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Public Procurement & Government Contracts

South Africa
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SOUTH AFRICA

Law and Practice

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1. General

1.1 Legislation Regulating Procurement of Government Contracts

The five fundamental principles that must underlie all government procurement (and processes) are set out in Section 217 of the Constitution of the Republic of South Africa, 1996 (Constitution), which requires organs of state to contract for goods or services in a "fair, equitable, transparent, competitive and cost effective" manner.

The following national legislation gives effect to the abovementioned public procurement principles:

- the Public Finance Management Act 1 of 1999 (PFMA);
- the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA); and
- the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA).

The PFMA regulates financial matters in national and provincial government departments and public entities. The Regulations published by the National Treasury in terms of Section 76 of the PFMA (Treasury Regulations) and the circulars, practice notes, instructions and guidelines issued by the National Treasury published in terms of Section 76(4) of the PFMA (Treasury Guidelines and Circulars) all form part of the framework governing public procurement.

The MFMA regulates, among other things, how municipalities and other institutions in the local sphere of government should manage their financial affairs. The 2005 Municipal Supply Chain Management Regulations (Municipal SCM Regulations) published under the MFMA deal specifically with local government procurement. Notably, local government procurement regulations are somewhat more robust than procurement regulations at the national and provincial government level. As a result, there are typically more grounds upon which a local government procurement could be "unlawful" than there are in national or provincial government procurement.

The Constitution allows organs of state to implement preferential procurement policies that protect or advance persons disadvantaged by unfair discrimination. The PPPFA and the regulations published under it in 2017 (PPPFA Regulations) are the framework within which preferential procurement policies must be implemented.

The following statutes also apply generally to public procurement.

- The Promotion of Administrative Justice Act 3 of 2000 (PAJA) prescribes that "administrative action" should be lawful, reasonable and procedurally fair. The PAJA applies to public procurement because the award of a contract by an organ of state constitutes an administrative action. The PAJA provides anyone aggrieved by an administrative action with a right to receive written reasons from the relevant administrative body. It also enables an aggrieved or interested party to challenge an administrative action.
- The Prevention and Combating of Corrupt Practices Act 12 of 2004 (PCCA) makes a range of corrupt activities an offence, including those related to public procurement – it establishes a Register that places restrictions on those convicted of corrupt activities relating to tenders and contracts, and requires that persons in positions of authority report corrupt transactions.
- The Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act) aims to address inequities resulting from the systematic exclusion of black people from meaningful participation in the South African economy, and plays an important role in the award of government contracts. The BEE Act provides a legislative framework for the promotion of black economic empowerment, and contains formulations to calculate a broad-based black economic empowerment (BEE) score, which is a level of empowerment used by organs of state when evaluating tenders/bids in accordance with the PPPFA.

Special Rules Applicable to Infrastructure and Construction Procurement

The rules described below specifically apply to infrastructure and construction procurement.

The National Treasury has issued the Standard for Infrastructure Procurement and Delivery Management as Annexure A to Treasury Instruction (No 4 of 2015/2016) (SIPDM), which applies specifically to infrastructure procurement. The SIPDM prescribes a control framework for the planning, design, procurement and execution of infrastructure projects. All national and provincial government departments, constitutional institutions and public entities listed in Schedules 2 and 3 to the PFMA must apply the SIPDM.

The National Treasury Model Supply Chain Management (SCM) Policy for Infrastructure Procurement and Delivery, which forms part of National Treasury Circular No 77 and is issued in terms of the MFMA, guides municipalities and municipal entities in establishing a suitable supply chain management system for infrastructure delivery. The Model SCM Policy for Infrastructure Procurement and Delivery incorporates the provisions of the SIPDM.

Special rules also apply to construction procurement. The Construction Industry Development Board Act 38 of 2000 (CIDB Act) establishes the Construction Industry Development Board (CIDB), which is a body that regulates the construction industry. In terms of Section 16 of the CIDB Act, contractors working in the construction industry must register on the CIDB's national register of contractors. The register is available on the CIDB website, and categorises contractors in a way that facilitates public sector procurement and promotes contractor development. Section 16(4) of the CIDB Act requires every organ of state to apply the register of contractors to its procurement process, subject to its policy on procurement.

The Minister of Public Works must prescribe the manner in which public sector construction contracts may be invited, awarded and managed within the framework of the register and within the framework of the policy on procurement (Section 16(3) of the CIDB Act).

The CIDB's Standard for Uniformity in Construction Procurement (CIDB Standard), dated July 2015, prescribes standard procedures for construction procurement and guidance on the preparation of procurement documents, among other things. The CIDB Standard is issued in terms of Sections 4(f), 5(3)(c) and 5(4)(b) of the CIDB Act, read with Regulation 24 of the Construction Industry Development Regulations, 2004. Notably, the PFMA and the Treasury Guidelines and Circulars take precedence over any prescripts of the CIDB that are in conflict with them.

1.2 Entities Subject to Procurement Regulation

All organs of state in the national, provincial and local sphere of government, and any institution identified in national legislation, must comply with procurement regulations. Organs of state include government departments and public entities.

National and provincial government departments, national and provincial public entities, constitutional institutions and provincial legislatures are subject to the PFMA. Municipalities and municipal entities are subject to the MFMA, which also applies to national and provincial organs of state, but only to the extent of their financial dealings with municipalities.

Private companies are not subject to procurement regulation. However, the PCCA does make certain corrupt activities related to private procurement an offence, and the BEE Act incentivises private entities to procure their goods and services from persons historically disadvantaged on account of their race, gender or disability.

1.3 Type of Contracts Subject to Procurement Regulation

Procurement regulations apply whenever an organ of state contracts for goods or services, sells or lets state assets (including the sale of goods no longer required), or concludes a public-private partnership (PPP), such as in respect of an infrastructure project. The phrase "contracts for goods and services" is interpreted widely and includes the steps leading up to the award of a tender, such as procurement negotiations or the advertisement of a tender, even if those steps do not finally result in a contract.

Access to state-regulated assets is regulated through PPP agreements or through the regulations that are applicable in the specific sector. For example, in the minerals and petroleum sector, applications to exploit such assets are governed by sector-specific legislation.

There are no generally prescribed minimum value thresholds that determine whether a contract is subject to procurement regulation. Furthermore, procurement regulations do not generally prescribe the precise format for procurement. There are, however, value thresholds that determine what type of procurement process is appropriate to use. Generally, the higher the contract value, the more robust the tender procedure will be. National Treasury Practice Note No 8 of 2007/2008 prescribes the procurement process (ie, petty cash, verbal or written price quotations or competitive bids) applicable at national or provincial level, according to transaction value. Procuring institutions may use petty cash for contracts with a value of up to ZAR2,000. For contracts from ZAR2,000 to ZAR10,000, verbal or written quotations can be used. For contracts from ZAR10,000 to ZAR500,000, the procuring institution should call for written quotations. Contracts with a value above ZAR500,000 must undergo a competitive tender process. At the municipal procurement level, the same threshold values apply, except that written quotes are required for contracts from ZAR10,000 to ZAR200,000, and contracts from ZAR200,000 upwards must undergo a competitive bidding process (Regulation 12(1)(c) and (d) of the Municipal SCM Regulations). The threshold values may be lowered, but not increased.

A procuring institution must ensure that the procurement thresholds are strictly adhered to.

1.4 Openness of Regulated Contract Award Procedure

Interested parties from other jurisdictions or foreign bidders may participate in the tender process.

The PPPFA provides that there could be specific local content requirements in a tender that must be met in order for the ten-

der to qualify for competitive adjudication. These requirements will be set out in the request for proposal (RFP) document.

BEE considerations are also relevant to foreign contractors. The PPPFA and the regulations published under it in 2017 (PPPFA Regulations) prescribe certain BEE requirements for state tenders. In order to qualify for BEE status and earn the points allocated under the PPPFA, foreign bidders would need to form a bidding consortium or joint venture with appropriate BEE entities. The BEE Act sets out how to calculate the broad-based black economic empowerment score used by organs of state when evaluating tenders/bids in accordance with the PPPFA.

Another consideration relevant to foreign bidders is the National Industrial Participation Programme (NIPP) administered by the Department of Trade and Industry, which imposes an "Industrial Participation Obligation" on suppliers whose contract with the government includes imported content of USD10 million or more. These suppliers must participate in local economic activities, by supporting productive sectors of the economy, particularly manufacturing, through activities such as investment, export sales, research and development, technology transfer and transformation of the domestic economy. The value of a supplier's participation must amount to at least 30% of the imported content value. NIPP obligations are agreed with the Department of Trade and Industry under a standalone contract and after a successful bid.

The NIPP also applies when a supplier is awarded several contracts for the same item over two years, provided the cumulative value of these contracts exceeds USD10 million.

1.5 Key Obligations

The overriding legislative obligations are to conduct procurement in a manner that meets the constitutional requirements of fairness, equitability, transparency, competitiveness and cost-effectiveness. These five principles are the yardstick for public procurement. Similarly, Section 51(1)(a)(iii) of the PFMA requires the accounting authority of, among others, a national or provincial department or public entity to ensure that the relevant department or entity has and maintains an appropriate procurement and provisioning system that is fair, equitable, transparent, competitive and cost-effective.

Fairness and equitability require a procurement process to be conducted in a procedurally fair manner. Organs of state should provide all bidders with the same information and opportunities so that they tender for the same thing. One group of bidders should not be allowed to gain an unfair advantage over another. For example, an organ of state must not grant some bidders an extension to submit bid documents and not others. Interested parties should be afforded a reasonable opportunity to make representations on the ultimate award of the tender. Furthermore, decision-makers must avoid conflicts of interest, actual bias or the reasonable suspicion of bias, which would violate the principles of fairness and equitability. The South African courts have held that a tender process that resulted in a contract that differed from the terms of the invitation to tender and the letter of acceptance produced by the relevant organ of state undermined fairness and equitability. The courts have also set aside the award of a tender where a senior municipal official who was involved in the tender adjudication process had given the successful bidder an opportunity to supplement its bid after bid close.

Transparency requires openness and accountability, and discourages corruption and favouritism. A tender process that is conducted publicly and not behind closed doors is a transparent one. The transparency principle requires organs of state to make procurement information generally available, to standardise and publicise procurement rules, and to ensure that information regarding government contracts and their award is widely accessible. Bid documentation should be sufficiently detailed so as to enable potential bidders to understand the scope of the bid and assess whether they are eligible to participate. The public should be notified when an organ of state intends to negotiate a contract with another institution, and the reasons for the award or failure to award a tender must be provided to successful and unsuccessful bidders alike.

The principles of competitiveness and cost-effectiveness require organs of state to derive value for money by maximising quality and minimising cost. Competitiveness requires organs of state to openly advertise a bid so that a wide group of bidders can participate. The courts have held that, where a successful bidder contracts on terms that competing bidders were not informed of, and therefore were not afforded an opportunity to match, the tender process was not competitive as the government did not have the benefit of a range of comparable offers to choose from. Competitiveness contributes to cost-effectiveness. Conversely, corrupt and anti-competitive practices curb competition by discouraging truthful bidders from participating, and therefore undermining overall public confidence in procurement processes. Cost-effectiveness requires organs of state to spend public money and use scarce resources effectively and efficiently.

While not inherently contradictory, there is a tension among the five procurement principles, and there may be circumstances where the achievement of one principle is not possible unless another is sacrificed partially. Therefore, when evaluating whether there has been compliance with Section 217 of the Constitution, the procurement principles must be considered holistically, based on the particular circumstances of each case. The need to balance the procurement principles depending on

the individual procurement processes at issue, rather than apply them in a mechanical or rigid fashion, is well recognised.

2. Contract Award Process

2.1 Prior Advertisement of Regulated Contract Award Procedures

As discussed above, Section 217(1) of the Constitution requires organs of state to procure "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective." Transparency and competitiveness are best achieved through a publicised "Request for Proposals" (RFP) process. Accordingly, regulated contract award procedures must be advertised in advance. Although this is the standard approach, organs of state may deviate from the RFP process in certain exceptional circumstances, provided the requirements of Section 217 are still met.

The National Treasury issued a Treasury Instruction (No 1 of 2015/2016) prescribing the mandatory advertisement of bids and the publication of awards on the eTender Publication Portal by all departments, constitutional institutions and public entities listed in Schedules 2 and 3 to the PFMA from 1 May 2015. The web address is http://www.etenders.gov.za/content/advertised-tenders.

Accounting officers of public entities listed in Schedules 3A and 3C to the PFMA, who are required to comply with Chapter 16A of the Treasury Regulations, must, as a minimum, advertise tenders in the Government Tender Bulletin for a minimum period of 21 days before bid closure. Bids may be advertised in other media as well, if an accounting officer or accounting authority deems it necessary to ensure greater exposure to potential bidders. The 21-day period for advertisement does not apply in urgent cases, when bids may be advertised for a shorter period determined by the accounting officer or accounting authority (Regulation 16A6.3(c) and (d) of National Treasury Instruction (No 1 of 2015/2016)).

The CIDB Standard requires construction tenders to be advertised and registered on the CIDB's website, using the i.Tender@cidb service. Furthermore, in terms of sub-regulation 4.2.1.4 of the CIDB Standard, advertisements for bidders to submit bids in respect of engineering and construction works contracts shall be placed on the CIDB website using the CIDB's i.Tender@cidb service at least ten working days before the closing date for tenders, and at least five working days before any compulsory site meeting.

National Treasury Instruction No 1 of 2015/2016 requires bids advertised on the eTender Publication Portal to include the following: a description of the bid, the bid number, the name of the PFMA-compliant institution calling for bids, the place where the bid is required to be performed, the closing date and time of the bid, contact details of the PFMA-compliant institution, the place where bids can be collected and delivered, and the bid document or RFP with terms of reference and relevant annexures.

The RFP itself will set out the criteria and terms under which bidders are requested to bid. As an example, the RFP would set out whether a tender will be evaluated based on functionality – ie, the bidder's ability to provide goods or services in accordance with the bid specifications.

2.2 Preliminary Market Consultations by Awarding Authority

There is no express provision for preliminary market consultations before the launch of a tender in South African law. However, such a procedure may be permissible if it complies with the procurement principles. More particularly, since potential bidders are likely to be part of the group that is consulted, the procuring entity must ensure that the subsequent contract award procedure remains fair to all potential bidders.

There are requirements regarding market assessment and demand-side management. In terms of National Treasury Regulation 16A3.2(d)(i), an organ of state in the national or provincial sphere must have a supply chain management system that incorporates "demand management", which involves assessing public sector delivery requirements or business needs to ensure that goods and services are delivered at the right price, time and place, and that the quality and quantity of the goods or services satisfy needs.

The National Treasury's Guidelines on the Implementation of Demand Management, dated 29 July 2011, apply to departments, constitutional institutions and public entities listed in Schedules 3A and 3C to the PFMA and, as the name suggests, set out guidelines for the implementation of demand management.

The SIPDM sets out high-level guidelines for demand management in the context of infrastructure procurement. With effect from July 2016, the demand for infrastructure delivery needs to be managed through service life plans and infrastructure plans. Projects need to be prioritised and budgeted for in the infrastructure plan, and, where possible, delivered in accordance with standard principles that are designed to yield value for money. Costs need to be proactively managed through the setting and proactive monitoring of control budgets for projects through the project planning, detailed design and site processes.

The demand management requirements are similar in the municipal sphere. Regulation 10 of the Municipal SCM Regulations provides that a supply chain management policy must provide for an effective system of demand management in order to ensure that the resources required to support the strategic and operational commitments of the municipality or municipal entity are delivered at the correct time, at the right price and at the right location, and that the quantity and quality satisfy the needs of the municipality or municipal entity.

The Model SCM Policy for Infrastructure Procurement and Delivery requires municipalities and municipal entities to establish a supply chain management system for infrastructure delivery that delivers value for money while minimising the scope for corruption. Demand management is recognised in the aforementioned Model SCM Policy as an essential component of supply chain management policy.

The CIDB prescripts require demand management at the pre-tendering or pre-feasibility portfolio stage of a construction project.

2.3 Tender Procedure for Award of Contract

An open, competitive tender process is the standard approach and is most likely to meet the requirements of Section 217 of the Constitution. However, depending on the circumstances, it is not required by law. The Supreme Court of Appeal has stated that fairness is inherent in an open, competitive tender procedure, the very purpose of which is to ensure cost-effectiveness and competitiveness in a transparent manner.

The National Treasury has issued Treasury Regulation 16A, which regulates supply chain management and applies to national and provincial departments, constitutional institutions and public entities to the extent that they are listed in Schedules 3A and 3C of the PFMA. Major public entities listed in Schedule 2 to the PFMA are not subject to Regulation 16A. Regulation 16A.6 deals with the procurement of goods and services. More particularly, Regulation 16A.6.4 permits procuring institutions to which it applies to deviate from an open, competitive tender process in circumstances where complying would be "impractical". In such cases, the reasons for the deviation must be recorded and approved by the accounting officer or accounting authority.

National Treasury has also issued a Practice Note (No 8 of 2007/2008), which applies to all departments, constitutional entities and public entities, including major public entities listed in Schedule 2 of the PFMA. The Practice Note allows deviations from the prescribed tender process in two circumstances – namely, urgent, emergency situations and where there is only one supplier. The accounting officer or accounting authority may procure the required goods or services by other means, such as price quotations or negotiations. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer or accounting authority, or his or her delegate. Accounting officers or accounting authorities are required to report to the relevant treasury and the Auditor-General all cases where goods and services above the value of ZAR1 million (VAT inclusive) were procured using a deviation, within ten working days. The report must include the description of the goods or services, the names of the suppliers, the amounts involved and the reasons for dispensing with the prescribed competitive bidding process.

Similarly, at the municipal government level, deviations are permitted in the case of an emergency, and if the goods are only available from a "sole source" (Regulation 36 of the Municipal SCM Regulations).

Importantly, deviations must still comply with the constitutional principles of fairness, equitability, transparency, competitiveness and cost-effectiveness. The courts judge deviations very strictly.

As mentioned above, there may be circumstances where negotiation may be permitted, such as in an emergency situation or with a true sole source. However, as a general rule, an open tender process must be conducted; any deviation from this must be authorised. Negotiations post-bid submission are dealt with in the PPPFA Regulations, which provide that organs of state may negotiate a market-related price with the highest bidder if a market-related price was not initially offered. Although this is the only circumstance mentioned in the PPPFA Regulations, it is not considered to be the only circumstance giving rise to negotiations.

The SIPDM provides for, as examples, restricted competitive negotiation procedures or open competitive negotiation procedures.

Furthermore, the CIDB Standard permits negotiations regarding project scope, terms and conditions, and pricing within certain parameters. The two types of negotiations provided for are negotiations with a sole service-provider and a competitive negotiations process with several bidders who are afforded the opportunity to improve their respective offers in one or more rounds. Negotiations with a sole service-provider must be restricted to the final terms of the contract and must not under any circumstances lead to a change in the competitive position of bidders. During a competitive negotiation, a procuring institution must ensure that all bidders are treated equally. The procuring institution should not divulge any requirements, criteria, guidelines, documents, clarification or other informa-

tion relating to the negotiations in a discriminatory manner, as this may give some bidders an advantage over others. For both types of negotiations, minutes and the reasons for pursuing the negotiations must be kept for record and audit purposes.

Any negotiations must be with specifically mandated parties as per the RFP, and the bidder should check the authority under which it is being conducted.

2.4 Choice/Conditions of Tender Procedure

The general principle is that all procurement must follow an open and transparent tender process. While procuring institutions have a measure of discretion in how they procure goods and services, any deviation from an open, competitive tender process must be reasonable and objectively justifiable. Furthermore, this process must still be fair, equitable, transparent, competitive and cost-effective. An emergency or true sole source are accepted reasons for a deviation, but these are strictly judged and, as mentioned above, require the reasons for deviating from inviting competitive bids. The reasons should be recorded and approved by the accounting officer or accounting authority, or his or her delegate, and, where the product has a value of more than ZAR1 million (VAT inclusive), the relevant accounting officers or accounting authorities must report to the relevant treasury and the Auditor-General.

2.5 Timing for Publication of Documents

Please see **2.1 Prior Advertisement of Regulated Contract Award Procedures**.

The SIPDM requires procuring institutions to develop implementation plans for each infrastructure project scheduled in a financial year. Among other factors, the implementation plan must include a procurement plan with timelines for the advertising and closing of tenders, and the obtaining of gate approvals leading up to the award of the contract or the issuing of an order.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The time limits for the receipt of expressions of interest are not regulated by legislation but will be regulated in the RFP. Procuring institutions are required to regulate these time limits internally. As such, these time limits will differ from institution to institution. The time provided must be sufficient for a reasonable bidder to prepare a response. If not, the process is not fair and may be challenged.

2.7 Eligibility for Participation in Procurement Process

Entities that wish to participate in a procurement process must register on the Central Supplier Database (CSD). This database of organisations and institutions has been the single source of key supplier information for organs of state since April 2016.

An interested party who is on the list of restricted suppliers kept by the National Treasury is prohibited from bidding or supplying goods or services to the government.

A bidder must generally submit tax clearance certificates from the South African Revenue Service and Certificates of Good Standing from the Compensation Commissioner in order to participate in a tender.

The PPPFA Regulations impose subcontracting criteria on all tenders above ZAR30 million, provided that the subcontracting is feasible. In such circumstances, the procuring institution must advertise the tender with the condition that a minimum of 30% of the contract value must be subcontracted to one or more of the following qualifying entities:

- an Exempted Micro Enterprise (EME) or Qualifying Small Enterprise (QSE);
- an EME or QSE which is at least 51% owned by black people;
- an EME or QSE which is at least 51% owned by black people who are youth;
- an EME or QSE which is at least 51% owned by black people who are women;
- an EME or QSE which is at least 51% owned by black people with disabilities;
- an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;
- a co-operative which is at least 51% owned by black people; or
- an EME or QSE which is at least 51% owned by black people who are military veterans.

Local content requirements may also be set for each sector or bid, as per the PPPFA Regulations.

The PPPFA Regulations allow for an RFP to state objective criteria with which potential bidders must comply in order to participate in a tender process. These will be specified in the RFP.

2.8 Restriction of Participation in Procurement Process

Section 217(2) of the Constitution permits the government to implement a procurement policy that provides for categories of preference in the allocation of contracts, and for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. The PPPFA was enacted to give effect to the principle of preferential procurement.

A procuring institution can decide to restrict participation in a tender process to a group of "pre-qualified" bidders, such as bidders with a certain minimum BEE score, EMEs or QSEs, and a bidder that undertakes to subcontract a minimum of 30% of the contract value to the categories of black people mentioned in **2.7 Eligibility for Participation in Procurement Process**, including youth, women, military veterans and people with disabilities.

If a procuring institution decides to apply one or more of the pre-qualification criteria identified above, the bid must be advertised with a specific condition that only bidders that meet the pre-qualification criteria may respond. A bid that fails to meet the specified pre-qualification criteria will be considered an unacceptable bid, and will be disqualified from adjudication.

As mentioned above, local content requirements may also be applied in terms of the PPPFA Regulations. The Department of Trade and Industry, in consultation with the National Treasury, may designate certain sectors, industries or products for local production and content in accordance with national development and industrial policies. For those sectors, only services or goods that are locally produced or manufactured, or only services or goods that meet the stipulated minimum threshold for local production and content, will be considered. The invitation to bid must be advertised with this condition.

At local government level, it is also possible to conduct a two-stage bidding process where, in the first place, a panel of eligible suppliers are pre-qualified for a period to receive RFPs for particular tender. The pre-qualification process would generally see bidders pre-qualified on technical grounds. This typically occurs in the context of large and complex projects, or projects to be implemented over three years or longer.

For small bids above a value threshold of ZAR2,000 but below ZAR10,000, three verbal or written quotations may be sought from a list of prospective suppliers. Closed-bid processes are not favoured in other cases, and would be treated as a deviation from the requirement for an open, competitive, fair and transparent procurement process. The minimum number of suppliers that may be invited to participate in a closed-bid process is not legislated, but the procuring institution would have to demonstrate to the National Treasury that the number chosen was sufficient to allow for a competitive and cost-effective outcome.

2.9 Evaluation Criteria

The PPPFA Regulations prescribe a three-stage process where bids are first checked for formal compliance with the specifications and conditions of tender as set out in the tender documents. Once the tender is found to be acceptable, it is then evaluated on the basis of "functionality" (whether, objectively, the tender fulfils the technical specifications). If a bid meets the minimum qualifying score for functionality, it will be evaluated on the basis of price and preference in accordance with the preferential procurement points system, and then any objective criteria.

Under the preferential procurement points system, bidders are given a score out of 100 points, based on price and the bidder's BEE status level or "preference". The scoring is weighted as follows:

- for contracts from ZAR30,000 up to ZAR50 million, 80 points are allocated for price and the remaining 20 points for preference; and
- for contracts above ZAR50 million, 90 points are allocated for price and ten points for preference.

A bidder's BEE score under the BEE Act will therefore influence its preferential procurement score for PPPFA purposes. A bidder with a high BEE score will receive a high score for preference under the preference point system.

A bid is awarded to the bidder that scores the highest number of points, unless there are "objective criteria" that justify the award to another bidder. These "objective criteria" should be specified in the tender documents, and may include criteria such as a government programme being over-exposed to a particular contractor or the contractor's overall financial position posing an unacceptable risk to the project.

Where two tenders have equal scores, the one with the highest BEE rating must be awarded the contract; where the BEE ratings are also equal, the one with the highest functionality points must be awarded the contract (unless there are objective criteria that justify the award to another bidder).

3. General Transparency Obligations

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

The evaluation criteria must be stipulated in the RFP. More particularly, the PPPFA Regulations require the tender documents to stipulate the preference points system applicable to the tender, the pre-qualification criteria, whether the goods or services are in a designated sector for local production and content, whether compulsory subcontracting is applicable to the tender, and whether objective criteria are applicable.

The Standard for Uniformity in Construction Procurement also requires the evaluation criteria for contractors to be clearly stipulated in the bid documents.

The courts have held that adequate notice requires procuring institutions to give potential bidders sufficient information that enables them to submit compliant bids. A tender process that depends on vague, uncertain criteria undermines the principles of fairness and competitiveness because it excludes meritorious bidders. Competitiveness and fairness are also not served if bids are evaluated against altered criteria once they have been submitted.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

This is generally regulated in the RFP for a particular bid.

In terms of National Treasury Instruction (No 1 of 2015/2016), all departments, constitutional institutions and public entities listed in Schedules 2 and 3 of the PFMA must publish the results of all advertised, competitive tenders on the eTender Publication Portal. Information on successful bids and unsuccessful bids should be included in the notification. In respect of successful bids, the contract description and bid number, names of the successful bidders, preference points claimed, contract price (if possible), contract period, names of directors and date of award should be included. In respect of unsuccessful bids, the names of the unsuccessful bidders, preference points claimed and contract price should be included.

For departments, constitutional entities and public entities listed in Schedules 3A and 3C to the PFMA, a tender award must be published in the Government Tender Bulletin and in any other media in which the bid was advertised.

Furthermore, in terms of the National Treasury Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management 2011/2012, the following information on the successful bids must be made available on the institution's website, in the Government Tender Bulletin and in the media where the bid was originally advertised:

- contract numbers and description;
- names of the successful bidder or bidders and preference scores claimed;
- the contract pricing; and
- if possible, brand names and dates for completion of contracts.

Records of the published awards should be retained for audit purposes.

For construction-related bids, the CIDB prescripts require bids to be registered on the CIDB Register of Projects (RoP) on award and progressively updated until project completion for the promotion, assessment and evaluation of best practices on construction projects.

3.3 Obligation to Notify Bidders of Contract Award Decision

Please see **3.2 Obligation to Notify Interested Parties Who Have Not Been Selected**.

3.4 Requirement for Standstill Period

Procurement legislation does not currently prescribe a "standstill period", but the Draft National Public Procurement Bill will introduce this. Many internal processes have a one or two-week period in which immediate complaints can be raised with an ombud or similar entity. For example, Regulation 49, read with Regulation 50, of the Municipal SCM Regulations provides for a two-week period within which persons aggrieved by a decision can lodge a written objection or complaint with the relevant municipality.

4. Review Procedures

4.1 Responsibility for Review of Awarding Authority's Decisions

At national and provincial level, there are no special bodies responsible for the review of tender decisions. However, the National Treasury, Auditor-General and Public Protector can all investigate claims that a tender did not comply with applicable legislation. The relevant procuring institution may have internal appeal procedures in place. Once these internal procedures are exhausted, a review application may be brought before the High Court.

The courts have held that the solicitation, evaluation and award of public tenders amount to "administrative action" within the meaning of the Constitution and the Promotion of Administrative Justice Act (PAJA). A tender decision will, in most circumstances, constitute "administrative action" (as defined in the PAJA) on the part of the organ of state. An unlawful tender can be taken on review to the High Court in terms of the PAJA if it constitutes administrative action; otherwise, it can be reviewed under the principle of legality. A High Court review can be appealed to a full bench of the High Court, then the Supreme Court of Appeal, and finally the Constitutional Court. The procuring institution concerned will have to be cited as a party to the legal proceedings.

An interested party can apply for and be granted an interim injunction (interdict) from the court to prevent the organ of state from contracting with another party, or to prevent the implementation of the contract, pending the hearing of the review application to set aside the decision to grant the con-

tract. The court will consider (amongst other things) whether, on the face of the facts before it, there is a sufficient basis to conclude that the reviewing party will succeed in the ultimate review. This must be sought immediately when the challenger hears of the award, and on an urgent basis. If interim interdict proceedings are brought, all interested parties would be notified. This generally includes the successful bidder but not necessarily other unsuccessful bidders.

If the reviewing court finds that there has been non-compliance with procurement legislation, it may set the contract aside and may refer the procurement decision back to the procuring institution to re-open the procurement procedure. The court will consider the impact that setting a contract aside may have on the delivery of public services by the procuring institution.

Any review application made under the PAJA must be filed within 180 days from the date the applicant was informed of the decision, or the date on which any internal procedures are concluded (the 180-day limit may be extended). This is, however, an outside date and to succeed, most reviews must be launched within a month or two of the award, and must be accompanied by an interim injunction.

4.2 Remedies Available for Breach of Procurement Legislation

A tender process can be challenged by judicial review in the High Court. The court may grant an order that is just and equitable, including granting an interim or final interdict setting aside the decision. An organ of state may disqualify a bidder or terminate a contract if the bidder submitted false information that affected the evaluation of the bid, or where any subcontracting information was not disclosed. The bidder can also be added to the National Treasury's restricted suppliers list.

Additionally, municipalities are required, in terms of the Municipal SCM Regulations, to appoint an independent adjudicator in municipal public procurement disputes. Thereafter, the dispute may be taken to a provincial treasury or to the National Treasury.

Treasury Regulation 16A9.3 requires the National Treasury and each provincial treasury to establish a mechanism (i) to receive and consider complaints regarding alleged non-compliance with the prescribed minimum norms and standards, and (ii) to make recommendations for remedial actions to be taken if non-compliance with any norms and standards is established, including recommendations of criminal steps to be taken in the case of corruption, fraud or other criminal offences.

The Municipal SCM Regulations (specifically, Regulation 49, read with Regulation 50) provide that a municipal supply chain management policy must allow persons aggrieved by decisions or actions taken in the implementation of its supply chain management system to lodge a written objection or complaint within 14 days of the decision.

As mentioned in **4.1 Responsibility for Review of Awarding Authority's Decisions**, the Auditor-General and the Public Protector can also investigate claims of non-compliance with procurement legislation.

4.3 Interim Measures

An interested party can apply for and be granted an interim injunction (interdict) from the court to prevent the organ of state from contracting with another party, or to prevent the implementation of the contract, pending the review of the decision to grant the contract. The action must be launched as soon as possible. The court must be satisfied, among other things, that, on the facts before it, there is sufficient basis to conclude that the reviewing party will succeed in the ultimate review.

4.4 Challenging Awarding Authority's Decisions

As mentioned in **4.1 Responsibility for Review of Awarding Authority's Decisions**, a tender award will generally constitute "administrative action" on the part of the organ of state. The PAJA has generous judicial "standing" rules, which effectively allow any person to argue that they act in the broader public interest and institute proceedings before the High Court for the review of administrative action.

4.5 Time Limits for Challenging Decisions

There is no general time limit within which internal remedies must be pursued. However, time limits may be prescribed in the legislation applicable to the organ of state responsible for the decision. An application for the judicial review of a tender decision in terms of the PAJA must be launched as soon as possible, but at least within 180 days of the date on which the person or entity was informed of the decision, or of the date on which any internal remedies were exhausted. While 180 days is allowed, the court may decline a meaningful remedy if it considers that too much time has passed and implementation of the tender has started. Any challenge should, therefore, be brought in as short a timeframe as possible.

4.6 Length of Proceedings

The review of a tender can take six months to two years, depending on the urgency of the matter, the relevant court's caseload, the complexity of the matter, the co-operation of the parties in complying with the timeframes within which pleadings should be filed, and whether there are any appeals.

4.7 Annual Number of Procurement Claims

High Court review proceedings are launched relatively frequently to challenge high-value tenders. The various divisions of the High Court probably have between five and 50 such cases per year.

4.8 Costs Involved in Challenging Decisions

This is substantial litigation that is brought on the papers requiring a strong legal team. Costs could be from ZAR500,000 to ZAR5 million, or more.

5. Miscellaneous

5.1 Modification of Contracts Post-award

Certain value thresholds apply to the modification of contracts post-award. The National Treasury has issued SCM Instruction Note 3 of 2016/2017 on Preventing and Combating Abuse in the Supply Chain Management System (SCM Instruction Note 3 of 2016/17), which prescribes thresholds for the expansion or variation of the value of contracts post-award. Contracts may be expanded or varied by not more than 20% or ZAR20 million (including all applicable taxes) for construction-related goods, works and/or services, and by 15% or ZAR15 million (including all applicable taxes) for all other goods and/or services of the original value of the contract, whichever is the lower amount. The relevant treasuries may, however, decrease these thresholds for institutions reporting to them.

Deviations in excess of these thresholds will only be allowed subject to the prior written approval of the relevant treasury. Whilst provision is made for deviations, it is imperative to note that requests for such deviations may only be submitted to the relevant treasury where good reasons exist.

The above direction is not applicable to transversal term contracts facilitated by the relevant treasuries and specific term contracts as, in such contracts, orders are placed as and when commodities are required, and required quantities are not known at the time of awarding the contract.

The Supply Chain Management Guide for Accounting Officers/Authorities makes recommendations in respect of price adjustments due to escalation. In some instances, it might be in the best interest of the state to allow price adjustments based on escalation. Assessing the best option requires a careful analysis of all related aspects that will influence the adjusted price, including the cost for the additional administrative work. If the accounting officer or authority resolves to allow price escalation as part of the contract, this should be specified in the bid documents, including the formula and the time periods at which intervals such price adjustments should be considered.

However, where an amendment or extension of a procurement contract departs from what was originally put out to tender to the extent that the contractor benefits significantly or other bidders may have bid differently, a new procurement procedure may be required.

5.2 Direct Contract Awards

An open and competitive tender process is the default position, and is the type of process that is most likely to meet constitutional requirements. However, a deviation from this default approach may be justifiable in certain exceptional circumstances. Any deviation must take place in accordance with constitutional principles and the applicable legislation.

A direct contract award would constitute a deviation from the preferred open tender process that may be justifiable in the case of an emergency, if there is a single supplier of the goods or services ("sole source" procurement), or if it is not practical or cost-effective to follow a competitive tender process.

The courts have set a high bar for justifying deviations from competitive tender processes. As an example, the courts have tended to treat sole-source procurement as presumptively unlawful, holding that sole-source procurement is only permissible where open and competitive tendering would be "impossible". National Treasury approval must be obtained for deviations.

In light of the principle of open procurement, it would be difficult to justify the direct award of a contract by an organ of state without some form of public process. As a minimum, the public should be informed that a public entity intends to negotiate a contract with a particular entity, except where it can be shown that there are highly exceptional circumstances that justify non-disclosure, such as national security.

5.3 Recent Important Court Decisions

In the past year, one court decision has been particularly important for public procurement and government contracting in South Africa. In the case of Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited 2019 (4) SA 331 (CC), the Constitutional Court was required to decide whether to review and set aside a municipality's decision to award a tender to the respondent, Asla. The municipality had applied for the judicial review and setting aside of its own decision to award the tender in terms of the PAJA on the basis that no competitive procurement processes were followed.

Following its decision in the 2017 case of State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23, the Constitutional Court held that it is now settled law that an organ of state seeking to set aside

its own decision must do so in terms of the principle of legality and cannot rely on the PAJA. Whilst an application for the judicial review of a tender decision in terms of the PAJA must be launched as soon as possible, but at least within 180 days of the date on which the person or entity was informed of the decision, or of the date on which any internal remedies were exhausted, a legality review does not have a fixed time limit within which it must be brought. Under the PAJA, a delay in excess of 180 days is likely to be unreasonable unless a court finds that it is in the interests of justice to condone the delay and extend the time limit. If a court does not extend the time limit, it will lack jurisdiction to decide on the merits of the review. However, the Constitutional Court held that the test for assessing whether a legality review had been brought within a reasonable period involves examining the facts of a particular matter. If the delay is unreasonable, a court must consider whether it is in the interests of justice for it to overlook the unreasonable delay. In other words, a court must consider whether, notwithstanding the unreasonable delay, it is in the interests of justice to review and set aside the tender.

The Constitutional Court held that in cases in where the unlawfulness of a decision is clear, a court must declare that the decision is unlawful notwithstanding the unreasonable delay. Accordingly, the Constitutional Court held that although the municipality's self-review was inexplicably and unreasonably delayed, it should be overlooked due to the manifest unlawfulness of the tender, and the fact that it would not be in the interests of justice and equity for Asla to continue performing under the contract. The Constitutional Court ordered that the tender be declared unlawful, but did not set aside any of the rights in terms of the tender that had already accrued to Asla. This case is significant because it confirms that the courts will not exalt form over substance where an organ of state brings a self-review in an attempt to rectify its own past unlawful and invalid actions.

5.4 Legislative Amendments Under Consideration

A much-anticipated early draft of the National Public Procurement Bill was published for initial public comment on 19 February 2020. The draft Bill aims to consolidate South Africa's fragmented procurement laws by, among other things, repealing the PPPFA and the Treasury Regulations. The draft Bill also proposes to establish a Public Procurement Regulator within the National Treasury and provide for an alternative dispute resolution process aimed at helping parties avoid the cost of pursuing procurement disputes in the courts.

Bowmans is an independent pan-African law firm with specialist expertise in corporate law, banking and finance law, and dispute resolution. The firm has six offices in four African countries and more than 400 lawyers, acting for corporates, multinationals and state-owned enterprises across a range of industry sectors, as well as financial institutions and governments. The 20-strong public procurement team includes lawyers from Kenya, South Africa, Tanzania and Uganda, as well as 15 partners. On the public sector side, the team assists with the design and implementation of fair tender processes, while on the private sector side it advises clients on the procurement of goods and services by organs of the state, and helps them to challenge tender processes that do not meet constitutional standards. The public procurement team regularly represents clients in proceedings before statutory bodies that regulate diverse areas of economic and social activity.

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