



Restriction of suppliers and BBBEE objectives

Should a contractor to a municipality or municipal entity obtain preferences fraudulently or fail to attain any specified goals in terms of the Preferential Procurement Regulations then the municipality or entity may take various actions, including exercising its power in terms of the regulations to restrict the supplier from doing business with the public sector.

This circular also provides information on the latest developments regarding the alignment of preferential procurement with the aims of the Broad-Based Black Economic Empowerment Act (BBBEE Act).

Restriction of suppliers

Legislative framework

When evaluating a bid, municipalities and entities are required to follow the requirements of the Preferential Procurement Regulations issued in terms of the Preferential Procurement Policy Framework Act, Act No. 5 of 2000 (PPPFA).

Regulations 21 and 28 of the Municipal Supply Chain Management Regulations (SCM Regulations) require all bids to be evaluated in accordance with the supply chain management policy of the municipality or entity and in terms of the PPPFA. The evaluation criteria used by the municipality or entity must be implemented within the framework of the PPPFA.

The Preferential Procurement Regulations prescribe requirements for developing and applying evaluation criteria and goals to achieve required outcomes. Should the municipality or entity discover that the bidder obtained preference on a fraudulent basis or has failed to attain specified goals during the performance of the contract then certain remedies are available to and need to be considered by the municipality or entity.

Regulation 15 of the Preferential Procurement Regulations reads as follows:

- “15 (1) An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.*
- (2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulation (1) –*
- (a) recover all costs, losses or damage it has incurred or suffered as a result of that person’s conduct;*

- (b) *cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;*
- (c) *impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and*
- (d) *restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.”*

Taking action against a contractor

In the event of a contravention, the municipality's or entity's success to impose its available remedies and exercise its powers in this regard will be improved if the process requirements when inviting and awarding the bid have been correctly followed by the municipality or entity.

In each case the municipality or entity should consider whether it has appropriate skills/ knowledge internally to investigate the matter or whether such skills/ knowledge or the circumstances of a specific case require such to be sourced externally. For some types of contract breaches it may be necessary to obtain independent advice. For example, a registered engineer should confirm inferior quality in terms of construction breaches. In less severe cases it may be appropriate to obtain an internal report or statement from a suitably qualified official. Legal advice may also be required in some instances.

In all instances where a criminal offence is suspected, and immediately after its discovery, the matter must be reported by the Accounting Officer/ Chief Financial Officer to the South African Police Service (SAPS). This is over and above the municipality's or entity's own internal investigation and action. In the event that the Accounting Officer or Chief Financial Officer is implicated, the Speaker of Council or the person delegated by council in the interim with the responsibilities of the Accounting Officer should immediately report the matter to the SAPS.

The municipality or entity, over and above its contractual and other remedies, is also entitled to the remedies included in the Preferential Procurement Regulations. When exercising the remedies provided for in regulation 15 of the Preferential Procurement Regulations, the municipality or entity should consider the following:

1. Before action is taken in terms of regulation 15, the Accounting Officer must issue a final notification to the contractor by registered mail indicating the action to be taken in accordance with the contract conditions unless the contractor complies with the contract conditions and delivers satisfactory supplies or services within a specified reasonable time. Such time limit should be decided upon by the Accounting Officer and should not be less than seven (7) and not longer than fourteen (14) calendar days.
2. If the contractor still does not perform satisfactorily despite this final notification, the Accounting Officer may, in addition to any contractual or other remedy the municipality or entity may have against the contractor, elect to exercise any or all of the actions stipulated in regulation 15(2) of the Preferential Procurement Regulations.

Implementing Preferential Procurement Regulation 15(2)(d)

In addition to, and irrespective of any contractual or other remedies that may be pursued, the municipality may commence action in terms of regulation 15(2)(d). Should the decision be made in terms of 15(2)(d) to restrict the contractor, its shareholders and directors from obtaining business with the public sector, the Accounting Officer, prior to imposing such a restriction, must:

1. inform the contractor or person(s) by registered mail or by delivery of the notice by hand of the intention to impose the restriction, provide the reasons for such decision and the envisaged period of restriction;
2. allow the contractor and / or person(s) fourteen (14) calendar days to provide reasons why the envisaged restriction should not be imposed;
3. if requested, allow the contractor and / or person(s) the right to present evidence in person;
4. consider any reasons submitted by the contractor and / or person(s) in terms of paragraph (2) above;
5. impose the restriction or amended restriction;
6. inform the contractor and/ or person(s) of the decision; and
7. inform the National Treasury within five working days of such restriction, particulars of the person(s) to be restricted, (including, where applicable, names of the restricted persons, identity numbers, trade name of enterprises, company registration numbers, income tax reference numbers and vat registration numbers), the reason(s) for the restriction, the period of restriction and the date of commencement of the restriction.

Any restriction imposed on any person by the Accounting Officer, will at the discretion of the Accounting Officer, also be applicable to any other enterprise or any partner, manager, director or other person who wholly or partly exercises or exercised or may exercise control over the enterprise of the first-mentioned person, and with which enterprise or person the first-mentioned person, is or was in the opinion of the Accounting Officer actively associated.

The Accounting Officer of a municipality or entity, based on sound reasons, can amend or uplift any restriction imposed in terms of regulation 15(2)(d) of the Preferential Procurement Regulations by the municipality or entity and must inform the contractor and/ or persons(s) and the National Treasury accordingly within five working days of the decision. The reasons for such a decision must be documented.

Right of appeal by the contractor

A contractor or any other person restricted by the Accounting Officer in this manner has a right to contest this restriction in a Court of Law. The municipality or entity that imposed the restriction is responsible and accountable for any costs associated with court proceedings and for the cost of any decision that may result.

Database of persons prohibited from doing business with the public sector

According to SCM Regulation 38(1)(c) the Accounting Officer must check the National Treasury's database prior to awarding any contract to ensure that no recommended bidder or any of its directors is listed as a person prohibited from doing business with the public sector.

Accounting Officers can check the National Treasury database by forwarding details of contractors to restrictions@treasury.gov.za for verification within 2 working day.

Augmentation of General Conditions of Contract

Paragraph 23 of the General Conditions of Contract is hereby augmented by the insertion of new sub-paragraphs 23.3 to 23.7 listed below. A revised General Conditions of Contract is attached to this circular that includes the new sub-paragraphs, no other changes have been made to the original document.

- 23.3 *Where the purchaser terminates the contract in whole or in part, the purchaser may decide to impose a restriction penalty on the supplier by prohibiting such supplier from doing business with the public sector for a period not exceeding 10 years.*
- 23.4 *If a purchaser intends imposing a restriction on a supplier or any person associated with the supplier, the supplier will be allowed a time period of not more than fourteen (14) days to provide reasons why the envisaged restriction should not be imposed. Should the supplier fail to respond within the stipulated fourteen (14) days the purchaser may regard the supplier as having no objection and proceed with the restriction.*
- 23.5 *Any restriction imposed on any person by the purchaser will, at the discretion of the purchaser, also be applicable to any other enterprise or any partner, manager, director or other person who wholly or partly exercises or exercised or may exercise control over the enterprise of the first-mentioned person, and with which enterprise or person the first-mentioned person, is or was in the opinion of the purchaser actively associated.*
- 23.6 *If a restriction is imposed, the purchaser must, within five (5) working days of such imposition, furnish the National Treasury, with the following information:*
- (i) the name and address of the supplier and / or person restricted by the purchaser;*
 - (ii) the date of commencement of the restriction;*
 - (iii) the period of restriction; and*
 - (iv) the reasons for the restriction.*
- These details will be loaded in the National Treasury's central database of suppliers or persons prohibited from doing business with the public sector.*
- 23.7 *If a court of law convicts a person of an offence as contemplated in sections 12 or 13 of the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004, the court may also rule that such person's name be endorsed on the Register for Tender Defaulters. When a person's name has been endorsed on the Register, the person will be prohibited from doing business with the public sector for a period not less than five years and not more than 10 years. The National Treasury is empowered to determine the period of restriction and each case will be dealt with on its own merits. According to section 32 of the Act the Register must be open to the public. The Register can be perused on the National Treasury website.*

Inclusion in bid and contract documentation

Although the PPPFA and its regulations apply irrespective of their explicit inclusion in an agreement, municipalities and entities should ensure that all future bid and contract documentation includes the amended clauses relating to regulation 15 of the Preferential Procurement Regulations.

Alignment of preferential procurement with the aims of the Broad-Based Black Economic Empowerment Act

The National Treasury in collaboration with the Department of Trade and Industry (DTI) have commenced a process to align the preferential procurement procedures with the BBBEEA.

The revision of preferential procurement legislation will include broadening the basis of evaluation to beyond only equity ownership and the promotion of the non-quantifiable Reconstruction and Development Programme (RDP) goals. Bidders will also be able to earn preferences for other elements such as the number of specific designate representatives in management, transfer of skills, equity employment, indirect empowerment by procuring goods and services from specific designated enterprises and socio-economic development initiatives in terms of the BBEE scorecard.

Status quo for application of preferential procurement

Municipalities and municipal entities are required to apply the current Preferential Procurement Policy Framework Act, Act No. 5 of 2000 and the Preferential Procurement Regulations, 2001 until such time that the amendment to the legislation takes effect and the revised Regulations pertaining thereto are promulgated.

The National Treasury is planning workshops and training initiatives to support municipalities and municipal entities in the implementation of the new preferential procurement policy procedures as soon as the Act and its Regulations are amended.

Contact

SCM Policy and guidance on implementation is provided by the SCM Unit within the National Treasury to ensure consistent application of the framework. Therefore, please address all supply chain related enquiries to the email below, for the attention of Mr. Henry Malinga.



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