



REPUBLIC OF MALAWI

**Millennium Challenge Account - Malawi
(MCA-Malawi)**

BID CHALLENGE SYSTEM PROCEDURES

JUNE 2015

Table Contents

DEFINITIONS 3

Article 1. Right to Challenge 5

Article 2. Suspension of Procurement Proceedings 5

Article 3. Bid Challenge Review Committee 6

Article 4. Submitting a Bid Challenge 6

Article 5. Bid Challenge Proceedings 8

Article 6. Independent Review Board 8

Article 7. Submitting an Appeal 10

Article 8. Appeal Proceedings 10

Article 9. Right of Bidders to Join Bid Challenge Proceedings 11

Article 10. Notice, Calculation of Periods of Time 12

Article 11. Language Requirements 12

Article 12. Filing Fee and Costs 12

Article 13. Governing Rules 13

Article 14. Reporting to MCC 14

DEFINITIONS

Bidder(s)	Any Consultant, Contractor or Supplier that participates in the procurement process to provide goods, services or construction works in the furtherance of the Compact.
Bidding Documents	Any solicitation document for the procurement of goods, services and works in the furtherance of the Compact.
Bid Challenge	The right of all Bidders to seek review of procurement actions and decisions.
Claim	The written allegation made by a Bidder who believes that he/she has suffered or may suffer loss or injury due to a breach of a duty by MCA-Malawi in the conduct of a procurement proceeding.
MCA-Malawi	The Millennium Challenge Account – Malawi Authority, a statutory entity established under the laws of the Republic of Malawi.
Potential Bidder	Bidders who would have participated in the solicitation process but for an alleged mistake of MCA-Malawi
IRB	Independent Review Board
IRP	Independent Review Panel
Review Panel	The first level of bid challenge review by MCA-Malawi.

PREAMBLE

WHEREAS, on 7 April 2011], the United States of America, acting through the Millennium Challenge Corporation (“MCC”), and the Republic of Malawi (“the Government”) signed a Millennium Challenge Compact (“the Compact”) that, set forth the general terms and conditions on which MCC will provide funding of Three Hundred Fifty Million Seven Hundred Thousand United States Dollars (US\$350,700,000) to the Government for a program to reduce poverty through economic growth in Malawi (“the Program”), and describes the terms and conditions for procurements of goods, services and works made in furtherance of the Compact using MCC funding;

AND WHEREAS , the Government has designated the Millennium Challenge Account – Malawi (“MCA-Malawi”) to implement the Program pursuant to the laws of the Republic of Malawi;

AND WHEREAS, pursuant to the Compact, MCA-Malawi shall ensure that the procurement of all goods, works and services by the Government is consistent with the MCC Program Procurement Guidelines;

AND WHEREAS, the MCC Program Procurement Guidelines require that MCA-Malawi establishes and publishes a Bid Challenge System that provides bidders and potential bidders the ability to seek a review of procurement actions and decisions.

NOW, THEREFORE, in consideration of the promises and covenants contained in the Compact, MCA-Malawi has established the procedures set forth in this Bid Challenge System (“the Challenge Procedures”) and agrees that the review of procurement actions and decisions shall be referred to as bid challenges, and these Challenge Procedures shall be incorporated in all bidding documents distributed to potential bidders.

The principles upon which these Challenge Procedures are based include:

- a) Clear explanations of why bidders were disqualified or unsuccessful bids or proposals were not selected.
- b) A procedurally simple and expeditious process to address concerns about how procurement rules and procedures were applied to specific procurement actions.
- c) The action to suspend the procurement proceedings and to prevent, in normal circumstances, the signing of a contract while a challenge remains outstanding.
- d) One body to hear a challenge as a first step and an independent body to hear an appeal as a second step.
- e) The ability to implement corrective measures.

Capitalized terms used but not defined herein shall have the meaning given to them in the MCC Program Procurement Guidelines.

Article 1. Right to Challenge

1.1 A Bidder¹ or Potential Bidder², that claims to have suffered or claims that it may suffer loss or injury because of an alleged decision or action of MCA-Malawi that is not in compliance with the MCC Program Procurement Guidelines or Standard Bidding Documents, may challenge the decision or action concerned, except for:

- a. the selection of a method of procurement or selection procedures;
- b. the selection of the type of procurement;
- c. the decision by MCA-Malawi to reject all offers; or
- d. allegations of fraud and corruption or intent of wrong doing in the procurement process, which shall be processed in accordance with MCC's Policy on Preventing, Detecting and Remediating Fraud and Corruption in MCC Operations, a copy of which is available on MCC's Website (www.mcc.gov).

Any Bidder or Potential Bidder who wishes to raise an allegation of fraud and corruption or intent of wrong doing involving MCC funding should do so directly with MCC and/or the U.S. Office of the Inspector General (OIG). This may be done using the following links:

MCC:

1. Go to the MCC Website link: www.mcc.gov/reportfraud
2. Complete MCC Reporting Form and press "Submit" to send to MCC online

OIG:

1. Go to the OIG's Website link: www.usaid.gov/oig/hotline/hotline.htm
2. Click on "Webform Submission," complete form, press "Submit Complaint"
3. Or call the OIG at 800-230-6539 or 202-712-1023

1.2 Subcontractors or members of the general public are not eligible to submit a bid challenge.

1.3 Bid challenge proceedings may be initiated by submitting a bid challenge to MCA-Malawi, pursuant to Article 4 of these Challenge Procedures.

Article 2. Suspension of Procurement Proceedings

- 2.1 The procurement under review will be suspended for the duration of the bid challenge proceedings, if the Bid Challenge Review Committee’s report recommends suspension, , unless MCA-Malawi or the Independent Review Board (IRB) determines that:
 - a. there are urgent or compelling reasons not to suspend;
 - b. the claim is frivolous;
 - c. there will be no irreparable harm to the challenger; or
 - d. The granting of the suspension will cause disproportionate harm to MCA-Malawi.
- 2.2 MCA-Malawi shall not sign a contract in the procurement proceedings concerned when it receives:
 - a. a bid challenge within the time periods specified in Article4; or
 - b. An appeal within the time period specified in Article7.
- 2.3 A suspension shall be lifted:
 - a. three (3) working days after a written decision of the Bid Challenge Review Committee has been sent to the challenger and to all Bidders in the procurement proceedings ; or
 - b. immediately after a written decision of the Independent Review Board has been sent to the challenger, to all Bidders in the procurement proceedings, and to MCA-Malawi
- 2.4 The decision to not suspend the procurement proceedings and the reasons therefore, shall be made part of the bid challenge record, and shall promptly be communicated to the challenger, and to all Bidders in the procurement proceedings.

Article 3. Bid Challenge Review Committee

- 3.1 For the purposes of these Challenge Procedures, MCA-Malawi shall establish a Bid Challenge Review Committee (“Review Committee”), entrusted with considering bid challenges and making a recommendation to the Chief Executive Officer (CEO) of MCA-Malawi.
- 3.2 The Review Committee shall consist of three (3) members, including the MCA-Malawi Procurement Director, MCA-Malawi Legal Director, and MCA-Malawi Procurement Agent Manager, or their delegated representatives.

Article 4. Submitting a Bid Challenge

- 4.1 A Bidder or Potential Bidder may submit a written bid challenge in English (which may be in electronic form using the MCA-Malawi e-mail address, which (a) must be in the form set forth in **Annex A**, and (b) must state at least the information required in

said form, followed by a hard copy by fax or mail) to MCA-Malawi for a review of a decision or an action taken by MCA-Malawi in the procurement proceedings. .

4.2 A bid challenge shall:

- a. Identify the procurement out of which the bid challenge arises;
- b. Describe the nature of the bid challenge and supporting facts, including the bidding documents or portion of the procurement process that was allegedly in non-compliance;
- c. Identify the specific provision(s), as set forth in the MCC Program Procurement Guidelines or the bidding documents, which were allegedly non-compliant;
- d. The justification for the bid challenge including the nature of the loss or injury suffered as a result of the decision taken by MCA Malawi during the execution of the procurement.
- e. Requested remedy;
- f. Explain why the bid challenge was timely; and
- g. Include the name, address, telephone and facsimile numbers, as well as the email address of the challenger.

4.3 A bid challenge shall be submitted to MCA-Malawi, in writing, within the following time periods:

- a. Bid challenges to decisions or actions taken by MCA-Malawi in pre-qualification or pre-selection proceedings shall be submitted within five (5) working days after the pre-qualification or pre-selection decision or action.
- b. Bid challenges to the bidding documents shall be submitted within ten (10) working days after MCA-Malawi issues an invitation to prequalify or submit a bid or submit a proposal.
- c. Bid challenges to any two-envelope (i.e., separate technical and financial bid or proposal) procurement proceedings shall be submitted within five (5) working days after notification of the technical rankings/results and/or after the combined evaluation result is known.
- d. Bid challenges of all other decisions or actions taken by MCA-Malawi in the procurement proceedings shall be submitted within five (5) working days after the notice of award or three (3) working days after receiving a written debriefing, as set forth in paragraph 4.4 below.

Note: Any information, document or additional document or information submitted by the challenger after the date mentioned under 4.3 shall not be considered.

4.4 For the purposes of these Challenge Procedures, a Bidder may request a debriefing by submitting a written request for debriefing to MCA-Malawi within two (2) working

days after receipt of the notice of award. MCA-Malawi shall provide a written explanation of why the Bidder was not selected within three (3) working days of receiving the request for debriefing.

Article 5. Bid Challenge Proceedings

- 5.1 MCA-Malawi shall notify all Bidders of the substance of the bid challenge not later than three (3) days after receipt of the bid challenge.
- 5.2 The Review Committee may recommend that the Chief Executive Officer of MCA-Malawi dismiss the bid challenge if it decides that:
 - a. the bid challenge is clearly without merit, including not citing a specific provision, as set forth in paragraph 4.2(c);
 - b. the bid challenge was not submitted within the time periods set out in paragraph 4.3; or
 - c. the challenger is not eligible to submit a bid challenge, as set forth in paragraph 1.2.
- 5.3 The Review Committee may recommend that the Chief Executive Officer of MCA-Malawi adopt a decision to overturn, correct, vary or uphold a decision or action taken in the procurement proceedings to which the bid challenge relates.
- 5.4 The Chief Executive Officer of MCA-Malawi, or their delegated representative, shall issue a decision within ten (10) working days after receipt of the bid challenge. MCA-Malawi shall immediately thereafter communicate the decision to the challenger and to all Bidders in the procurement proceedings. The decision shall:
 - a. be in writing;
 - b. state the action taken and the reasons therefore; and
 - c. promptly be made part of the bid challenge record, together with the bid challenge received by MCA-Malawi.
- 5.5 If MCA-Malawi does not issue a decision to the challenger, as required in paragraph 5.4 above, or the challenger is dissatisfied with the written decision, the challenger may immediately thereafter submit an appeal to the Independent Review Board, as set forth in Article 7. When such proceedings commence, the Review Committee will no longer be the review body.

Article 6. Independent Review Board

- 6.1 MCA-Malawi has established an Independent Review Board (IRB) consisting of a minimum of six (6)³ competent and qualified persons, the members of the IRB shall be independent and impartial, and have no interest (through financial, family, business or beneficial ownership or otherwise, directly or indirectly) the outcome

of the procurement, nor be involved or connected with the procurement process. The full

names, addresses, occupations, nationalities and qualifications of all qualified persons shall be posted on the MCA-Malawi website for the bidder and MCA-Malawi to choose from. Representatives from industry associations and legal and judicial bodies shall be invited to join the IRB. These organizations will be requested to nominate representatives who will be trained by MCA-Malawi.

- 6.2 An Independent Review Panel (IRP) consisting of three (3) IRB Members shall be established when an appeal is made to the IRB. Within one (1) working day of MCA-Malawi receiving an appeal, each party (MCA-Malawi and the bidder) shall appoint one (1) member from the IRB. The first Member of the IRP shall be appointed by the bidder and the second Member shall be appointed by MCA-Malawi – each party shall be responsible for the fees and expenses for the Member chosen by it, to be negotiated independently by each party. In case a Member is challenged or replaced, the other party shall appoint a new Member. The two Members thus appointed shall appoint, within three (3) working days, a third Member of the IRP from the IRB whose cost shall be shared between the two parties, to be the presiding Member of the IRP, called the Chairperson of the IRP. MCA-Malawi shall pay for the logistics of the proceedings. If within three (3) working days after the receipt of a party's notification of the appointment of an IRP Member by the other party, the other party has not notified the first party of the IRP Member it has appointed, then the first IRP Member shall appoint the second Member.
- 6.3 In the event that a member of the IRP is not available or does not meet the requirements set forth in paragraph 6.6 below, the other Members of the IRP shall immediately select another member of the Independent Review Board at random.
- 6.4 Any Member of the IRP may be challenged by the other party if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence. The challenging party shall give notice of the challenge to the other party, to the member of the IRP who is challenged and to the other members of the IRP. The notification shall be in writing and shall state the reasons for the challenge. When a Member of the IRP has been challenged by a party, the other party may agree to a challenge, and the procedure described in Article 6.2 shall be used in full for the appointment of the substitute Member. If the other party does not agree to the challenge and the challenged Member does not withdraw within three (3) working days after delivery of a notice pursuant to the requirement above, the decision on the challenge will be made by the Chairperson. If the Chairperson decides the challenged member should not participate in the IRP, then the Chairperson shall appoint a substitute Member from the IRB.
- 6.5 MCA-Malawi shall enter into agreements with the members of the Independent Review Board, setting forth qualifications, training requirements, restrictions on participation, confidentiality, and reasonable compensation for services based on local market conditions.
- 6.6 The members of the Independent Review Board will be well-versed in procurement

and MCA-Malawi will arrange for training in MCC procurement principles, practices and procedures.

Article 7. Submitting an Appeal

- 7.1 A Bidder may appeal against a decision or non-decision of MCA-Malawi with the Independent Review Board, subject to restrictions set forth in Article 9.
- 7.2 A written appeal shall be submitted to the MCA-Malawi Chief Executive Officer marked ATTN: INDEPENDENT REVIEW BOARD within three (3) days from the date on which MCA-Malawi issues, or should have issued, a written decision from the MCA Malawi Review Committee. An Appeal must be in the form set forth in **Annex B**.
- 7.3 An appeal shall include:
 - a. a request that the challenge be referred to the IRB;
 - b. the name and address of the bidder;
 - c. a copy of the original bid challenge;
 - d. a copy of the written decision issued by MCA-Malawi, if available; and
 - e. a written response by the challenger to the written decision or non-decision of MCA-Malawi setting forth:
 - i. The objection by the challenger to the written decision or non-decision;
 - ii. The basis for that objection; and
 - f. The justification for the challenge, including the nature of the loss or injury suffered as a result of MCA Malawi’s Review Committee’s decision or none decision under the MCC program procurement guidelines, and the requested remedy;
- 7.4 The details of MCA-Malawi’s bank accounts shall be availed to any bidder upon request from the MCA-Malawi via the CEO.

Article 8. Appeal Proceedings

- 8.1 MCA-Malawi shall notify all Bidders of the substance of the appeal not later than two (2) days after receipt of the appeal.
- 8.2 MCA-Malawi shall provide the IRP with a brief report responding to an appeal within four (4) days of receipt of that appeal.
- 8.3 The IRP shall review the bid challenge record and only entertain issues raised in the bid challenge and written decision.
- 8.4 The IRP may only overturn a decision that it finds has no reasonable basis or is a clear error of judgment in the application of the MCC Program Procurement Guidelines or bidding documents, provided, however; if there is no written decision, the IRP may

request that MCA-Malawi provide access to all documents in its possession relating to the subject procurement proceedings, and review the decisions or actions taken to which the bid challenge relates.

- 8.5 The IRP may take one or more of the following actions:
 - a. Prohibit MCA-Malawi from acting, taking a decision or following a procedure that it finds is not in compliance with the MCC Program Procurement Guidelines or bidding documents;
 - b. Recommend that MCA-Malawi act or proceed in a manner that is in compliance with the provisions of the MCC Program Procurement Guidelines or bidding documents;
 - c. Uphold a decision of MCA-Malawi;
 - d. Deny the appeal; and/or
 - e. Require the payment of compensation for any reasonable and verifiable cost of bid preparation and appeal, not to include attorney fees or lost profits. Any decision requiring payment of compensation shall be subject to review by MCC.
- 8.6 The IRP chairperson shall issue a decision and submit to the MCA CEO, within ten (10) days after the receipt of the appeal from MCA-Malawi, with an option to extend five (5) days with sufficient cause.
- 8.7 The IRP’s decision shall then be communicated to the challenger, and to all Bidders in the procurement proceedings. MCA-Malawi shall then proceed to publicize the decision on all avenues previously used for the procurement. The decision shall:
 - a. be in writing;
 - b. state the action taken and the reasons therefore; and
 - c. promptly be made part of the bid challenge record, together with the appeal received by MCA-Malawi.

Article 9. Right of Bidders to Join Bid Challenge Proceedings

- 9.1 Any Bidder, who appears to have a substantial prospect of receiving an award, may join in the bid challenge proceedings by either submitting:
 - a. written comments to a bid challenge; or
 - b. an appeal, in accordance with Article 7.
- 9.2 Written comments shall be submitted to MCA-Malawi not later than three (3) days after receipt of the bid challenge notice. Written comments shall promptly be made part of the bid challenge record.
- 9.3 Bidders, who join, in accordance with paragraph 9.1 above, shall be deemed participants of the bid challenge proceedings. Any Bidder who does not join the bid challenge proceeding cannot thereafter submit a bid challenge or appeal citing the

same circumstances.

Article 10. Notice, Calculation of Periods of Time

- 10.1 For the purposes of these Challenge Procedures, any notice, including a notification, communication, bid challenge, appeal or decision is deemed to have been received if it is delivered to the address on record with MCA-Malawi. Notice shall be deemed to have been received on the day it is so delivered.
- 10.2 Within one (1) day of receipt of a request to appeal an MCA-Malawi decision to the IRB, MCA Malawi will begin the process of establishing an IRP pursuant to Article 6.
- 10.3 For the purposes of calculating a period of time under these Challenge Procedures, such period shall begin on the first working day (as defined herein) following the day when a notice, notification, communication, bid challenge, appeal, or decision is received. If not otherwise specified in these Challenge Procedures, all references to “days” shall mean working days. “Working day” means any day in Malawi that is not a public holiday or a weekend.
- 10.4 Notices and all other documents required to be delivered to MCA-Malawi, the Review Committee or the IRB, under these Challenge Procedures, shall be sent to the following physical or electronic addresses:

Millennium Challenge Account –Malawi
 CHIEF EXECUTIVE OFFICER
 MCA-Malawi, Pamodzi House, off Presidential Way, Plot No. 13/42, P.O. Box 31513
 Telephone: +265 1 774 303
 Telephone/Fax: +265 1 774 301
 Email: susan.banda@mca-m.gov.mw

Article 11. Language Requirements

- 11.1 All written documents related to these Challenge Procedures shall be in English.

Article 12. Filing Fee and Costs

- 12.1 There shall be no filing fee applied to the submission of a bid challenge.
- 12.2 In the event of an appeal to the IRP, the MCA-Malawi and the Challenger shall share the costs of the appeal proceedings equally, except that personal attorney and expert fees are the direct responsibility of the individual parties. As a sign of good faith, the

Challenger shall at the time of the appeal, deposit the amount of USD 10,000 (or equivalent in Malawi Kwacha at the Bank of Malawi exchange rate for the day of filing the appeal) into MCA Malawi’s bank account via an electronic transfer, to be managed by MCA-Malawi and used as a non-refundable deposit (unless otherwise determined by the IRP) against its liability towards the total costs of the IRP proceedings. This payment via electronic transfer must be made within 24 hours of filing an appeal or the appeal shall be deemed invalid.

- 12.3 The IRP shall set forth the costs of the appeals proceeding in their written decision. The term “costs” includes:
 - a. The fees, travel, per diem, translation services, administrative costs, and other expenses of the IRP, calculated in accordance with the agreement that each member has entered into with MCA-Malawi;
 - b. The reasonable costs of technical advisors and of other assistance required by the IRP; and
 - c. The travel and other expenses of technical advisors to the extent such expenses are approved by the IRP.

Article 13. Governing Rules

- 13.1 These procedures shall govern the bid challenge system, except that where any of these procedures are in conflict with provisions of the Compact, PIA or the MCC Program Procurement Guidelines, provisions of the latter shall prevail.
- 13.2 These Challenge Procedures, and any disputes arising under these Challenge Procedures, shall be governed by and construed in accordance with the laws of the Republic of Malawi
- 13.3 The bidding documents shall state that every Bidder or Potential Bidder, bidding for the provision of services and/or the supply of goods or execution of works, agrees to be bound by these Challenge Procedures, and they further accept at the commencement of bidding that no legal challenge of any kind may be instituted in any court in any jurisdiction with respect to any matter, claim or issue arising out of the bidding and procurement processes until and unless a bid challenge and appeal have been completed in accordance with these Challenge Procedures.
- 13.4 MCA-Malawi may, with the prior written approval of MCC, modify these Challenge Procedures in writing from time to time. For the avoidance of doubt, the Challenge Procedures posted at the time the bid challenge is submitted shall govern with respect to those suppliers, providers and contractors, even if MCA-Malawi subsequently modifies the Challenge Procedures in accordance with this Article 13.

Article 14. Reporting to MCC

- 14.1 Bidders and Potential Bidders shall have no right to appeal to MCC regarding decisions resulting from these Challenge Procedures.
- 14.2 Within three (3) days after a final decision, MCA-Malawi shall submit to MCC a report of the handling and disposition of the bid challenge. The report shall include the bid challenge record, all notices and other relevant correspondence.
- 14.3 MCC, at its sole discretion, has the right to be an observer to all bid challenges and appeals proceedings, but does not have the obligation to participate in any proceeding, in any capacity. The acceptance by MCC of the right to be an observer to any proceeding shall not constitute consent to the jurisdiction of the courts or any other body of the Republic of Malawi or any other jurisdiction.

Form of Challenge

Challenger		
Name:		
Choose one: <input type="checkbox"/> Bidder <input type="checkbox"/> Potential Bidder		
(For legal persons only) Country under whose laws Challenger was organized:		
Postal address for Protest purposes:		
Email address for Protest purposes:	Telephone number for Protest purposes:	Fax number for Protest purposes:
Name of authorized representative for the Protest (if any):		
Signature of Challenger or authorized representative:		

Challenged Procurement
Name:
Number:

Protest	
Date when Challenger became aware of Procurement Action:	Date of filing of Protest:
Description of Procurement Action:	
Procurement Rules provisions violated by Procurement Action:	
Explanation of reason why Procurement Action constitutes a violation of the Procurement Rules provisions:	
Explanation of reason why Challenger has been damaged by Procurement Action:	

--

If Challenger requests suspension of Procurement Action, explanation of reason why Challenger will suffer irreparable damage if Procurement Action is not suspended:

--

Relief Sought

Description of relief sought:

--

Explanation of reason why Challenger is entitled to relief sought:

--

MILLENNIUM CHALLENGE ACCOUNT – MALAWI BID CHALLENGE SYSTEM PROCEDURES

Instructions:

1. Please use additional sheets for the required information if necessary.
2. Please attach copies of the relevant documents if available.

Form of Appeal

Appellant		
Name:		
Postal address for Appeal purposes (if different from postal address for Protest purposes):		
Email address for Appeal purposes:	Telephone number for Appeal purposes:	Fax number for Appeal purposes:
Name of authorized representative for the Appeal (if any):		
Signature of Appellant or authorized representative:		

Challenged Procurement
Name:
Number:

Appeal	
Date when Appellant became aware of BCRC Decision:	Date of filing of Appeal:

Explanation of reason why the Appellant believes that the BCRC failed to decide the Protest in accordance with the BCRC's Duty:	

Relief Sought
Description of relief sought:
Explanation of reason why Appellant is entitled to relief sought:

Instructions:

1. Please attach a copy of each of the following documents, if available to the Appellant: (a) the Protest and its attachments, and the Comment and its attachments, if any, (b) the BCRC Decision, and (c) proof of timely payment of the appropriate Appeal Fee and Appeal Deposit.
2. Please use additional sheets for the required information if necessary.