

MILLENNIUM DEVELOPMENT AUTHORITY

BID CHALLENGE SYSTEM

- A. WHEREAS**, the United States of America, acting through the Millennium Challenge Corporation (“*MCC*”), and the Government of the Republic of Ghana (the “*Government*”) executed the Millennium Challenge Compact on August 1, 2006 (the “*Compact*”) that sets forth the general terms and conditions on which MCC will provide funding of up to \$547,009,000 to the Government for a Millennium Challenge Account program to reduce poverty through economic growth in Ghana;
- B. WHEREAS** in accordance with the Compact and its associated documents, including the Procurement Agreement, dated as of February 16, 2007 (the “*Procurement Agreement*”), by and among MCC, the Government, acting through the Ministry of Public Sector Reform (the “*Ministry*”), and the Millennium Development Authority (“*MiDA*”), a public corporation organized under Ghanaian law, pursuant to which MiDA is required to establish a bid challenge process that provides bidders¹ the ability to seek review of procurement actions and decisions.
- C. WHEREAS** in accordance with the Procurement Agreement, MiDA 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 MiDA under the MCC Program Procurement Guidelines contemplated by the Procurement Agreement (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 or the Procurement Agreement, as the case may be.

1. Purpose and Principles

- (1) This Bid Challenge System is established to provide bidders with a means to seek transparency in any procurement proceeding. This Bid Challenge System 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 Bid Challenge System is not intended to examine or review the implementation or conduct of any contract once awarded.
- (2) An effective Bid Challenge System is one that reviews alleged inappropriate acts and decisions taken by MiDA, 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.
- (3) The principles of the Bid Challenge System are to:

¹ The 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.

- a. Establish and implement a formal Bid Challenge System to address complaints about how procurement rules and procedures were applied to specific procurement actions.
 - b. Clearly and openly state the basis on which decisions are made to accept and evaluate bids and proposals in the solicitation documents
 - c. Provide unsuccessful bidders, upon request, further explanations of why their bids or proposals were rejected or not selected; and
- (4) The rules set forth below (these “**Rules**”) shall govern MiDA’s Bid Challenge System except where any of such rules are in conflict with the provisions of the Compact, or the Procurement Agreement and the Procurement Guidelines, in which case the provisions of such documents shall prevail in the order in which they are referred to herein.

2. Right to Lodge Complaint

- (1) Subject to sub-clause (3) below in this Clause 2, the following shall have the right to lodge a complaint:
- a. Any bidder who has suffered or is at the risk of suffering a loss or damage as a result of a breach by MiDA of the procurement provisions of the Compact or of the Procurement Agreement, including the Procurement Guidelines; and
 - b. Any potential bidder who has grounds to believe that he or she or the entity he or she represents has been prevented from becoming a bidder; provided however that, the onus of proving the said prevention shall be on such potential bidder.
- (2) A person qualified under sub-clause (1) above (“**Complainant**”) shall have a right to lodge a complaint to MiDA Management in the first instance (a “**Complaint**”).
- (3) Only lead bidders shall be eligible to lodge a Complaint (sub-bidders, sub-contractors, or sub-consultants shall not qualify as Complainants).

3. Exclusion of Complaint

Notwithstanding Clause 2 above, the following shall not be the subject of a Complaint entitled to review:

- (1) The procurement method or type of procurement adopted by MiDA for any procurement;
- (2) A decision by MiDA as the context requires rejecting all bids, proposals, offers or quotations or to otherwise terminate a procurement process; or
- (3) The choice of evaluation criteria to determine the most qualified bidder.

4. Procedure for Lodging Complaint

A Complaint shall not be entertained unless:

- (1) The Complaint is submitted in writing in the English language. Any accompanying document that is not in English shall be accompanied by a version in English.
- (2) The Complainant has stated his or her particulars and the means by which he or she may be reached.
- (3) The Complainant has stated the facts upon which he or she relies.
- (4) The complainant has stated the remedy or relief that he or she seeks and the grounds upon which he or she seeks those reliefs or remedies.
- (5) The Complaint is submitted (by hand, mail, courier, email and/ fax) through MiDA's Procurement Agent with a copy to the Chief Executive Officer of MiDA at the addresses provided below:

The Procurement Agent Manager
Charles Kendall & Partners Ltd.
Private Mail Bag, CT484, Cantonments
Accra
Tel: +233 21 775603
Telefax: +233 21 775609
Email: mculpan@charleskendall.com

And to

The Chief Executive Officer
Millennium Development Authority
4th Floor, Heritage Tower
6th Avenue, Ridge
Private Mail Bag 56,
Stadium Post Office
Accra
Tel: + 233 21 666619
Fax: + 233 21 666669
Email: meson-benjamin@mida.gov.gh

All Complaints shall be submitted in accordance with the following timelines:

- a. within five (5) working days of the date of (a) issuance or modification of a solicitation document or (b) a decision to extend the time for submission of proposals;
- b. 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.

Solely to the extent that a Complaint is based on facts or information that was not available to a Complainant at the times set forth above, a Complainant may also file a Complaint within three (3) working days of the date that the Complainant 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.

5. Advisory Panel

- (1) MiDA Management shall on receipt of a Complaint, initially, set up a Five (5) member Advisory Panel (the “*Advisory Panel*”) whose work shall be in accordance with these Rules:
- (2) The duties, functions and powers of the Advisory Panel will be to review Complaints from Complainants, conduct inquiries into Complaints, and determine whether Complaints are valid. The Advisory Panel’s conclusions shall be made in the form of recommendations for action or otherwise, to the Chief Executive Officer.

See below for timelines for action

- (3) The Advisory Panel will determine whether the Complainant 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 Complainant has filed sufficient information to support its Complaint. The Advisory Panel at any time following receipt of the Complaint may request additional information relating to the relevant procurement, indicating the time in which the Complainant shall provide such information.
- (4) The timely submission of a request for Review will suspend the Procurement Process for the duration of the bid challenge process unless there are urgent or compelling reasons not to. However the procurement will not be suspended if: the claim is frivolous, there will be no irreparable harm to the Challenger, or the granting of the suspension will cause disproportionate harm to the Compact Goal, Project or Project Activity (as determined by the Advisory Panel).
- (5) In the event that the Advisory 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.

6. Composition of the Advisory Panel

- (1) The Advisory Panel shall be appointed for the purposes of a Complaint to MiDA Management and shall be comprised of the following drawn from MiDA’s staff (other than in the case of (v):
 - i. Legal Counsel
 - ii. The Chief Operating Officer
 - iii. Procurement Director
 - iv. The Project Manager under whom the particular procurement is being undertaken

- v. A person who is knowledgeable in public procurement and who is not in the public service and has no conflict of interest with the activities of MiDA or the subject matter of the Complaint.
 - vi. The Advisory Panel at its discretion will also have the option to convoke additional experts in the field to assist with their investigation/enquiry. When appointing additional experts, the Advisory 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) The following persons shall not be qualified to represent MiDA on the Advisory Panel:
- i. The Chief Executive Officer of MiDA
 - ii. Any person who is connected to, or is the subject of the Complaint. In the event that one of the designated members of the Advisory Panel is the subject of the Complaint, MiDA Management shall appoint a suitable replacement.
- (3) The Advisory Panel shall upon receipt of the Complaint, investigate the Complaint and communicate its findings and recommendations to the Chief Executive Officer within five (5) working days or if necessary, with prior notification to the Complainant, extend this time for a further five (5) working days
- (4) The Chief Executive Officer shall take the recommendations of the Advisory Panel into account in reaching his decision. This decision shall be notified in writing (which may be by email or fax) by the Procurement Agent to the Complainant within two (2) working days of the decision.
- (5) Upon the communication of the decision by the Procurement Agent to the Complainant, the Advisory Panel shall be deemed to be dissolved.

7. Appeal To Appeal Panel

- (1) A complainant who is still not satisfied with the decision of the Chief Executive Officer or who does not receive the Chief Executive Officer's decision within the specified time after duly lodging a Complaint, shall have the right to appeal (an "**Appeal**") to a three-member panel of procurement experts (the "**Appeal Panel**") within two (2) working days of receipt of the Chief Executive Officer's decision or expiry of the specified time limit within which the Chief Executive Officer's decision should have been communicated.
- (2) If a complainant fails to lodge an Appeal to the Appeal Panel within two (2) working days under Section 7(1), he/she will be deemed to have waived all rights to complain and the procurement process shall take its normal course.
- (3) For the Appeal, the Complainant shall:
- a include the name, address, telephone and facsimile numbers of the Complainant;
 - b identify the procurement decision that it is the subject of the Appeal;
 - c include all information required to establish the timeliness of the request for Appeal;

- d describe the nature and the facts supporting the Appeal; and
 - e state the form of relief requested.
- (5) All requests for Appeals should be addressed to the Secretary to the Board of MiDA with a copy to the Chief Executive Officer at the following address:

The Secretary to the Board of Directors
Millennium Development Authority

4th Floor, Heritage Tower
6th Avenue, Ridge
Private Mail Bag 56
Stadium Post Office
Accra
Tel: + 233 21 666619
Fax: + 233 21 666669
Email: dgyamfi@mida.gov.gh

And to

The Chief Executive Officer
Millennium Development Authority
4th Floor, Heritage Tower
6th Avenue, Ridge
Private Mail Bag 56
Stadium Post office
Accra
Tel: + 233 21 666619
Fax: + 233 21 666669
Email: meson-benjamin@mida.gov.gh

8. Appeal Panel

- (1) In the case of an Appeal, MiDA shall in consultation with the Public Procurement Authority, procure a list of experts in the field of procurement who do not have any direct or perceived conflict of interest in the outcome of the Appeal and shall not have been involved in the procurement process at issue.
- (2) The list of experts will be made available to each Party (MiDA and the Complainant) who shall each select one member; the third member shall be jointly appointed by the members selected by the Parties, in consultation with the Public Procurement Authority. The Members of the Appeal Panel shall be paid sitting fees for the time served on the Panel. The costs of the Appeal including members' sitting fees 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 with costs for similar proceedings in Ghana.
- (3) The Appeal Panel shall sit no later than later then five (5) working days from the date the request for the Appeal is received by MiDA. The timely submission of a request for Appeal will suspend the procurement process for the duration of the appeal process unless there are urgent or compelling reasons not to. However the procurement will not

be suspended if: the claim is frivolous, there will be no irreparable harm to the Challenger, or the granting of the suspension will cause disproportionate harm to the Compact Goal, Project or Project Activity (as determined by the Advisory Panel).

- (4) In the event that the Appeal 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 Appeal.
- (5) The Appeal 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.
- (6) The Appeal Panel at any time following receipt of a request for Appeal may request, in writing, additional information relating to the relevant procurement, and must include the time in which the Complainant or MiDA shall provide such information.
- (7) Each party must furnish the information requested by the Appeal Panel; provided that the Complainant 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 violate a confidentiality agreement to which the Complainant is a party. Any refusal to disclose information is to be accompanied by reasons in writing. In case the Complainant does not provide such requested information, the Appeal Panel shall continue with the Appeal process without the information. However, if the Appeal Panel believes that the Appeal cannot be continued without this information, it may decide to terminate the Appeal process, and declare the Complaint invalid.
- (8) If any confidential information of the Complainant is disclosed by the Complainant to the Appeal Panel at the Appeal Panel's request, the Complainant may request that such information only be made available to members of the Appeal Panel. In such cases, a statement is to be provided by the Complainant identifying the Complainant's confidential information, together with a copy of the confidential information (which is to be provided to through the Secretary to the Board only) and another copy of the documents where the confidential information has been deleted.
- (9) In case the Appeal Panel may consider necessary, the Appeal Panel may at any time ask the Complainant or MiDA to appear in person and present his or her Complaint verbally. The Appeal Panel may address the Complainant or MiDA by asking questions. The Procurement Agent may also be called for questioning by the Panel at the discretion of the Appeal Panel.
- (10) After hearing and reviewing all documents and statements, the Appeal Panel will discuss the facts and merits of the Complaint. The Appeal Panel may decide to meet as many times as necessary within the specified time period for arriving at their recommendations.
- (11) If the Appeal Panel reaches the conclusion that a Complaint is valid, then it may recommend such remedy as it considers appropriate to the full MiDA Board of Directors. The Appeal 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.

- (12) The Appeal Panel shall issue its recommendations within Ten (10) working days from the date the Appeal Panel convened for the first time, stating the reasons for their recommendations.
- (13) The MiDA Board of Directors shall take a decision on the basis of the recommendations of the Appeal Panel, within four (4) working days of receipt of the recommendations of the Appeal Panel.
- (14) If the Board finds that a Complaint is valid (in whole or in part), it may grant one or more of the following remedies:
 - a Require MiDA to issue the relief (in whole or in part) requested by the Complainant;
 - b Determine that MiDA 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 MiDA to take specific actions that the Appeal Panel may consider appropriate;
 - d Decide on cost distribution of the proceedings, and require MiDA to pay compensation for any reasonable costs incurred by the Complainant 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 Complainant;
 - e Require that the procurement proceedings be terminated, provided that if the procurement proceedings are terminated pursuant to this paragraph 14(e), MiDA may institute new procurement proceedings; or
 - f Recommend changing a procurement procedure and amending the documents that constitute the procedure.
- (15) In the case that the Complaint is considered not to be valid, the Board will render its decision explaining the reasons of the decision.
- (16) The decision of the Board will be final and binding on both Parties. The decision shall be notified in writing (which may be by email or fax) by the Secretary to the Board to the Complainant within two (2) working days of the decision. Any decision of the Board requiring action from MiDA shall be carried out within fifteen (15) working days of its issuance.

9. Certain rules applicable to Bid Challenge proceedings by the Advisory Panel or by the Appeal Panel

- (1) A copy of the decisions of the Advisory Panel or the Board, as the case may be, shall be posted on the MiDA 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 Ghanaian law or the Compact, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of Parties or would inhibit fair competition in the future.

(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 Appeal Panel shall be final.

(3) All documents and proceeding under these rules shall be in the English language; provided that the Complainant may at its own cost, provide for official translation services at any oral hearings or when providing statements for the record

Timetable of Actions

Administrative Procedure	No. of Working Days					Total
Complainant lodges complaint	1					
MiDA sets up Advisory Panel	1					
Advisory Panel considers and Reports		5				
CEO MiDA makes decision			2			
Procurement Agent informs complainant of decision			1			8
If the Complainant is still aggrieved						
Appeal Panel						
Complainant lodges complaint	2					
Secretary to MiDA Board establishes Appeal Panel		5				
Appeal Panel reviews, decides and reports			10			
Board of MiDA takes decision				4		
Secretary of Board issues decision					2	
Decision placed on MiDA website					1	23
Decision to suspend Procurement			2			
Procurement Suspended				14		16

