

## Chapter 16

### BEST PRACTICE IN SOUTH AFRICAN CONSTRUCTION PROCUREMENT LAW

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#### INTRODUCTION

The construction industry plays an important role in the South African economy. According to Statistics South Africa (Stats SA), the industry contributed 4% to the country's Gross Domestic Product (GDP) in the first quarter of 2015 (Stats SA, 2015). It was also the industry with the largest turnover for the last quarter in 2014 (Lehohla, 2014).

In 1994, with the constitutional transformation of South Africa, a need to transform the public procurement system of the time was identified. The construction industry was used as a model for procurement reform in South Africa and much of the rules and procedures incorporated into the new public procurement regime were adopted from English and international law.

Consequently, the construction industry, public procurement is heavily regulated. The legislation applicable to this industry is the general public procurement legislation as well as the *Construction Industry Development Board Act (CIDB Act) 32 of 2005* and its Regulations. The CIDB Act provides that the CIDB must promote best practice by publishing best practice guidelines for further regulation of the industry. This article will determine whether the qualification criteria for construction contractors in South Africa complies with the imperatives of Section 217 of the Constitution, where the rules may fall foul of the section. It will also highlight the current developments in South African public procurement law to the extent that they have a bearing upon the qualification stage of the procurement process.

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## METHOD

In this chapter, a literature based review and analysis of legislation will be used. Various applicable literature sources will be referred to and the meaning of legislative provisions will be analysed.

### **Legal Regulation of Government Procurement in South Africa**

#### ***Legislative Frameworks for Government Procurement***

Section 217(1) of the Constitution provides that when contracting for goods or services, organs of state in the national, provincial or local sphere of government or institutions identified in national legislation must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 217(2) provides for the use of procurement as a policy tool. This provision states that subsection (1) does not prevent organs of state or institutions in subsection (1) from implementing procurement policies providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination. Section 217(3) prescribes a national legislative framework to be enacted in terms of which preferential procurement policies as contemplated in subsection (2) are to be implemented.

The law applicable throughout the procurement process is the private law of contract (Bolton, 2007). However, because the government is a party to the contract and is obligated to act in the public interest and deals with public funds, public law, or more specifically administrative law, is applicable as well (Ferreira 2011). Therefore, section 33 of the Constitution which protects the right to just administrative action applies to public sector procurement. Section 217(2) and (3) of the Constitution provide for the use of procurement as a policy tool. Public procurement is thus used to attain equity. Section 9 of the Constitution which entrenches the right to equality is therefore also applicable.

The legislation applicable to procurement in general includes the Preferential Procurement Policy Framework Act (PPPFA) 5 of 2000 and its Regulations which regulate preferential procurement by providing a framework in terms of which preferential procurement policies must be implemented. At national and provincial government

level, the Public Finance Management Act (PFMA) 1 of 1999 and its Regulations govern public finance in general and public sector procurement. The Local Government: Municipal Finance Management Act (MFMA) 56 of 2003 with its Regulations and the Local Government: Municipal Systems Act 32 of 2000 manages public finance and thus public sector procurement at local government level.

The Supreme Court of Appeal (SCA) has further held in paragraph 552 of *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* that the invitation, evaluation and award of government tenders is of an administrative law nature, therefore, the Promotion of Administrative Justice Act (PAJA) 3 of 2000 applies. The Promotion of Access to Information Act (PAIA) 2 of 2000 is also applicable as it regulates access to any information held by both the government and private parties. The Broad-Based Black Economic Empowerment Act (BBBEEA) 53 of 2003 applies to preferential procurement in that it regulates black economic empowerment. Various National Treasury Practice Notes are also published specifically for public procurement purposes. Since public procurement is of great economic importance, of potential application is the Competition Act 80 of 1998 since the purpose of this Act is *inter alia* the promotion of economic efficiency, the socio-economic welfare of South African citizens and the participation of small, medium and micro enterprises (SMMEs) in the economy. The Protected Disclosures Act 26 of 2000 also finds application and lastly, the Prevention and Combating of Corrupt Activities Act 12 of 2004 which is aimed at curbing corruption in general and also in procurement processes is relevant. Legislation which regulate procurement in general also prescribe that the specific prescripts of the CIDB apply to construction procurement alongside the general legislation.

### **Legislative Frameworks for Public Sector Construction Procurement**

Legislation applicable to public sector construction procurement are those applicable to procurement in general, the CIDB Act, the Regulations to the Act and the prescripts issued by the CIDB. Section 2 of the Act establishes the CIDB as a juristic person and regulatory board for the construction industry and construction procurement in particular. The Act sets out the powers and functions of the board, it requires a register of contractors to be created for efficient

procurement practices and to facilitate public sector construction procurement.

In terms of section 5(1)(vii) the CIDB must promote and implement policies aimed at procurement reform. Section 5(1)(viii) provides that the board may promote and implement policies and programmes aimed at standardisation of procurement documentation, practices and procedures. The board is empowered in terms of section 5(4)(b) to initiate, promote and implement national programmes aimed at the standardisation of procurement documentation, practices and procedures. Section 5(3)(c) of the Act further places an obligation on the CIDB to promote standardisation of the procurement process within the framework of the government procurement policy in order to advance the uniform application of policy in the construction industry.

A register has been established in terms of section 16(1) of the Act of which the purpose is to provide for efficient public sector procurement in the construction industry. Contractors are registered in different categories which are determined based on their grading designations and their status as potentially emerging contractors. Nine grading designations exist in which contractors are registered and all contractors must apply to the CIDB to be registered in a specific category. Section 18(1) of the Act provides that a contractor may not undertake, carry out or complete any construction work or portions of the work if such contractor is not registered with the CIDB and holds a valid registration certificate. A contractor who disobeys this requirement is guilty of an offence in terms of section 18(2) of the Act. There are, however, certain contractors who are exempt from registration in Regulation 4.

### **The Meaning of Construction Procurement**

Regulation 1 of the CIDB Act defines construction procurement as “procurement in the construction industry, including the invitation, award and management of contracts.”<sup>1</sup> A construction contract is generally considered to be a form of letting and hiring of services or work (Du Toit, 2008). In the South African procurement context, construction work is considered to be a part of services. There is therefore no additional or separate category for construction works. Within the construction industry, a distinction is made between

construction works, services, supplies and disposals. These four categories thus constitute construction procurement.

Construction works are specifically defined in section 1(j) of the CIDB Act as “the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure”. However, in terms of the Regulations to the CIDB Act, construction works are divided into categories or classes which appear to exclude goods and services. These are defined in Schedule 3 to the CIDB Regulations. The first class is civil engineering works which involves *inter alia* the construction of bridges, the provision of water supply, drainage works and pipelines. The second class is electrical engineering works involving infrastructure which refers to the generation, transmission and distribution of electrical equipment. The third class provides for electrical engineering involving electrical installation in buildings. General building works as a fourth class refers to the construction of buildings and the fifth class, mechanical engineering works, provides for *inter alia* boiler installations, air-conditioning and mechanical ventilation. The last class provides for specialist works which are identified and defined by the CIDB and may constitute the demolition of buildings and engineering infrastructure and blasting.

Services in the construction industry are not defined in the Act or its Regulations. However, the CIDB Standard for Uniformity in Construction Procurement defines a services contract as “the contract for the provision of labour or work, including knowledge-based expertise, carried out by hand, or with the assistance of equipment and plant”. A distinction appears to be made between services in general and professional services. Professional services in the construction industry involve the design and supervision of construction work for limited periods of time without the obligation of permanent employment, possessing superior knowledge, transfer of skills and upgrading of a knowledge base while executing an assignment and the provision of independent advice.

Supply contracts are “contracts for the provision of materials or commodities made available for purchase”. Lastly, disposals have been described as contracts for “the divestiture of assets, including intellectual property and other rights and goodwill by any means,

including sale, rental, lease, license, tenancy, franchise, auction or any combination thereof" (Watermeyer, 2004).

### **Qualification of Contractors in Public Sector Procurement**

When contractors wish to conclude contracts for the provision of goods or services, the procuring entity often requires compliance with certain criteria. These criteria are the minimum requirements for participation in the procurement process and serve as an indication to the procuring entity of the capability of a contractor to perform the contract in question (Arrowsmith, Linarelli, & Wallace, 2000). The criteria are normally advertised in a call for tenders or expressions of interest. It entails the financial and technical requirements needed in order to ensure that the winning contractor will be able to perform in terms of the contract (Arrowsmith, Linarelli, & Wallace, 2000). It may also entail "secondary" or "horizontal" criteria which are criteria not directly aimed at determining whether a contractor is able to perform a contract. It may relate to a contractor's criminal record for example or compliance with other laws such as affirmative action laws or the integrity and business practices of contractors (Arrowsmith, Linarelli, & Wallace, 2000). Trepte (2004) notes that the general suitability of a contractor is looked at and refers to the general standing of the potential tenderer. The purpose is to ensure that the tenderer is of good professional standing, responsible and trustworthy.

A distinction has been made between pre-qualification, qualification and shortlisting. It has been noted that the pre-qualification of a contractor takes place in the case of open procedures where the procuring entity decides which tenderers will be invited to submit a tender offer.<sup>2</sup> In the case of restricted procedures, qualification is done prior to contractors being invited to submit tender offers and at which stage a shortlist of those to be invited is made (Arrowsmith, Linarelli, & Wallace, 2000).

The pre-qualification of tender offers, it is said, must be distinguished from the evaluation of tenders. Pre-qualification merely determines the capability of tenderers to complete a contract as opposed to evaluation which involves determining the lowest price or best offer received (Arrowsmith, Linarelli, & Wallace, 2000). Pre-qualification therefore relates to the tenderers and evaluation to the tenders.

### **Qualification of Construction Works Contractors in the South African Construction Industry**

As noted, qualification of contractors in the construction industry is regulated by means of registers. A national Register of Contractors is established in terms of section 16(1) of the CIDB Act and indicates which contractors are qualified to tender for a construction works contract. Contractors are placed on the Register in terms of a grading designation which is determined by their financial and works capability. A contractor's status as a potentially emerging enterprise,<sup>3</sup> its recognition status in terms of a best practice recognition scheme and its Broad-Based Black Economic Empowerment (B-BBEE) recognition level are also considered when determining which grading a contractor should have. Contractors are registered in one of nine grading designations with grade one being the grade with the lowest value of contracts for which contractors may tender and grade nine with an unlimited value, the highest. A contractor may be registered to perform more than one class of construction works but may hold one grading designation in relation to a specific class. It should be noted that certain contractors are exempt from registration on the Register of Contractors. Regulation 4(1) exempts contractors who are registered as home builders in terms of the Housing Consumer Protection Measures Act 95 of 1998 from registration with the CIDB for the purpose of construction works relating to the provision of a home. Regulation 4(2) and (3) further exempt contractors who perform construction contracts which substantially consist of the provision of labour, in other words services and construction contracts which substantially consist of the provision of supplies.

Secondly, a Register of Projects is established in terms of section 22(1) of the CIDB Act for the recording of projects in which construction works contractors are involved. Failure to register a project must be reported to the Auditor-General in terms of Regulation 21(4).

#### ***Qualification Criteria for Placement on the Register of Contractors***

The CIDB Regulations differentiate between requirements for contractors to be registered in grade one and those to be registered in grades two to nine.

### *Grading Designations Two to Nine*

A contractor, who wishes to be registered as a grade of 2-to 9-contractor, must apply to the CIDB for the registration. Application must be made for registration in at least one grading designation. As noted, a contractor may be registered for more than one class of construction works, but may hold one grading designation for a specific class of works. An application for registration must be accompanied by the required fees as indicated in Schedule 2 to the Regulations and the complete financial statements of the contractor for the two years preceding the application. Where the financial statements are not audited, supporting evidence relating to the contractor's turnover as set out by the South African Revenue Services (SARS) and proof of payment of value added tax must be provided if requested by the CIDB. An original tax clearance certificate issued by SARS must be provided as well as certified copies of the identity documents of the principal(s) of the contractor. Proof of any financial sponsorship must be provided, qualified persons employed by the contractor must be registered and if the contractor is registered with an emerging contractor development scheme, proof of such registration must be furnished. Documentary proof of contracts completed must be submitted to the CIDB as well as any other information required by the Board. The CIDB may obtain a contractor's tax clearance certificate if authorised to do so and may take reasonable steps to verify the information provided by a contractor. If a contractor does not provide further information within 60 days as requested by the CIDB, the application for registration may be cancelled. The information on the Register of Contractors on the CIDB website serves as a contractor's registration certificate.

In terms of Regulation 10(1), the CIDB must appoint an assessor or an independent person with the relevant expertise to evaluate applications for registration. The assessor is obligated in terms of Regulation 10(2) to decide on the specific category of registration for a contractor and may register a contractor in a lower grading than that applied for. The contractor must be notified within 21 days and may request reasons for registration in a lower grading.

### *Grading Designation One*

As in the case of grading designations two to nine, a contractor who wishes to be registered as a grade one contractor must apply to

the CIDB for the registration. An application for registration as a grade one contractor must be accompanied by certified copies of the identity documents of the contractor's principal(s), the registration number and certificate in the case of a close corporation, an original tax clearance certificate issued by SARS, proof of registration with the relevant professional bodies for example the Electrical Contracting Board of South Africa and any other information required by the CIDB.

### **Qualification for Grading Designations**

Regulation 11(1) provides that a grading designation is determined by a contractor's financial and works capability. Different criteria are used for grades five to nine and grading designations two to four. It would appear that no specific qualification criteria is applicable to grade one contractors who may conclude contracts with a value below or equal to R200 000.

A contractor, who is registered in grading designations two to four, must have financial capability determined by the contractor's best annual turnover for the two years immediately preceding the application for registration which must be equal to or exceed the minimum amount indicated in Regulation 12(1). The contractor is required to have completed at least one construction works contract during the five years immediately preceding the application which exceeds a value indicated in Regulation 12(1). The contractor must further have available capital equal to or exceeding the minimum amounts indicated in Regulation 12(1).

The works capability of a contractor in grade two to four is determined by the number of qualified persons as indicated in Regulation 12(4). The contractor is further required to fulfil the requirements in Regulations 12(5) or (8) which provide for registration with the relevant professional bodies. Lastly, the contractor must have completed at least one construction works contract in the five years immediately preceding the application in the category for which the contractor wishes to register which is of a value exceeding the minimum amount stated in Regulation 12(7).

In order to determine the financial capability of a contractor in grade five to nine, it must be established whether the contractor has available capital equal to or exceeding an amount indicated in Regulation 12(1). A contractor is required to employ the minimum

number of qualified persons as indicated in Regulation 12(4) in the specific class of construction works for which it wants to register. As in the case of grading designations two to four, the contractor applying to be registered as a grade five to nine contractor must be registered with the relevant professional body as provided for in Regulations 12(5) or (8).

### ***Grading Designation for Joint Ventures***

Regulation 25(6) provides that the grading designation of a joint venture<sup>4</sup> is determined based on the number of partners registered in a specific grade. In other words, a joint venture will be a grade three contractor if three of its partners are registered in grading designation two. Similarly, a joint venture will be a grade four contractor if three of its partners are registered in grading designation three. Its grading can also be determined in terms of Regulation 11 and will be based on the sum of the annual turnovers of all its members, the sum of the available capital of all the members and the total number of full-time qualified persons in the specific class of construction works advertised.

### **Qualification Criteria for the Invitation of Construction Works Contracts**

Contrary to the above, the qualification of this section relates to the ability of an organ of state to invite offers to tender for construction work. The qualification criteria relating to the invitation of construction works contracts are applicable to organs of state who advertise contracts with a value equal to or exceeding R30 000. Regulation 25(1) provides that subject to subregulation (1A), a call for tenders or expressions of interest must stipulate that only those contractors who are registered in the category of registration for which a contract is advertised or higher, may tender. However, a contractor who is not registered in the required category but who is capable of being registered before tenders are evaluated, may submit a tender offer. In the case of an expression of interest, the contractor concerned must be capable of being registered within 21 days of the closing date for submission.

Regulation 25(2) provides that despite subregulation (1A) a procuring organ of state may under extreme conditions state in its call for tenders or expressions of interest that only contractors who

are registered at the time of the advertisement will be evaluated. Extreme conditions are considered to be when human injury or death, human suffering or deprivation of human rights, serious damage to property or financial loss, injury, suffering or death of livestock or other animals, serious environmental damage or degradation and the interruption of essential services is present or imminent. A single class of construction works which best describes the work to be performed must be advertised. However, if more than one class adequately describes the work, no more than two classes may be stated in the tender call. In terms of Regulation 25(3)(b), a contractor's recognition status in terms of a best practice contractor recognition scheme must also be considered to determine its grading designation. In the case of a joint venture, Regulation 25(5) provides that it may submit a tender offer or expression of interest if every member is registered and the leading partner is registered in the specific grading designation for which the contract is advertised.

Of note is that in terms of Regulation 25(7), an organ of state must determine after the receipt of tender offers, the final lowest category of registration required for the contract concerned. An organ of state may further evaluate a tender offer from a tenderer which is registered but tendered outside of its grading designation. This is, however, conditional upon the requirements that the margin by which the value of the contract advertised and that for which the contractor may tender, is reasonable. The award of a contract to such tenderer must furthermore not pose any undue risk to the procuring organ of state. Lastly, the decision to award a contract to a tenderer in terms of this Regulation must be reported. An organ of state may furthermore evaluate the tender offer of a contractor who is a potentially emerging enterprise for a contract with a tender value one grade higher than the grading designation for which the contractor is registered. This may take place provided that the contractor has the potential to develop and qualify to be registered in the higher grade and that the contractor has the necessary financial, management and other support to enable it to perform the contract properly. Lastly, an organ of state must be satisfied prior to awarding a contract that the suggested winning tenderer is registered in terms of the Regulations, is not prohibited by legislation from participating in the procurement process and has the necessary resources to perform the contract.

The tenderer's capacity to perform the contract must furthermore not be unduly compromised by the award of the contract.

## RESULTS AND DISCUSSION

### Qualification of Construction Works Contractors and Section 217

#### *Fairness*

Fairness in the public procurement context refers to procedural fairness in the relationship between an organ of state and tenderers and the relationship between tenderers in relation to each other (Bolton, 2007). In order for the process to be fair, it is required that the tender information or qualification criteria are publicly available. It is further required that tenderers should be familiar with all the applicable criteria and that the process should provide for sufficient participation. The qualification criteria which construction works contractors are required to meet, are found in the Construction Industry Development Regulations, CIDB prescripts and the CIDB website ([www.cidb.org.za](http://www.cidb.org.za)). Tendering opportunity is afforded to contractors who are capable of performing contracts of all values and classes of construction works, thus providing for a system of grading designations which facilitates competition. Furthermore, Regulation 24 provides that invitations for tenders or expressions of interest should be advertised on the CIDB website and in accordance with the PFMA and the MFMA.

Qualification criteria are therefore widely published for sufficient participation. The requirement that a contractor's works and financial capability must be evaluated promotes fair treatment of tenderers in relation to each other. The tenders received are competitive and therefore evaluated fairly as opposed to tender offers which differ vastly with regard to works and financial capability. It ensures that only those tenderers who are capable of performing, compete in the process. Neither the Regulations, nor the CIDB prescripts provide for qualification criteria applicable to contractors registered in grading designation one. Consequently, no standard exists in terms of which the capability of a grade one contractor to perform a contract can be tested or established. It has been recorded in CIDB statistics that one of the reasons for poor quality in construction work in South Africa is procurement related, specifically the lack of pre-qualification of tenderers.<sup>5</sup> It would appear that the qualification of grade one

contracts for the purpose of registration and evaluation is, in the absence of qualification criteria, done at the discretion of the procuring entity.

As noted, in order for fairness to be complied with, tenderers should be treated fairly in relation to one another. It has been noted that grade two to nine contractors are required to comply with a registration system from which grade one contractors are exempt. On the face of it, it may appear as though these contractors have been given an unfair advantage above others.

However, this may have been done in the interest of cost-effectiveness. As required by National Treasury Practice Notes, all procurement transactions below R500 000 must be procured by way of written quotations. Grade one contracts would be awarded by means of quotations which is a less formal method of procurement. Additionally, the administrative process in procuring goods or services from grade one contractors would also be shorter. CIDB prescripts have indicated that grade one contractors, which constitute the micro enterprise sector has been over stimulated in the building and civil engineering classes of construction works to the extent that these enterprises are no longer sustainable.

Challenges facing this sector have been recorded as low annual average turnovers due to contractor dependence on cession agreements or donation of construction materials and sporadic track records due to fluctuating job opportunities. Initiatives have been suggested for the development of these contractors and once they have been sufficiently developed to be competitive contractors, qualification criteria for these contractors should be set. It has been noted that fairness and equity are interrelated principles and that procedural fairness cannot be completely separated from substantive fairness (Bolton, 2007). Therefore, although those needs of a grade one contractor cannot be compared to that of a grade nine contractor, in the light of fair and equal treatment as well as a cost-effective procurement system in ensuring that all contractors are capable of performing, section 217(1) would be better complied with if contractors in all grading designations are required to comply with prescribed criteria. The Regulations make provision for distinct requirements for two groups of grading designations, thereby acknowledging that different requirements are needed for the two groups. Therefore, specific criteria should be set for grade one

contractors as well. Such criteria would furthermore provide an opportunity for grade one contractors to develop their capability to perform construction works contracts and in turn ensure fair treatment of all tenderers in the construction procurement process.

In terms of Regulation 25(7), on receipt of tender offers, the procuring entity must determine the final lowest category of registration required for the tender advertised. However, a departure from the category indicated in the tender advertisement must be reasonable. Regulation 25(10) in turn provides that a tender offer which does not satisfy the requirements envisaged in Regulation 25(7) must be rejected. It has been noted that tenderers have a right to expect and require an organ of state to apply the criteria advertised in a tender call, especially in the case of a construction contract due to its technical nature (Bolton, 2007). The principles of fairness and transparency would be compromised if this was not adhered to. Therefore, it would seem unfair to adjust tender requirements after tender offers have been received. The different classes of construction works each provide for a different field of expertise and the grading designations provide for contract values which differ vastly. Tenderers who would have prepared responsive tenders may be unfairly excluded if the criteria, although required to be reasonable, is changed. Where organs of state or procuring entities are uncertain of the exact specifications of a project, a call for expressions of interest in terms of procurement procedures such as the qualified, two-envelope and two-stage procedures may be used in order to determine what options are available to them. Once expressions of interest have been received, an organ of state should be able to set the qualification criteria for the particular tender. Furthermore, the provision made in Regulation 25(3)(a)(i) further assists in allowing an alternative class of construction works to be advertised in a call for tenders. In order to ensure that fairness is complied with, the criteria advertised in the call for tenders should be the criteria applied when tenders are evaluated.

In light of the above, the court in *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd* 2008 JDR 1014 (SE) set a tender award aside which was found to have exceeded the scope of a tender call. The municipality which awarded the tender to Afrisec accepted that it advertised a call for tenders for the procurement of security-related work and that it awarded the contract

to the deserving tenderer, Afrisec. However, the municipality alleged that the work which was performed in execution of the tender was beyond the scope of the tender call (para 2). The municipality concluded a main agreement with Afrisec (scope of work or SOW 1) based on the tender advertised and various subsequent agreements (SOW 3-28) which were not concluded in terms of a separate tender process (para 5). During the execution of the work it became apparent that the amount paid for work already done far exceeded the amount which Afrisec tendered (para 9). Afrisec then initiated litigation when the municipality advertised a call for tenders which involved the implementation of work which Afrisec assumed it was contracted to perform (para 10). The court held that a tender process should have been conducted for SOW 3-28 to have been concluded (para 17) and that the vast difference between the price tendered and the price paid indicated that the work performed exceeded the tender call (para 20). The court further held that the argument that the work in terms of SOW 3-28 was negotiated based on SOW 1 could not stand since no tender process existed where the offer made by Afrisec could be matched by other tenderers. The original call for tenders which resulted in SOW 1 did not refer to the work performed in terms of SOW 3-28. Therefore, the tender was found to be beyond the scope of the tender call and set aside. Therefore, in order to comply with the principle of fairness, the tender awarded should be in line with the specifications called for in the call for tenders.

### ***Equity***

Equity in the public procurement context refers to substantive equality. This means that the socio-economic circumstances of construction contractors should be taken into account when contracts are awarded and is referred to as preferential or targeted procurement. Regulation 5 of the Construction Industry Development Regulations provides that in terms of a targeted development programme, potentially emerging contractors in particular grading designations allocated specifically for the purpose of development programmes on the Register of Contractors, may be identified. When contractors apply to be placed on the Register of Contractors, their status as potentially emerging enterprises and their status in terms of a best practice recognition scheme (aimed at achieving equity within the construction industry) is considered. Provision is therefore made for equity to be implemented in construction procurement

qualification criteria. Regulation 6(d) further provides for a contractor's B-BBEE status to be considered when applying to be placed on the Register of Contractors.

Furthermore, in terms of Regulation 25(8), a procuring entity may accept the tender offers or expressions of interest of a contractor who is registered as a potentially emerging enterprise in terms of a targeted development programme and is registered in a grading designation one level lower than that advertised. This is, however, conditional upon the entity being satisfied that the contractor has the potential to develop and qualify to be registered in the higher grade and that the contractor has the necessary financial, management or other support in order to carry out the contract. The equity principle is therefore complied with.

### ***Transparency***

In order to regulate the behaviour of all stakeholders in the construction industry, a Code of Conduct has been published in terms of section 5(4)(a) of the CIDB Act and binds all participants in construction procurement processes. The preamble to the Code of Conduct makes reference to good corporate governance which is of great importance for all parties in the construction industry to comply with and requires *inter alia* transparent conduct. It is further stated that the development of the construction industry will be promoted by transparent performance and is further emphasised in the principles governing the conduct of parties in construction procurement. Participants must furthermore ensure that transparency is maintained in the tendering process. Section 29 of the CIDB Act provides for the enforcement of the Code of Conduct by way of an inquiry into a possible breach. All parties are therefore bound by the Code which will ensure that transparency is complied with. The CIDB Standard for Uniformity further provides that procuring entities and tenderers behave honestly and transparently. In promoting transparent practices, parties to a particular procurement are required to disclose any conflict of interest and shall not participate in any of the procurement decisions or recuse themselves from the process.<sup>6</sup> Transparency is further promoted in the obligation placed upon the procuring organ of state to accept only tenders which comply with the published criteria. Tenderers must further inform organs of state of any material change relating to the qualification criteria of a tender.

A transparent system is one which is open and requires that all tender information be made publicly available (para 6 3). Qualification criteria for contractors in the construction industry are published in the Construction Industry Development Regulations, CIDB prescripts and the CIDB website. The criteria contractors must meet are therefore widely available which makes for a transparent system.

Procurement documents in the construction industry include those used to prequalify tenderers in order to solicit tender offers. These documents require tenderers to submit sufficient information to enable organs of state to evaluate tender submissions and make a well-informed decision. It is required that qualification criteria should be set in clear and unambiguous terms and that all rights and obligations must be defined. The rules for preparing construction procurement documents therefore promote transparency.

The requirements for the Register of Projects further promote transparency in that all information relating to a particular award is made publicly available. This is strengthened by the sanction imposed in Regulation 21(4) which is a report to the Auditor-General by the CIDB of the failure to register a project. Transparency is, however, compromised by the absence of works and financial capability criteria for grade one contractors. Therefore, the rules which determine the capability of these contractors to perform contracts are not publicly available. However, this may possibly be justified by the cost-effectiveness principle.

### ***Competition***

According to Bolton (2007), the principle of competition is intertwined with that of cost-effectiveness. The aim of competition in a procurement process is to have a choice between different options in order to choose the most viable deal. Competition with regard to the qualification of contractors is given effect to by means of the registration system. The designation of different grades determined by financial and works capability provides for competition amongst contractors. The higher the grading designation, the bigger the tender value for which contractors may compete. This therefore serves as an incentive for contractors to develop their financial and works capability in order to ultimately be registered in the highest grading designation. Regulation 25(8) further provides for contractors who are

registered as potentially emerging enterprises to tender for contracts in one grading designation higher than they are registered for. Such a provision promotes competition and contractor development in that more contractors tender for a contract than would be the case in the absence of Regulation 25(8). Competition is further complied with in the qualification of contractors based on their works and financial capability which ensures that competitive tenders are submitted.

Competition is promoted in Regulation 25(5) which provides for joint ventures to submit tender offers or expressions of interest. The formation of joint ventures allows contractors to pool their resources, both their financial and works capabilities, in order to win a tender which is normally of a value much higher than they would be able to tender for individually. More contractors are therefore involved which provides for more competition in the tender process.

### ***Cost-Effectiveness***

Cost-effectiveness involves attaining value for money by taking into account various factors such as price, whole-life cost, the nature and quality of the goods or service to be provided, knowledge, capacity and the track record of tenderers. Since public sector procurement and thus construction procurement involves the expenditure of government funds, measures must be put in place to ensure that value for money is attained.

When construction contractors are placed on the Register of Contractors, their financial and works capabilities are looked at not only to determine their respective grading designations but also to determine whether they are capable of performing the work to ensure a cost-effective procurement. Cost-effectiveness is further established by evaluating quality in tender submissions.<sup>7</sup> Contractors are often required to submit expressions of interest before submitting tender offers to enable an organ of state to determine what its options for procurement are and to choose the most viable deal. It would appear, therefore, that the purpose behind the qualification of contractors is to achieve value for money for a cost-effective procurement system.

In the South African context, cost-effectiveness entails the capability of potential tenderers to perform a contract and the submission of tax clearance certificates by tenderers (Bolton, 2007). It has been noted that the verification of tax clearances certificates

enhances the attainment of value for money and that it can be assumed that a contractor who is unable to pay its taxes will be unable to perform a contract properly (Bolton, 2007). Provision is made for determining the capability of construction works tenderers and tax clearance certificates issued by SARS must be submitted in order for contractors to be registered.<sup>8</sup> The court in *Mpumalanga Steam and Boiler Works CC v Minister of Public Works* (22023/08) [2010] ZAGPPHC 128 (30 September 2010) set aside the award of a tender to a tenderer who submitted an invalid tax clearance certificate based on Regulation 16 of the 2001 PPPFA Regulations.<sup>9</sup> The court held that in light of Regulation 15 of the 2001 PPPFA Regulations which places a duty on organs of state to act against any person who obtains a preference in a fraudulent manner, the organ of state was obliged to launch an investigation into the acquisition of a possible fraudulent tax clearance certificate and that its failure to do so has no place in a constitutional order that values transparency, accountability and effective service delivery (para 33). The court found that on the evidence presented, it could not establish that the tax clearance certificate was indeed obtained fraudulently, however, due to its invalidity at the time of tender submissions the award had to be set aside (para 34).

In *IMVUSA Trading 134CC v Dr Ruth Mompoti District Municipality* (2628/08) [2008] ZANWHC 46 (20 November 2008), the court condoned the fact that the municipality allowed the winning tenderer to submit a fresh tax clearance certificate which was found to be invalid at the time of submission of tenders. The unsuccessful party argued that the winning tenderer submitted a fatally defective tender which rendered its acceptance invalid. The court held that the tender process was subject to section 217 of the Constitution but that the tender board was permitted to condone some defects. A distinction had to be drawn between a material factor and the evidence needed to prove that factor and that all the facts of the case had to be considered as well as public interest. The court held further that those who fraudulently contribute to the country's economy are not permitted to benefit from public tenders. This meant that a tenderer's tax matters had to be in order for a contract to be awarded to it (para 6). It was found that the winning tenderer's tax matters had at all times been in order and that only the proof of this was omitted. Therefore, the organ of state having allowed the tenderer to submit a

fresh certificate constituted correcting a *bona fide* mistake which it was entitled to do (para 16). Section 217 was thus complied with in that the process was fair, transparent and competitive (para 17).

It would appear that the qualification of construction works contractors is done at various stages. They are qualified based on their works and financial capability, in order to be placed in a grading designation and in terms of an invitation for tenders or expressions of interest. This ensures that contractors are able to perform in terms of their contracts. Furthermore, the overall detailed qualification criteria for construction works contractors ensure that only capable contractors are awarded contracts and that cost-effectiveness is complied with.

In terms of Regulation 25(1), a call for tenders or expressions of interest must indicate that those contractors who are registered in the grading designation indicated in the advertisement or higher, may tender. Subregulation (1A), however, provides that notwithstanding Regulation 25(1), a contractor who is not registered in the grading designation advertised may submit a tender or expression of interest if such contractor is capable of being registered in the required grading. This must be done before tenders are evaluated in the case of a call for tenders and within 21 days after the submission date in the case of expressions of interest. It is further indicated in Regulation 25(2), that despite Regulation 25(1A), a procuring entity may indicate in extreme conditions only that contractors who are already registered may submit a tender offer or expression of interest.

Cost-effectiveness may be compromised where contractors are not registered within the time frame given. In other words, where they are not registered within 21 days or before evaluation. The process may be less cost-effective and more time-consuming when unqualified contractors are allowed to participate in the procurement process. A measure of flexibility should be provided for in exceptional circumstances where tenderers are not capable of being registered at the time it is required or may still be in the process of doing so when they tender for a contract. However, Regulation 25(2) appears to contravene the requirement in section 18(1) of the CIDB Act that contractors must be registered to undertake construction works contracts and contradicts the idea of maintaining a Register of Contractors which promotes a cost-effective system.

### NEW DEVELOPMENTS

Despite the seemingly adequate regulation of construction procurement in South Africa, issues such as non-compliance with rules and corruption are still rife in the construction industry. This leads to the conclusion that if the rules are not the problem per se, the problem must lay at the door of those parties involved in construction procurement. In an attempt to curb some of the issues faced by the industry, National Treasury has begun a transition to a new system of public procurement which will entail less legislation, clearer rules and more efficient remedies in order to settle disputes such as those in qualification criteria.

As a result of the various laws applicable, the regulation of public procurement is rather fragmented which may lead to confusion as to which legislation is applicable in certain situations. In order to address the fragmentation as well as the lack of effective remedies, an initiative has been started by the National Department of Finance which entails centralising the public procurement system in South Africa. This means that a central Office of the Chief Procurement Officer (OCPO) has been established and is managed by the Chief Procurement Officer. The intention is that the OCPO will function as a central regulator of public procurement and will be exclusively responsible for regulation of public procurement. In other words, the Regulator will not procure goods and services on behalf of the government.

Currently, the OCPO is assisted by various public officials who manage specific areas of public procurement such as preferential procurement, legal matters, information technology etc. The suggestion is that the Regulator will consist of 3 bodies. An administrative body managed by an executive official and supported by public servants which will oversee the administrative functions of the OCPO, meaning the day-to-day regulatory functions of this body. Secondly, a non-executive board to oversee the work of the administrative body and provide guidance to the executive body. The non-executive board will also make high-level regulatory decisions and will be accountable to Parliament. The recommended third body will be responsible for enforcement of procurement rules which will include an ombudsman. This body will strictly handle only the enforcement of procurement rules. Since both the executive and non-executive bodies will make regulatory decisions, it is currently unclear

what will constitute high-level decisions and how these are distinguished from those decisions made by the executive body. Currently, there exists no legal basis for the creation of the above bodies therefore legislation will be required for its establishment. It is recommended that the ombudsman would be the first port of call in relation to all public procurement disputes and his/her powers will be limited to recommendations to contracting authorities. He/she will also be able to fulfil the role of mediator or arbitrator in such disputes. It therefore appears that dissatisfied parties will be able to take the decisions of the ombudsman on judicial review.

In an attempt to curb the scourge of corruption in public procurement, National Treasury has further established an e-tender publication portal and central supplier database on which all tenders in all spheres of government will be published. All tender documents and information pertaining to the advertised tenders will be made available on the central portal. The entire initiative and the administration behind the portal will be managed by the OCPO. The intention is to reduce fragmentation, improve transparency and accountability with regard to the award of government tenders and in the process curb corruption and reduce costs.

In addition to the above, as of 1 July 2016, a new Standard for Infrastructure Procurement and Delivery Management will come into operation. The standard has been issued as National Treasury Instruction Note 4 of 2015/2016 in terms of section 76(4)(c) of the PFMA and Regulation 3(2) of the MFMA SCM Regulations. It will apply to all departments, constitutional institutions and public entities listed in Schedules 2 and 3 to the PFMA and organs of state in terms of section 239 of the Constitution, including the CIDB. The instruction note introduces a new term into South African public procurement, that of “infrastructure procurement” which is defined as “the procurement of goods or services including any combination thereof with the acquisition, refurbishment, rehabilitation, alteration, maintenance, operation or disposal of infrastructure” (National Treasury Instruction Note 4 of 2015/2015). The Instruction note makes no reference to construction procurement or construction work or even the construction industry. It appears therefore that the intention is to re-name procurement in the construction industry, infrastructure procurement. Although the instruction note does not strictly affect the qualification criteria of construction contractors, it

will majorly impact upon the description of the work they tender for and their ability to be registered with the CIDB which consequently affects their ability to contract with the government. Since the new rules refer to “infrastructure” and “infrastructure procurement”, the CIDB Act, the Regulations and the CIDB best practice guidelines will have to be amended in order to be aligned with the new standard.

#### NOTES

1. According to Watermeyer in his paper “Public construction procurement in a global economy” presented at the Knowledge Construction Joint International Symposium of CIB Working Commissions in Singapore, October 2003 procurement constitutes the provision of supplies, services or engineering and construction works or any combination thereof, the disposal of moveable property, the hiring or letting of anything and the acquisition or granting of any rights. This definition is broader than that in the Regulations and the generally accepted definition of procurement which constitutes only acquisition, and not disposal.
2. It has been noted by Arrowsmith, Linarelli, and Wallace (2000, pp. 610-611) that the benefits of pre-qualification according to the World Bank include affording contractors the choice not to tender, thereby avoiding expenses, when they are not qualified to do so or the opportunity to form joint ventures in order to increase their chances of winning a tender. Another benefit is that those contractors who do meet the qualification criteria, tender with the assurance that they are competing against equally qualified tenderers. Procuring entities can assess the interest shown by potential tenderers and amend the contract requirements accordingly. It is noted that pre-qualification is to be used to determine which contractors are qualified and not to reduce the number of tenderers. See Arrowsmith, Linarelli, and Wallace (2000, p. 608).
3. An emerging enterprise is defined in s 1 of the CIDB Act as “an enterprise which is owned, managed and controlled by previously disadvantaged persons and which is overcoming business impediments arising from the legacy of apartheid”.

4. Regulation 1 defines a joint venture as “a grouping of two or more contractors who jointly and severally undertake to perform a construction works contract”. Joint ventures are often also referred to as consortiums.
5. At the same time, it is acknowledged that a factor which ensures good quality in construction works is a contractor’s capability to perform a contract which is in turn ensured by the use of a procurement system which provides for the recognition of a contractor’s capabilities, therefore the qualification criteria for contractors.
6. A conflict of interest is defined as a situation in which i) someone in a position of trust has competing professional or personal interests which make it difficult to fulfil his or her duties impartially or ii) an individual or organisation is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit or iii) incompatibility or contradictory interests exist between an employee and the organisation which employs that employee. See CIDB Standard for Uniformity 34 para F.1.3.3 a).
7. Quality is used as a synonym for functionality in the construction industry and is defined as “the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs”. See CIDB Standard for Uniformity 5 para 3.11.
8. Therefore, despite the absence of works and financial capability criteria for grade one contractors, the submission of a tax clearance certificate is required and is thus some indication of their financial standing.
9. This Regulation provides that no contract may be awarded to a person who has failed to submit an original tax clearance certificate issued by SARS to certify that the taxes of that person are in order.

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