

The Law of Government Procurement in South Africa

*** This is courtesy of Webber Wentzel

Legislative and Regulatory Framework

1. The obvious departure point is the **Constitution of the Republic of South Africa** Section 217(1). This deals specifically with procurement and provides that when an organ of state or an identified public entity contracts for goods and services, it must do so in accordance with the 'five central pillars of procurement', ie a system that is fair, equitable, transparent, competitive and cost-effective.
 2. However, this does not preclude organs of state from implementing procurement policies which make provision for categories of preference in the allocation of contracts and the protection or advancement of persons (or categories of persons) disadvantaged by unfair discrimination. The **Preferential Procurement Policy Framework Act** ("PPPFA") has now been enacted to provide a framework for such policies.
 3. Public Finance Management Act ("PFMA") and the Municipal Finance Management Act ("MFMA") also provide guidelines for procurement. The PFMA applies to national and provincial governments, constitutional institutions, Parliament, provincial legislatures and public entities, and the MFMA applies to local governments.
 4. As PFMA and the MFMA seek to secure sound and sustainable management of state resources, so they both place a high premium on accountability. Both the PFMA and the MFMA require that every department, institution or organ of state must appoint an accounting officer. The legislation gives considerable powers to accounting officers to ensure they manage their financial affairs within the parameters laid down by the respective Acts. So, for example, the accounting officer has the duty to maintain an appropriate procurement and provisioning system complying with the constitutional tenets of procurement referred to above. In turn, the accounting officer has the duty to keep full and proper records and submit these, together with any other relevant information, to the Auditor-General and relevant treasury.
 5. Both the MFMA and PFMA impose sanctions for failing to maintain an appropriate procurement and provisioning system. Not only does such failure constitute an act of financial misconduct and subject to disciplinary proceedings, but the accounting officer may also be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.¹
 6. Similarly, any irregular expenditure – expenditure seen to be in contravention of the legislation -- must be recorded by the relevant accounting officer and inserted into the institution's annual financial statement. Steps should also be taken to recover such amounts.
 7. It should also be remembered that the tender process generally constitutes administrative action and is therefore subject to scrutiny by the courts.
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8. The PPPFA is the act that introduces the point preference system that is used to award a tender. For contracts above a certain prescribed amount, a maximum of 10 points may be allocated for specific goals (90/10 principle). For contracts below the prescribed amount, a maximum of 20 points may be allocated for specific goals (80/20 principle). Specific goals in this context refer to the advancement of socio-economic objectives and the promotion of persons previously subject to unfair discrimination.
9. Any specific goal for which a point may be awarded must be clearly specified in the tender invitation and must be measurable and monitored for compliance. Ultimately, a contract must be awarded to the bidder with the highest points, unless objective criteria exists which justifies the award of the contract going to another.
10. While national legislation encourages the autonomous and decentralised functioning of each organ of state, in terms of the PFMA, the National Treasury may make regulations and issue instructions to determine a framework for an appropriate procurement and provisioning system complying with the five constitutional pillars of procurement.
11. National Treasury promulgates regulations and issues practice notes on a continuing basis. These additional rules ensure that the public procurement system complies with certain basic requirements and procedures and a norm is maintained, while allowing institutions or bodies sufficient freedom to procure goods and services depending on its needs.

General outline of the procurement process:

Procedure

1. Regulation 16A of the National Treasury regulations deals with 'Supply Chain Management'. Supply chain management can be defined as an integrated management system used to manage all steps of the supply chain. This includes demand management (a needs assessment of the procuring entity), acquisition management (the bidding process and acquiring of assets/services), logistics management (reception and distribution of goods) and disposal management (redundancy disposal). The purpose of the regulations and practice notes is to steer toward an integrated system where value is added at every single stage of the procurement process.
2. Once the particular need of an institution has been established, procurement of goods and services occur either through tender or by way of quotations, depending on the value of the goods and services.
3. Should the tender process be followed, the bidding process can conveniently be divided into three distinct stages: compiling bid documents, receiving bids, the evaluation of bids followed by the awarding of contracts.

3 A) Compiling bid documents

All contracts must be based on the General Conditions of Contract issued by the National Treasury. The basis for bid evaluation and selection should be clearly outlined in the instructions to bidders. This

would include the criteria taken into account in terms of the PPPFA and its regulations.

Furthermore, the bidding documents should clearly state the type of contract entered into. Documents should specify the work to be carried out, the location and the schedule for delivery and completion.

The National Treasury has also identified a list of standard bidding documents to be submitted by each bidder. This includes a declaration of interest and a Certificate of Individual Bid Determination. The bidder must also file a tax clearance certificate in order to be considered for award.

In some instances, an institution might chose to invite persons to bid. This is usually necessary for large and complex works, or in any other circumstances in which the high costs of preparing detailed bids could discourage competition.

Tenders must be published in at least the *Government Tender Bulletin* for a minimum period of 21 days before closure.

3 B) *Receiving and evaluating responses*

No bids received after the stipulated time should be considered. Similarly, if a bid is not accompanied by all the required documents, or if it substantially deviates from the bidding document specifications, then the bid should not be considered.

The adjudication of bids is to be done by a bid adjudication committee.

3 C) *Awarding the contract*

Bids of R10 million or more may only be awarded with the concurrence of the relevant Treasury. In addition, an award needs vetting by at least the legal services of the procuring institution prior to the signing of a formal contract, according to Treasury regulations.

The award must be published in the *Government Tender Bulletin* and other media in the same way the bids were advertised

"Fast-tracking" - Deviation from established procurement processes

Procurement law does make allowances for an institution to deviate from procedure. In the case of an emergency, for example, an institution should be authorised to procure services in the shortest possible period of time.

The Treasury regulations currently allow an accounting officer to procure goods or services by other means, provided that the reasons for deviating from competitive bids must be recorded and approved by the accounting authority. What constitutes an emergency is not clearly defined.

Concern has been raised that the opt-out provisions afford the procuring entities too wide a discretion.² While there are practice notes, circulars and

guidelines relating to both the MFMA and PFMA, not all of these carry the force of law. It is therefore argued that procurement officers can decide, on very subjective grounds, when and how to use alternative methods of procurement.

Selwyn Hockey of Webber Wentzel feels that while regulations should allow for the exercise of discretion, "There should be well defined and clear safeguards when a procurement official exercises his discretion."

He suggests the UNiCTRAL Model law on Procurement as a guideline on what constitutes an emergency situation.
http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf [29 August 2012]

Hockey said the courts also continue to play a role in the development of the law of public procurement and in formulating principles that clarify how the tender process should work