



Prohibition of Restrictive Practices Certificate of Independent Bid Determination Municipal Bidding Document (MBD 9)

This circular is intended to ensure that when bids¹ are considered by accounting officers of municipalities and municipal entities, all reasonable steps are taken to deter any form of bid rigging (or collusive bidding)². This circular applies to all municipalities and municipal entities.

Section 4 (1) (b) (iii) of the Competition Act No. 89 of 1998, as amended, prohibits an agreement between, or concerted practice by, firms, or a decision by an association of firms, if it is between parties in a horizontal relationship and if it involves collusive bidding (or bid rigging).

Municipal Supply Chain Regulation 38 (1) prescribes that a supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer, among others, to:

- take all reasonable steps to prevent such abuse;
- reject the bid of any bidder if that bidder or any of its directors has abused the supply chain management system of the municipality or municipal entity or has committed any improper conduct in relation to such system; and
- cancel a contract awarded to a person if the person committed any corrupt or fraudulent act during the bidding process or the execution of the contract.

It has, however, come to light that in the supply chain management environment bid rigging (collusive bidding) is increasing rapidly at the expense of great cost and efficiency to government. Given that bid rigging is essentially a form of bid fraud, it follows that where bid fraud exists, the likelihood of uncovering bid rigging also increases.

To this end, the National Treasury in consultation with the Competition Commission of South Africa, intends providing accounting officers with preventative measures to counter bid rigging. These measures are also intended to inform bidders about the illegality of bid rigging, the penalties applicable to enterprises found to have engaged in such practices and the possible investigations and imposition of administrative penalties by the Competition Commission as contemplated in the Competition Act No. 89 of 1998.

¹ Includes price quotations, advertised competitive bids, limited bids and proposals.

² Bid rigging (or collusive bidding) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods and / or services for purchasers who wish to acquire goods and / or services through a bidding process. Bid rigging is, therefore, an agreement between competitors not to compete.

Measures to address restrictive practices

The following measures are introduced to combat any form of bid rigging (or collusive bidding):

Certificate of Independent Bid Determination

With effect from the date on which this circular takes effect, accounting officers are required to utilize the attached Municipal Bidding Document (MBD 9) "Certificate of Independent Bid Determination" when inviting price quotations, advertised competitive bids, limited bids or proposals. The MBD 9 form should be used with minimum changes that are necessary to address contract and project specific issues. A copy the Municipal Bid Document (MBD 9) "Certificate of Independent Bid Determination" is attached hereto as Annexure B.

Bidders should be required to complete, sign and submit the Certificate together with the bid documentation at the closing date and time of the bid. If a bidder has failed to submit the MBD 9 together with the bid documentation, the bidder must be requested, in writing, to submit the signed form within seven (7) working days of notification. Failure to submit the signed form within seven (7) working days of notification may result in the invalidation of the bid.

Accounting officers are required to utilize the information contained in the certificate to ensure that when bids are considered all reasonable steps are taken to prevent any form of bid rigging.

If an accounting officer decides to refer a bidder or contractor who, based on reasonable grounds or evidence obtained by the accounting officer, has engaged in the restrictive practice referred to in Section 4 (1) (b) (iii) of the Competition Act No. 89 of 1998, as amended, to the Competition Commission for investigation and possible imposition of administrative penalties, such written request, together with all supporting documentation, must be sent to the Manager Enforcement and Exemptions at:

Competition Commission of South Africa
Private Bag X 23
Lynnwood Ridge
0040

or 77 Meintjies Street
Sunnyside
Pretoria
0001

The Manager Enforcement and Exemptions may be contacted on telephone (012) 394 3200, facsimile (012) 394 0166 or e-mail at ccsa@compcom.co.za.

Augmentation of General Conditions of Contract

The Government Procurement: General Conditions of Contract, attached as Annexure A, have been augmented to provide for the prohibition of restrictive practices with the inclusion of paragraph 35 as follows:

Prohibition of restrictive practices

- 35.1 In terms of section 4 (1) (b) (iii) of the Competition Act No. 89 of 1998, as amended, an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if a bidder (s) is / are or a contractor(s) was / were involved in collusive bidding.
- 35.2 If a bidder(s) or contractor(s), based on reasonable grounds or evidence obtained by the purchaser, has / have engaged in the restrictive practice referred to above, the purchaser may refer the matter to the Competition Commission for investigation and possible imposition of administrative penalties as contemplated in section 59 of the Competition Act No. 89 of 1998.
- 35.3 If a bidder(s) or contractor(s) has / have been found guilty by the Competition Commission of the restrictive practice referred to above, the purchaser may, in addition and without prejudice to any other remedy provided for, invalidate the bid(s) for such item(s) offered, and / or terminate the contract in whole or part, and / or restrict the bidder(s) or contractor(s) from conducting business with the public sector for a period not exceeding ten (10) years and / or claim damages from the bidder(s) or contractor(s) concerned.

Accounting officers are required to ensure that all bids are in future invited in terms of the revised General Conditions of Contract. A copy of the revised General Conditions of Contract (GCC) is attached hereto as Annexure A.

Conclusion

It is incumbent on the accounting officer to ensure that this circular is brought to the attention of senior management, supply chain management practitioners and members of bid committees in the municipality or municipal entity. Accounting officers must also ensure that appropriate systems are in place to comply with the legislation.

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