



Millennium Challenge Account-Nicaragua THE BID CHALLENGE PROCESS

PREAMBLE

In accordance with the Millennium Challenge Compact (the “Compact”) signed between the Government of the Republic of Nicaragua and the United States of America, acting through the Millennium Challenge Corporation (“MCC”) and its associated documents, including the Procurement Agreement, dated as of May 30, 2006, among MCC, the Technical Secretariat of the Presidency and MCA-Nicaragua, pursuant to which MCA-Nicaragua is required to establish a bid challenge process that provides bidders¹ the ability to seek review of procurement actions and decisions. Accordingly, MCA-Nicaragua shall entertain complaints from any bidder that claims to have suffered or that may suffer loss or injury due to a breach of a duty by MCA-Nicaragua under the Procurement Guidelines in the conduct of any procurement. Capitalized terms that are not defined herein shall have the meanings given to such terms in the Compact and the Procurement Agreement.

The bid challenge process is established to provide bidders with a means to seek transparency in any procurement proceeding. The bid challenge process is intended to ensure that if errors or abuse in the procurement process occur, there is suitable redress for the aggrieved parties and that proper corrections are made. The process is not intended to examine or review the implementation or conduct of any contract once awarded.

An effective bid challenge process is one that reviews alleged inappropriate acts and decisions taken by MCA-Nicaragua, ensures the proper functioning of the procurement process and promotes confidence in the process. This document sets forth provisions establishing a right to review and governs the exercise of that right.

The principles of the bid challenge process are to:

- a) Clearly and openly state the basis on which decisions are made to accept and evaluate bids and proposals in the requests for bids or proposals;
- b) Provide unsuccessful bidders and proponents, upon request, clear explanations of why their bids or proposals were rejected or not selected; and
- c) Establish and implement a formal bid challenge process to address complaints about how procurement rules and procedures were applied to specific procurement actions.

¹The term “bidder” is used herein to generally describe any consultant, contractor, supplier or other person or entity that participates in a procurement process to provide goods, works or services in furtherance of the Compact.

The rules set forth below (these “Rules”) shall govern MCA-Nicaragua’s bid challenge process except where any of such rules are in conflict with the provisions of the Compact or Procurement Agreement (including the Procurement Guidelines), in which case the provisions of such documents shall prevail in the order in which they are referred to herein.

RULES

Section 1 General Right to Review

(1.1) Except as set forth in paragraph (1.2) of this section, any bidder that claims to have suffered, or that may suffer loss or injury due to a breach by MCA-Nicaragua of the procurement provisions of the Compact or the Procurement Agreement, including the Procurement Guidelines, in the course of a procurement, may seek review in accordance with Section 2. Such a bidder shall be referred to as a “Claimant” and the claim shall be referred to as a (“Complaint”).

(1.2) The following shall not be the subject of a Complaint entitled to the review provided for in paragraph (1.1) of this section:

(a) The selection of a procurement method (QCBS, QBS, etc.) or the type of procurement (goods, works, non-consultant services, consultant services); or

(b) A decision by MCA-Nicaragua to reject all tenders, proposals, offers or quotations or to otherwise terminate a procurement process.

Section 2 Review by MCA-Nicaragua

(2.1) Each Complaint submitted by a Claimant in accordance with these Rules will be subject to a review by a Technical Panel comprised of the following: MCA-Nicaragua’s Deputy General Director, Procurement Director, General Counsel, and a representative of MCA-Nicaragua’s Procurement Agent. The Board of Directors of MCA-Nicaragua may in its sole discretion change the composition of the Technical Panel; provided that any such change will be notified to all bidders.

(2.2) The purpose of providing this review by MCA-Nicaragua is essentially to determine and correct defective acts, decisions or procedures in case they might exist. Such an approach can avoid unnecessarily burdening higher levels of review with cases that might have been resolved by the parties at an earlier, less disruptive stage.

(2.3) The duties, functions and powers of the Technical Panel are to receive and review Complaints from Claimants, conduct inquiries into Complaints, determine whether Complaints are valid and, if so, recommend the proper corrections to be adopted by the General Director or the Board of MCA-Nicaragua, as the case may be. The determination of the review will be made in accordance with these Rules. See below for timelines for action.

(2.4) The Technical Panel at its discretion can also convoke additional experts in the field to assist with the review. When appointing additional experts, the Technical Panel shall use its best efforts to select and appoint experts who are best qualified with the matter at hand and who do not have any direct or perceived conflict of interest in the outcome of the Complaint and shall not have been involved in the procurement process at issue.

(2.5) A Complaint may be initiated by the Claimant by submission in writing (which may be by email or fax) to MCA-Nicaragua (through the Procurement Agent at the address

given below) at the following times:

(i) within five (5) working days of the date of (a) issuance or modification of a request for proposals or (b) a decision to extend the time for submission of proposals;

(ii) in the event that the procurement process requires a technical evaluation prior to the opening of financial bids, within three (3) working days of the date that the results of the technical evaluation are notified to bidders; and

(iii) within three (3) working days of the date that the proposed award is notified to bidders.

Solely to the extent that a Complaint is based on facts or information that was not available to a Claimant at the times set forth above, a Claimant may also file a Complaint within three (3) working days of the date that the Claimant knows or should reasonably be expected to know (whichever is earlier) of the fact that gives rise to the Complaint. Complaints that are untimely on their face shall be dismissed.

The Complaint submitted by the Claimant shall:

a) include the name, address, telephone and facsimile numbers of the Claimant; b) identify the procurement action out of which the Complaint arises; c) include all information required to establish the timeliness of the Complaint; d) describe the nature of the Complaint and the facts supporting such Complaint; and e) state the form of relief requested.

Only lead bidders shall be eligible to file a Complaint (not the sub-bidders, sub-contractors, or sub-consultants).

(2.6) All Complaints should be sent to the Procurement Agent at the following address:

MCA- Nicaragua
Att: LUIS VILLALTA
Procurement Agent,
MCA-Nicaragua
Villa Fontana No. 26, Frente al costado norte del Club Terraza Anexo B: Cuenta
Reto del Milenio Managua, Nicaragua Telefax: (505) 277 1272; E-mail:
lvillalta@louisberger.com

(2.7) Once the Complaint has been received by the Procurement Agent it shall be handled in the following manner:

(2.7.1) The Complaint will be sent via a formal letter, by email or fax by the Procurement Agent to the General Director of MCA-Nicaragua within one (1) working day after receiving the Complaint, and the General Director will promptly forward such Complaint to the Technical Panel.

(2.7.2) The Technical Panel shall have five (5) working days from the time it receives such Complaint to issue a written decision, which period may be extended at the discretion of the Technical Panel for five (5) additional working days. The timely submission of a Complaint suspends the procurement process temporarily, provided that the Complaint is not frivolous (as determined by the Technical Panel), and contains a declaration which, if

proven, demonstrates that the Claimant will suffer irreparable injury in the absence of a suspension. In the event that the Technical Panel determines that the procurement should be suspended, the Technical Panel shall inform all bidders of the suspension of the procurement process and take such other measures as it deems necessary to maintain the integrity of the procurement process pending a resolution of the Complaint.

(2.7.3) The Technical Panel will determine whether the Claimant has an interest in the procurement concerned, whether the information provided discloses a reasonable indication that the procurement has not been carried out in accordance with the Procurement Agreement and whether the Claimant has filed sufficient information to support its Complaint. The Technical Panel at any time following receipt of the Complaint may request additional information relating to the relevant procurement, indicating the time in which the Claimant shall provide such information.

(2.7.4) If a Complaint fulfills the conditions set forth above, the Technical Panel shall recommend a decision to be adopted by the General Director or the Board of MCA-Nicaragua, as the case may be. This recommendation shall state:

- (a) the reasons for a decision, and/or
- (b) the remedial measures, if any, to be taken.

(2.7.5) The General Director or the Board of MCA-Nicaragua, as the case may be, will review the recommendations of the Technical Panel and render a decision in relation with the Complaint. This decision shall be notified in writing (which may be by email or fax) by the Procurement Agent to the Claimant within two (2) working days of the decision.

Section 3 Appeal for an Administrative Review by a Procurement Panel

(3.1) If the Claimant is not satisfied with the decision of the General Director or of the Board of MCA-Nicaragua, as the case may be, rendered in accordance with Section 2 above, the Claimant shall have the right to request that the Complaint be subject to an administrative review (a "Review") by a procurement panel established in accordance with this Section 3. The following procedures shall be followed in this case of a Review.

(3.2) A Review can be initiated by the Claimant by submission in writing (which may be by email or fax) to MCA-Nicaragua (through the Procurement Agent) within five (5) working days from the date when the decision per 2.7.5 above is notified to the Claimant in writing (which may be by email or fax).

(3.3) For the Review, the Claimant shall:

- a) include the name, address, telephone and facsimile numbers of the Claimant; b) identify the procurement decision that it is requesting Review; c) include all information required to establish the timeliness of the request for Review; d) describe the nature and the facts supporting the Review; and e) state the form of relief requested.

(3.4) All requests for Reviews should be addressed to the General Director and sent to MCA Nicaragua at the following address:

MCA- Nicaragua

Att: General Director

Villa Fontana No. 26 Frente al costado norte del Club Terraza Anexo B: Cuenta
Reto del Milenio Managua, Nicaragua Telefax: (505) 277 1272 E-mail:
lvillalta@louisberger.com

(3.4.1) In the case of a Review, a procurement panel (the "Procurement Panel") comprised of three (3) members shall be established within seven (7) calendar days from the date the request is received by MCA-Nicaragua. These members shall be selected from a list of experts from the Center of Mediation and Arbitration "Antonio Leiva Perez" of The Chamber of Commerce of Nicaragua (the "Center") who do not have any direct or perceived conflict of interest in the outcome of the Complaint and shall not have been involved in the procurement process at issue. This list will be available to each party (MCA-Nicaragua and the Claimant, the "Parties") from the Center so that one member of the Procurement Panel can be selected by MCA-Nicaragua and one can be selected by the Claimant. The third member, who will act as the Chairman of the Panel, will be appointed by the Center. These three (3) members may include professors, lawyers or any other qualified professionals, provided by the Center as experts in working on Procurement Panels. The members of the Procurement Panel will be paid stipends for the time served on the panel. The costs of the Review (including the stipend of the panelists, but excluding any legal and travel costs of the Parties) shall be covered by the Parties in the proportion that the Panel determines is reasonable under the circumstances. The costs of the proceedings shall be reasonable and consistent costs for similar proceedings in Nicaragua. MCA-Nicaragua shall provide Claimant the estimated costs of the Review at the time of the decision per 2.7.5 above; provided that such estimate will not have any binding effect on the actual cost determined by the Parties.

(3.4.2) The Procurement Panel shall be convoked no later than five (5) calendar days from the date the Procurement Panel has been accepted by both MCA-Nicaragua and the Claimant, and in no case later than ten (10) working days from the date the request for the Review is received by MCA-Nicaragua. The timely submission of a request for Review suspends the procurement process temporarily, provided that the Complaint is not frivolous (as determined by the Procurement Panel), and contains a declaration which, if proven, demonstrates that the Claimant will suffer irreparable injury in the absence of a suspension. In the event that the Procurement Panel determines that the procurement should be suspended, the Procurement Panel shall inform all bidders through the Procurement Agent of the suspension of the procurement process and take such other measures as it deems necessary to maintain the integrity of the procurement process pending completion of the Review.

(3.4.3) The Procurement Panel shall consider the facts of the Complaint, and all written representations made by the Parties to determine whether or not the procurement was conducted in accordance with the Procurement Agreement and Procurement Guidelines.

(3.4.4) The Procurement Panel at any time following receipt of a request for Review may request, in writing, additional information relating to the relevant procurement, and must include the time in which the Claimant or MCA-Nicaragua shall provide such information. Each party must furnish the information requested by the Procurement Panel; provided that the Claimant may refuse to disclose certain information if it would be contrary to the public interest; would prejudice the legitimate commercial interests or fair competition between bidders; would be in breach of a legal professional privilege; or a confidentiality agreement to which the Claimant is a party. Any refusal to disclose information is to be accompanied by reasons in writing. In case the Claimant does not provide such requested information, the Procurement Panel shall continue with the review process without the information.

However, if the Procurement Panel believes that the Review cannot be continued without this information, it may decide to terminate the Review process, and declare the Complaint invalid.

If any confidential information of the Claimant is disclosed by the Claimant to the Procurement Panel at the Procurement Panel's request, the Claimant may request that such information only be made available to members of the Procurement Panel. In such cases, a statement is to be provided by the Claimant identifying the Claimant's confidential information, together with a copy of the confidential information (which is to be provided to the Procurement Panel only—the address will be given to the Claimant at the time of the Review) and one copy of the documents where the confidential information has been deleted.

(3.4.5) In case the Procurement Panel may consider necessary, the Procurement Panel may ask the Claimant or MCA-Nicaragua to appear in person and present his or her Complaint verbally. [Such proceedings shall take place in Managua, Nicaragua]. The Procurement Panel may address the Claimant or MCA-Nicaragua by asking questions. The Procurement Agent may also be called for questioning by the Panel at the discretion of the Procurement Panel.

(3.5) After hearing and reviewing all documents and statements, the Procurement Panel will discuss the facts and merits of the Complaint. The Procurement Panel may decide to meet as many times as necessary.

(3.6) If the Procurement Panel reaches the conclusion that a Complaint is valid, then it may recommend such remedy as it considers appropriate to the MCA-Nicaragua's Board of Directors. The Procurement Panel is then obliged to make a written report of its opinions or recommendations and to issue a statement describing the basis of the opinion or recommendation to be undertaken. The Procurement Panel shall issue this decision within 15 working days from the date the Procurement Panel convened for the first time, stating the reasons for the decision and the remedies granted, if any. Further, the Procurement Panel will determine the distribution of the costs (see para. 3.4.1 above) between the two Parties. This decision of the Procurement Panel shall be final.

(3.7) If the Procurement Panel finds that a Complaint is valid (in whole or in part), it may grant one or more of the following remedies:

(a) Require MCA-Nicaragua to issue the relief (in whole or in part) requested by the Claimant;

(b) Determine that MCA-Nicaragua was at fault (but not issue the relief), and require a corrective action;

(c) Annul in whole or in part the procurement proceedings, and require MCA-Nicaragua to take specific actions that the Procurement Panel may consider appropriate;

(d) Decide on cost distribution of the proceedings, and require MCA-Nicaragua to pay compensation for any reasonable costs incurred by the Claimant in connection with the procurement proceedings, provided that such reasonable costs do not include profit lost, travel costs, or punitive damages because of non-acceptance of a bid (or, proposal, offer or quotation) of the Claimant;.

(e) Require that the procurement proceedings be terminated, provided that if the procurement proceedings are terminated pursuant to this paragraph 3.7(e), MCA-Nicaragua may institute new procurement proceedings; or

(f) Recommend changing a procurement procedure and amending the documents

that constitute the procedure.

(3.8) In the case that the Complaint is considered not to be valid, the Procurement Panel will render its decision explaining the reasons of the decision.

(3.9) The decision of the Procurement Panel will be final and binding on both Parties. The decision shall be notified in writing (which may be by email or fax) by the Procurement Agent to the Claimant within two (2) working days of the decision. The decision of the Procurement Panel shall be carried out by MCA-Nicaragua within fifteen (15) working days.

Section 4 Certain rules applicable to Bid Challenge proceedings by MCA-Nicaragua or by the Procurement Panel

(4.1) A copy of the decisions of the Procurement Panel, as the case may be, shall be posted on the MCA-Nicaragua website within three (3) working days after the issuance of the decision. However, this posting shall not be undertaken if its disclosure would be contrary to the Nicaraguan law or the Compact, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interest of the Parties or would inhibit fair competition in the future.

(4.2) The process set forth in these Rules shall be the exclusive process for resolving disputes related to procurement actions under the Compact and all decisions of the Procurement Panel shall be final.

(4.3) All documents and proceedings under these Rules shall be in the Spanish language; provided that the Claimant may, at its own cost, provide for official translation services at any oral hearings or when providing statements for the record.