



ACCOUNTING OFFICERS/ CHIEF FINANCIAL OFFICERS/ SCM HEADS

PROHIBITION OF SET-ASIDES AND THE USE OF COST ESTIMATES AS BENCHMARKS

Practice Note Number: **SCM-12 of 2006**

This practice note is applicable to Provincial Departments and public entities as defined in schedule 3A and 3C of the Public Finance Management Act (PFMA). All accounting officers are required to disseminate the contents of this practice note to their chief financial officers.

1. PROHIBITION OF SET-ASIDES AND THE USE OF COST ESTIMATES AS BENCHMARKS

1.1 Set-Asides

1.1.1 The National Treasury has received several complaints that departments/institutions are inviting bids with specific conditions that promote set-asides or exclude certain categories of potential bidders from bidding for government contracts.

1.1.2 Section 217 (2) of the Constitution of the Republic of South Africa allows for organs of state or institutions to implement a procurement policy that provides for categories of preference in the allocation of contracts and the protection or advancement of persons or categories or persons, disadvantaged by unfair discrimination.

1.1.3 Section 217 (3) of the Constitution makes provision for national legislation to prescribe a framework within which this policy must be implemented.

1.1.4 The national legislation contemplated in section 217 (3) of the Constitution was adopted in the form of the Preferential Procurement Policy Framework Act (PPPFA), Act No 5 of 2000.

1.1.5 The preferences contemplated in the Constitution and PPPFA provide for the protection or advancement of categories of persons, disadvantaged by unfair discrimination **without prohibiting** any category of bidders from bidding for government contracts.

1.1.6 The following is an abstract of the opinion given by the Office of the Chief State Law Adviser regarding the interpretation of the prescripts of the PPPFA vis-à-vis section 217 of the Constitution:

“In our view, there is **nothing** in the PPPFA **that permits** an organ of state to **exclude** any person or category of persons to bid for a tender contract. The preferential procurement policy is aimed thereat to give HDI’s, according to a preferential points system, an advantage above other bidders, to redress historical imbalances and increase opportunities for those previously prevented from participating in the country’s mainstream economy. This is as far as the policy goes. Since the HDI’s factor has already been taken into account as a specific goal, it could not be regarded as objective criteria, or threshold criteria, in awarding a tender. As explained above, this would mean that HDI’s would compete against each other as a category bidders, with no need to award preferential points if there are no other categories of person (white bidders) bidding for the same tender. A specific condition in the tender contract disallowing a certain category (i.e. whites) of the public not to bid for such a contract, appears to be contrary to the principles of fairness and equitability, as well as the principles of competitiveness and cost-effectiveness. We are therefore of the opinion that it will be unconstitutional to **exclude** “white tenders” to bid in a tender process”

- 1.1.7 Accounting Officers / Authorities are, therefore, required to give all potential suppliers an opportunity to bid for government contracts. The practice of issuing bid documents that contain conditions that promote set-asides or **exclude** certain categories potential bidders from bidding for government contracts must be refrained from.

1.2 Use of Cost Estimates as Benchmarks

- 1.2.1 It has also come to the fore that departments/institutions are incorrectly evaluating bids by using cost estimates as a benchmark to regard bids as unacceptable or **non-responsive**.

- 1.2.2 The PPPFA prescribes that the lowest acceptable bid must receive 80 or 90 points for price. A bid is regarded as **acceptable** if:

- (a) it complies in all respects with the specification and conditions of the bid;
- (b) the bidder completed and signed all the prescribed bid forms to enable the principal to evaluate the submitted bid;
- (c) the bidder submitted the required tax clearance certificate and other clearance/registration forms as prescribed by various acts and/or in the bid documentation; and
- (d) the bidder has the necessary capacity and ability to execute the contract.

- 1.2.3 Bids should only be evaluated in accordance with the evaluation criteria stipulated in the bid documentation. When any bid is passed over or regarded as **non-responsive**, the reasons for passing over such a bid must be defensible in a court of law. Examples in this regard may include negative banking reports, non-submission of tax clearance certificates, not having the necessary capacity and/or capability and being listed on the Register for Tender Defaulters.

1.2.4 Deviation by more than a predetermined percentage from the cost estimates of the project/commodity cannot be regarded as a justifiable reason for the rejection of a bid and has, therefore, not been approved by the National Treasury as an evaluation norm or criteria.

2. MEASURABLES ATTACHED TO SPECIFIC GOALS FOR WHICH PREFERENCE POINTS ARE AWARDED

2.1 It has also come to light that departments/institutions are inviting bids without clearly indicating in the bid documentation the goals promoted and the applicable measurables for the promotion of such goals.

2.2 The PPPFA prescribes that any goals for which points are awarded must be measurable and clearly specified in the invitation to submit a bid. Treasury Regulation 16A 6.3(b) furthermore prescribes that an Accounting Officer/Authority must ensure that bid documentation include the evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA and the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003).

2.3 To this end, Accounting Officers / Authorities are required to ensure that when bids are invited, the specific goals to be promoted, and the preference points allocated, together with measurables for the promotion of each goal, must form part of the bid documentation. These measurables must clearly indicate how the bidder will be awarded a score out of the maximum points allocated.

3. EFFECTIVE DATE

This practice note takes effect from 01 February 2006.



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