

The changing face of public procurement

Introduction

Section 217 of the Constitution stipulates that procurement by organs of State and allied institutions must occur in accordance with a system which is fair, equitable, transparent, competitive and cost effective. However, the Constitution allows for preferences to be accorded to historically disadvantaged persons.

Flowing from the above constitutional prescripts, there have been various statutory enactments aimed at regulating public procurement, most importantly:

- Preferential Procurement Policy Framework Act, 5 of 2000, and the Regulations promulgated in terms of the Act;
- Public Finance Management Act, 1 of 1999, and the Regulations promulgated in terms of the Act, being the National Treasury Regulations;
- Municipal Systems Act, 32 of 2000; and
- Municipal Finance Management Act, 56 of 2003, and the Regulations promulgated in terms of the Act.

Public Procurement Bill

In February 2020 the Public Procurement Bill was published for comment by 30 June 2020.

The stated aim of the Bill is to take the current fragmented law governing public procurement and combine it into one regulatory statute.

Some notable features of the Bill

1. Preferential procurement

The Bill makes provision for the Minister of Finance to prescribe a framework setting out categories of preferences and the preferential treatment to be accorded to previously disadvantaged persons. The Minister is empowered to set aside certain government tenders exclusively for specified categories of persons. This could include restricting the eligibility of tenders to historically disadvantaged persons or to businesses operating in a particular province or municipality.

2. Establishment of Procurement System (Supply Chain Management System)

Each government institution must establish a procurement unit and system. The responsibilities of a procurement unit and system include maintaining a supply chain management system to ensure effectiveness and efficiency, reporting on the performance of the institution's supply chain management and to ensure compliance with broad-based black economic empowerment. A bid committee must also be established within the supply chain management system.

An institution must establish a committee system comprising as a minimum:

- a bid specification committee;
- a bid evaluation committee; and
- a bid adjudication committee.

3. Review of decision-making

3.1 Reconsideration by institution

- (a) A bidder may seek reconsideration or review of a decision, or a failure to make a decision, by an institution. The aggrieved bidder must pay a prescribed fee for the reconsideration or review of the decision. Whether payment of a

prescribed fee is constitutional will likely depend on the amount of the prescribed fee. It is arguable that, if the prescribed fee is substantial, it would unfairly limit a bidder's right to access to justice.

- (b) The bidder must make an application in writing to the institution within 10 days of becoming aware of the circumstances giving rise to the application.
- (c) The institution must immediately investigate the application and within 10 days of the submission thereof issue a written decision to the bidder.

3.2 Reconsideration by provincial treasury

- (a) An aggrieved bidder may make an application to the provincial treasury to reconsider or review a decision made by an institution falling within the provincial sphere of government.
- (b) The bidder must first have complained to the institution and received a decision from the institution on that complaint before making an application to the provincial treasury.
- (c) The application must be made by the bidder within 10 days of becoming aware of the institution's decision.
- (d) The provincial treasury must communicate its decision to the bidder within 30 days of submission of the application.

3.3 Reconsideration by Public Procurement Regulator

- (a) The Bill provides for the establishment of a Public Procurement Regulator ("the Regulator") within National Treasury.
- (b) In relation to tenders by National Departments of State aggrieved bidders are given the right to apply to the Regulator for the decision to be reconsidered, provided the bidder has already gone through the process of seeking reconsideration by the institution concerned and he acts within 10 days.

3.4 Reconsideration by Public Procurement Tribunal

- (a) The Bill makes provision for the establishment of a Public Procurement Tribunal ("the Tribunal") with jurisdiction to review the decisions of provincial treasuries and the Regulator.
- (b) An aggrieved bidder must apply to the Tribunal within 10 days for the review of an impugned decision.
- (c) The Tribunal will only review a decision if it considers that it will be in the public interest to do so.
- (d) The Tribunal is empowered to award damages in favour of the aggrieved bidder limited to the costs incurred in connection with the review process.

3.5 Judicial review

The Bill provides for an aggrieved bidder who is dissatisfied with an order of the Tribunal to apply to court for a judicial review of the decision as contemplated in the Promotion of Administrative Justice Act, 3 of 2000.

3.6 Suspension of awards

- (a) If a tender is subject to reconsideration by an institution, a provincial treasury or the Regulator, the Bill stipulates that no contract may be awarded until the elapse of 10 days after completion of the reconsideration process. The same applies in relation to reviews by the Tribunal.
- (b) It is unclear what the position will be if a tender has already been awarded by the time that the aggrieved bidder becomes aware of that and wishes to

challenge the tender process. In such cases the reconsideration and review process may be unavailable.

4. Deadline for bids

The Bill stipulates that an institution must set a deadline of at least four weeks for the submission of applications for pre-qualifications and bids. This deadline is fixed, regardless of the value or complexity of the tender. Further, the Bill does not provide for any exceptions to this deadline. This deadline may be further dealt with in the Regulations set by the Minister.

5. Cancellation of tenders

Further grounds for cancelling a tender have been provided under the Bill, such as:

5.1 where there is a significant change in the required technical specifications, bidding conditions, conditions of contract or other details;

5.2 if it is in the interest of national security; and

5.3 if insufficient bids are received to determine competitiveness.

The Bill does not expressly stipulate whether or not the tender process may be cancelled after a tender has already been awarded to a successful bidder.

6. Public/Private partnerships

The Bill introduces a more streamlined process for entering into public/private partnerships. Notably, the Bill stipulates that, when submitting a bid to tender, the public/private partnership must submit a draft partnership agreement and, further, that the private entity in the partnership will generally be liable for the risks of performing under the contract.

7. Disposal of State assets

Under the existing legislation, there is uncertainty regarding whether State assets must be disposed of through a tender process. The Bill clarifies this by stipulating that the disposal of State assets must take place through open advertised bidding, public auction, electronic reverse auction, restricted bidding or through any other method prescribed by the Minister.

Enforcement

The Bill empowers the Regulator to issue a debarment order against a bidder or supplier committing specified offences, including corruption and fraud. The effect of the debarment order is that the bidder is prohibited from participating in any procurement processes for a specified period or in circumstances otherwise specified in the order.

Comments

Currently the Procurement Policy Framework Act entrenches the preferences that can be accorded to bidders based on the value of the tender using either the 90/10 or 80/20 preference points system. This structure is not something that the Minister or any other Member of the Executive is entitled to change, whether by Regulations under the Act or otherwise.

The Bill proposes that the Minister will have the discretion to decide on what preferences and advantages can be given to tenderers who are previously disadvantaged persons or otherwise and the Minister will be entitled to change those provisions from time to time. This represents a fundamental shift of control from statutory law to government executive discretion. It also creates uncertainty and the potential for a significant increase in the cost of State procurement.

The various layered tender challenge processes provided in the Bill are likely to create longer delays in finalising tender awards which will inevitably increase the cost of affected projects.

The effect of the debarment procedure is to vest in the Regulator the power to blacklist tenderers.

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