) governance structure of the Fund;
- (b) eligible activities and criteria to access the funds;
- (c) the accounting standards applied by the Fund;
- (d) the financial policies and procedures of the Fund;
- (e) budget and cash-flow management at the Fund;
- (f) reporting mechanisms;
- (g) financial regulation;
- (h) monitoring and evaluation of the Fund; and
- (i) standard forms.

Made this 27th day of October, 2023.

(FILE NO. PFMS/2/1)

S. CHITHYOLA
Minister of Finance and Economic Affairs

GOVERNMENT NOTICE No. 59

PUBLIC FINANCE MANAGEMENT ACT

(No. 4 of 2022)

PUBLIC FINANCE MANAGEMENT (INTEGRATED FINANCIAL MANAGEMENT INFORMATION SYSTEM) REGULATIONS, 2023

IN EXERCISE of the powers conferred by section 115 of the Public Finance Management Act, 2022, I, SIMPLEX CHITHYOLA, Minister of Finance and Economic Affairs, make the following Regulations—

1. These Regulations may be cited as the Public Finance Management (Integrated Financial Management Information System) Regulations, 2023. Citation

2.—(1) The Accountant General shall use an integrated financial management information system in the management of public resources. Integrated financial management information system

(2) The integrated financial management information system shall be an integrated computerized accounting platform for all transactions involving public money and assets to promote effectiveness, transparency, and accountability.

(3) The integrated financial management information system shall be used for, but not limited to—

- (a) budget preparation, implementation, monitoring and tracking performance;
- (b) revenue collection, management, allocation and utilization;
- (c) expenditure administration, modification and transfer of money from one vote to another;
- (d) monitoring cashflow movements, funding requests and funding prioritization;
- (e) registration of public assets, their management and disposal;
- (f) debt management;
- (g) payroll management;
- (h) payment of pension, compensation and losses;
- (i) accounting and financial reporting;
- (j) public investment management;
- (k) procurement, inventory and contract management; and
- (l) bank reconciliations.

Management of integrated financial management information system

3.—(1) In order to protect the integrity of the integrated financial management information system, the Accountant General shall develop detailed manuals providing for standard operating procedures which aim at—

- (a) restricting access into the integrated financial management information system;
- (b) detecting and preventing unauthorized activities;
- (c) tracking down all activities and users in the system; and
- (d) securing the integrity and reliability of the system from sabotage, abuse or unauthorized access.

Cap 74:02

(2) The Accountant General may work together with the Malawi Computer Emergency Response Team established under section 6 of the Electronic Transactions and Cyber Security Act and any other relevant entities to protect the integrity of the integrated financial management information system.

Controlling officers to designate officers for user rights

4.—(1) A controlling officer shall designate officers who shall be granted user rights in the integrated financial management information system.

(2) A controlling officer shall submit to the Accountant General a list of the designated officers to be granted user rights in the integrated financial management information system.

(3) A controlling officer shall specify in the list of designated officers the nature of work of the designated officers and the extent of access which the Accountant General may grant.

(4) A controlling officer shall, within five working days, inform the Accountant General, in writing, of any changes in the status of the designated officer which adversely affect such officer's eligibility to continue accessing and using the integrated financial management information system.

(5) The changes in status under subregulation (4) may include, but not limited to—

- (a) death of the officer;
- (b) transfer of the officer to another department;
- (c) resignation from employment;
- (d) dismissal from employment;
- (e) retirement from employment; or
- (f) change of position within the ministry, department or agency.

5.—(1) The Accountant General shall assign user rights in the integrated financial management information system to a designated officer.

User rights in the integrated financial management information system

(2) A designated officer who is granted user rights in the integrated financial management information system shall—

- (a) use the rights only for the authorized purposes;
- (b) not share with any other person, user rights, or information, the use of which may give that other person access to the system; and
- (c) immediately report to the Accountant General any suspected illegal activity affecting the user's rights or access into the system.

6.—(1) A public body, which intends to develop, procure or install a financial management information system, shall consult the Accountant General prior to the development, procurement or installation of the system.

Financial management information system for public bodies

(2) The Accountant General shall, from time to time, develop guidelines setting out minimum requirements which every financial management information system used by a public body shall comply with.

Made this 27th day of October, 2023.

S. CHITHYOLA

(FILE NO. PFMS/2/1)

Minister of Finance and Economic Affairs

GOVERNMENT NOTICE NO. 60

PUBLIC FINANCE MANAGEMENT ACT

(NO. 4 OF 2022)

PUBLIC FINANCE MANAGEMENT (TREASURY SINGLE ACCOUNT)
REGULATIONS, 2023

IN EXERCISE of the powers conferred by section 115 of the Public Finance Management Act, 2022, I, SIMPLEX CHITHYOLA, Minister of Finance and Economic Affairs, make the following Regulations—

1. These Regulations may be cited as the Public Finance Management (Treasury Single Account) Regulations, 2023. Citation