



PROVINCIAL TREASURY • PROVINSIALE TESOURIE
• UNONDYEBO WEPHONDO



Verwysing
Reference
Isalathiso

T16/P

Navrae
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THE PROVINCIAL AUDITOR

MASTER RECORDS OFFICIAL: FINANCIAL MANAGEMENT

THE HEAD OF DEPARTMENT: LOCAL GOVERNMENT AND HOUSING

RE: PROPOSAL IN RESPECT OF INTERIM MEASURES IN THE APPLICATION OF THE PREFERENCE POINT SYSTEM AS A RESULT OF THE KZN HIGH COURT DECISION

1. BACKGROUND

1.1 In a decision made by the Pietermaritzburg High Court in respect of the matter ***Sizabonke Civils CC t/a Pilcon Project vs Zululand District Municipality; NRB Construction & Hire cc and the Minister of Finance***, the court ruled that:

“(a) The award of the contract under tender number ZDM769/2008 by the

first respondent to the second respondent be and is hereby reviewed and set aside.

(b) It is hereby declared that Regulation 8(2) to 8(7) of the Preferential Procurement Regulations, 2001 published in Government Notice R725 of 10 August 2001 are inconsistent with section 2(1)(b) of the Preferential Procurement Policy Framework Act, No 5 of 2000 and are invalid.

(c) The costs of this application shall be paid by the first, second and third respondents jointly and severally the one paying the others to be absolved, which costs shall included the costs occasioned by the employment of two counsel where this was done."

1.2 Resulting from this decision, Western Cape Provincial Departments and Municipalities have expressed concern on the impact the decision will have on the application of the preferential point scoring system in respect of future procurement processes.

1.3 Although this judgment is not binding on the Western Cape (or any other province) it is persuasive of nature and may open the door to potential litigation for cases of a similar nature.

1.4 The Provincial Treasury is of the opinion that the answer does not necessarily reside in the amendment of Preferential Procurement Regulations as this would require that functionality be removed in totality as the Act itself only provides for price and preference.

1.5 Despite the fact that functionality, as a scoring criterium, may be abused if incorrectly utilised, it is a necessary / essential requirement for the purposes of evaluating and securing value for money. Therefore it is common cause that the awarding of bids only on price and preference would seriously detract from the element of value for money in terms of the ability of the successful bidder to provide services.

1.6 The Provincial Treasury is of the view that it would be more prudent to amend the Act to provide for functionality as a scoring criterium and that sound

Regulations are issued to govern the utilisation of functionality for scoring purposes.

- 1.7 The National Treasury was requested to provide direction and an interim measure on the application / scoring of points in respect of price and functionality in response to the said judgment. See Annexure "A" attached hereto.

2. PURPOSE

- 2.1 To propose a way forward for the Province in mitigation of the risk surrounding this matter and providing an interim mechanism to manage functionality requirements.

3. PROPOSAL

- 3.1 The Provincial Treasury wishes to propose that the issue be dealt with as articulated hereunder:

3.2 Functionality Criteria

- 3.2.1 It is recommended that functionality should not be utilised in its current format (i.e. splitting of points for price and functionality). Functionality requirements should rather be utilised as pre-qualification criteria.
- 3.2.2 Bids which include functionality criteria should be the exception and not the rule and should generally apply to projects of a more complex nature or have a high value or is service orientated.
- 3.2.3 It should be noted that the proposed process would be applicable to the procurement of all goods and services but excludes construction and related contracts as these are governed by the CIDB Act and its Regulations.

3.3 Determination of Functionality criteria

3.3.1 The determination of functionality criteria will not alter the way in which it is currently determined. Functionality criteria must meet the following requirements:

- It must be clear in its intent;
- It must be measurable;
- It must be clear as to what measuring criteria would be;
- It must be realistic (applicable to the requirement); and
- It must not be seen as double preference.

3.3.3 It may be stipulated that a bidder must score a specified number of points for functionality in order to qualify for further evaluation. This threshold or minimum score should be determined in terms of the nature of the commodity (i.e. on a case by case basis) but should always be reasonable.

3.3.4 The functionality criteria (together with specifications and evaluation criteria) must be approved by the bid adjudication committee prior to its utilization in a bid.

3.4 Application of Functionality as Pre-evaluation Criteria

3.4.1 The pre-evaluation criteria, minimum score (if applicable) and how points will be granted must clearly be indicated in the bid documentation.

3.4.2 The current methodology and process utilised as provided for in National Treasury Practice Notes and the Guide for Accounting Officers (how and who) when scoring bidders remains.

3.4.3 When scoring bidders the following process / route is proposed:

- **Phase one: The Pre-Qualification Phase**

STEP 1: determine whether bidder is to specification, meets all conditions of bidding and legislative requirements (evaluation of specification, contract conditions and legislative requirements); and

STEP 2: determine whether the bidder meets functionality requirements.
Score / evaluate the bid in terms of functionality (if minimum score is met
move to Phase two);

- **Phase two: *The Evaluation Phase***

Evaluation and scoring in terms of the preferential procurement scoring
(HDI and price)

4. NOTE:

- 4.1 It must be noted that this is only a proposal / opinion expressed by the Provincial Treasury and may not be construed as Provincial policy;
- 4.2 For all intents and purposes it is proposed as an interim measure to neutralize the current status quo that in essence suggests an interim measure that mitigates against the potential of litigation.
- 4.3 Accounting Officers have the discretion of whether or not to accept / apply the proposal as indicated.
- 4.4 Alternatively the decision to apply the regulation in its current state applies and then to deal with any litigation that ensues when it arises is the other option.



NADIA EBRAHIM

SENIOR MANAGER: MOVEABLE ASSET MANAGEMENT

DATE: 12 AUGUST 2010



PROVINCIAL TREASURY

Provincial Government of the Western Cape

REFERENCE: T16P
ENQUIRIES: R. Alberts

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The Chief Director
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For attention: Mr. J. Breytenbach

IMPACT OF KZN JUDGMENT ON THE UTILISATION OF FUNCTIONALITY IN TERMS OF THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK REGULATIONS AND THE PROPOSED WAY FORWARD

1. PURPOSE

1.1 The purpose of this correspondence is to:

- (a) bring the above-mentioned judgment to the attention of the National Treasury;
- (b) to provide the Provincial Treasury's view on the judgment; and
- (c) to request guidance in terms of interim measures in the application of the preference point system until the applicable legislation is amended and / the Court decision appealed.

2. THE KZN JUDGEMENT ON THE UTILISATION OF FUNTIONALITY

2.1 Earlier this year, the matter of *Sizabonke Civils CC t/a Pilcon Project vs Zululand District Municipality; NRB Construction & Hire cc and the Minister of Finance* was heard in the Pietermaritzburg High Court.

2.2 The court ruled as follows:

- "(a) The award of the contract under tender number ZDM769/2008 by the first respondent to the second respondent be and is hereby reviewed and set aside.

- (b) *It is hereby declared that Regulation 8(2) to 8(7) of the Preferential Procurement Regulations, 2001 published in Government Notice R725 of 10 August 2001 are inconsistent with section 2(1)(b) of the Preferential Procurement Policy Framework Act, No 5 of 2000 and are invalid.*
- (c) *The costs of this application shall be paid by the first, second and third respondents jointly and severally the one paying the others to be absolved, which costs shall included the costs occasioned by the employment of two counsel where this was done."*
- 2.3 Although this judgment is not binding on the Western Cape (or any other province) it is persuasive of nature and may open the door to potential litigation for cases of a similar nature.
- 2.4 The Western Cape Provincial Treasury (hereinafter referred to as "WCPT") is of the opinion that the answer does not necessarily reside in the amendment of Preferential Procurement Regulations as this would require that functionality be removed in totality as the Act itself only provides for price and preference.
- 2.5 Despite the fact that functionality, as a scoring criterium, may be abused if incorrectly utilised, it is a necessary / essential requirement for the purposes of evaluating and securing value for money. Therefore it is common cause that the awarding of bids only on price and preference would seriously detract from the element of value for money in terms of the ability of the successful bidder to provide services.
- 2.6 It is WCPT's view that it would be more prudent to amend the Act to provide for functionality as a scoring criterium and that sound Regulations are issued to govern the utilisation of functionality for scoring purposes.
- 2.7 It is also requested that the National Treasury provide direction and an interim measure on the application / scoring of points in respect of price and functionality.
- 2.8 It has also been noted that the judge, when making his ruling, alluded to certain omissions /lack of certain issues being challenged that were not taken up or defended by the respondent. This resulted in the judge using his

discretionary powers to decide on those issues that were not sufficiently / not challenged at all. Is the National Treasury (the Minister for Finance) contemplating appealing the decision made, as it is the WCPT's opinion that if the appeal court sets aside the decision it will afford the National Treasury the required time to correct the legislative requirements as well as mitigate against potential risk of further litigation and adverse judgments.

- 2.9 It should be noted that this matter should be considered urgent as various municipalities and departments have approached the WCPT for guidance on the issue and require direction on the manner in which they ought to apply the points scoring system henceforth.

3. RECOMMENDATION OF THE PROVINCIAL TREASURY IN MITIGATION OF RISK REGARDING THIS MATTER

- 3.1 In mitigation of the risk surrounding this matter and providing an interim mechanism to manage functionality requirements the WCPT wishes to propose the process as depicted hereunder.

3.2 Functionality Criteria

- 3.2.1 It is recommended that functionality should not be utilised in its current format (i.e. splitting of points for price and functionality). Functionality requirements should rather be utilised as pre-qualification criteria.
- 3.2.2 Bids which include functionality criteria should be the exception and not the rule and should generally apply to projects of a more complex nature or have a high value or is service orientated.
- 3.2.3 It should be noted that the proposed process would be applicable to the procurement of all goods and services but excludes construction and related contracts as these are governed by the CIDB Act and its Regulations.

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3.3.4 The functionality criteria (together with specifications and evaluation criteria) must be approved by the bid adjudication committee prior to its utilization in a bid.

3.4 Application of Functionality as Pre-evaluation Criteria

3.4.1 The pre-evaluation criteria, minimum score (if applicable) and how points will be granted must clearly be indicated in the bid documentation.

3.4.2 The current methodology and process utilised as provided for in National Treasury Practice Notes and the Guide for Accounting Officers (how and who) when scoring bidders remains.

3.4.3 When scoring bidders the following process / route is proposed:

- **Phase one: *The Pre-Qualification Phase***
STEP 1: determine whether bidder is to specification, meets all conditions of bidding and legislative requirements (evaluation of specification, contract conditions and legislative requirements); and

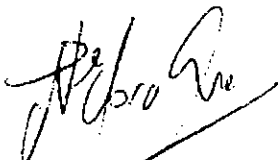
STEP 2: determine whether the bidder meets functionality requirements. Score / evaluate the bid in terms of functionality (if minimum score is met move to Phase two);

- **Phase two:** **The Evaluation Phase**
Evaluation and scoring in terms of the preferential procurement scoring (HDI and price)

4. **REQUEST**

4.1 The WCPT hereby requests that the National Treasury:

- (a) Provide the Province with their view on the judgment;
- (b) Provide assistance and guidance on the way forward and how the judgment affects the application of the preferential points scoring system; and
- (c) Advise the Province of its intention with regards to the Preferential Procurement Policy Framework Act and its supporting regulations as well as its intention, if any, with regards to appealing against the court's decision.



N. Ebrahim

SENIOR MANAGER: MOVABLE ASSET MANAGEMENT

DATE: 12 AUGUST 2010