

DISPUTES

Public procurement for COVID-19 related goods during the national state of disaster

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On 18 March 2020 the Minister of Cooperative Governance and Traditional Affairs issued Regulations under the Disaster Management Act, 2002, regarding the steps necessary to prevent an escalation of the disaster caused by the global COVID-19 pandemic, or to alleviate, contain and minimise the effects of the disaster. Regulation 9 states that during the state of national disaster, public procurement is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999) ("the PFMA"), and the applicable emergency provisions in the Regulations or Instructions made under section 76 of the PFMA, and the Municipal Finance Management Act, 2003 (Act No. 56 of 2003), and the applicable emergency provisions in the Regulations made under that Act.

National Treasury has recognised that organs of state, in compliance with the government's programme of preventing the spread of the COVID-19 virus, will have to procure basic preventative items to contain and manage the transmission of the COVID-19 virus. To this end, on 19 March 2020 the National Treasury issued Instruction No 8 of 2019/2020 (the "Treasury Instruction") which sets out measures to assist and regulate organs of state in their procurement processes during the national state of disaster. The stated purpose of the Instruction is to:

- Facilitate emergency public procurement to deal with the COVID-19 pandemic; and
- Avoid the abuse of the supply chain management ("SCM") system to deal with the disaster.

It is important to note, at the outset, that the Treasury Instruction is of limited application in that it applies only to procurement of commodities necessary to contain and manage the spread of the COVID-19 virus. Organs of state may therefore not rely on the Treasury Instruction for the procurement of goods and/or services not related to the COVID-19 pandemic and must continue to follow the procurement processes outlined in their respective SCM policies.

Use of transversal contracts

The Treasury Instruction encourages the use of transversal term contracts for the procurement of basic preventative items from suppliers listed in Annexure A, Table 1 to the Instruction. Transversal term contracts are centrally facilitated contracts arranged by the National Treasury for goods or services that are required by one or more than one organ of state.

The Treasury Instruction provides that institutions which are already participants on the transversal contracts listed in Annexure A, Table 1 may continue placing orders as usual. The Treasury Instruction however alters the position of institutions which are not participants to the relevant transversal contracts in that it permits accounting officers or accounting authorities of these institutions to, during the national state of disaster, procure items from the listed transversal contracts without first obtaining participation approval from the National Treasury's Transversal Contracting Unit.

Items in respect of which National Treasury has negotiated alternative arrangements with suppliers

Annexure A, Table 2 to the Treasury Instruction lists preventative items for the containment and management of the COVID-19 pandemic and suppliers of those items, which are not on transversal contracts, but in respect of which National Treasury has negotiated alternative arrangements. With regards to these items, the Treasury Instruction permits accounting officers and accounting authorities to place orders with the listed suppliers, at the listed prices.

Items not listed in Annexure A

Where an institution requires an item not listed in either Table 1 or 2 of Annexure A to the Treasury Instruction and which is deemed to be a specific requirement for the institution for purposes of complying with the government programme of preventing the spread of the COVID-19 virus, the Treasury Instruction permits institutions to deviate from competitive bidding processes, without National Treasury's prior approval.

It is in these particular instances that institutions are warned to guard against abuses of the procurement processes.

Provision is made in the Treasury Regulations and Practice Note 3 of 2016/2017 ("the Practice Note") for a deviation from normal supply chain management procedures, where following a competitive bidding process is impractical due to, *inter alia*, emergency situations.

There can be no doubt that the global outbreak of the novel coronavirus COVID-19 has, and will continue to, create a number of emergency situations which will compel organs of state to rely on emergency procurement provisions in order to procure goods and services to curb the spread of the virus. It is important to remember however that where emergency provisions are utilised, the procurement process must still comply with constitutional imperatives and must therefore be transparent, equitable, fair, cost effective, and competitive. In other words, organs of state are not empowered to do away with these principles simply because an emergency exists.

In *CEO, SA Social Security Agency NO and others v Cash Paymaster Services (Pty) Ltd* [2011] 3 All SA 233 (SCA) the SCA recognised that Section 217(1) of the Constitution prescribes the manner in which organs of State should procure goods and services, and reiterated that organs of State must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. This implies that a "system" with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of section 217(1), the question whether any procurement is "valid" must be answered with reference to the mentioned legislation or regulation.

In relation to Treasury Regulation 16A6.4, the SCA further held that Treasury Regulation 16A6.4 permits an accounting officer or chief executive officer to deviate from a competitive process subject to conditions and that the "system" referred to in section 217(1) of the Constitution may provide for such deviations. However, where an organ of state deviates from a competitive bidding process, there must be rational reasons for the decision to deviate. That is a material requirement. Second, the reasons have to be recorded. This the court referred to as a formal requirement. The court further held that the basis for these requirements is obvious. State organs are as far as finances are concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of regulation.

In applying the above *dictum* to deviations in the procurement process occasioned by emergencies, the first enquiry is whether rational reasons are provided for the decision to deviate from normal competitive procedures. In the determination of the rationality of the reasons provided for a deviation, it is important to bear in mind that the prescripts of administrative justice still require procedural fairness and competitiveness in public procurement processes, regardless of whether or not emergency provisions are utilised. The basis for deviating from normal procurement processes will have to be reasonable and justifiable, and the process of change must be procedurally fair.

The second stage of the process requires organs of state to record the reasons for the deviation. The Treasury Instruction provides, in paragraph 3.6, that all items procured in terms of paragraph 3.5 as emergency procurement related to COVID-19

must be reported to the relevant treasury within 30 days. The report must contain a description of the item, the name of the supplier from whom it was procured, the unit price, the quantity of items procured, the total price, the total saving achieved when compared to the pricing contained in Annexure A and, the motivation for deviating from the items listed in Annexure A where applicable.

From the above it is clear that organs of state cannot initiate and follow procurement processes that flout the constitutional imperatives stipulated in section 217 of the Constitution, on the basis of any emergency resulting from the national state of disaster.

General compliance provisions

The Treasury Instruction lists general compliance provisions, including *inter alia* the following:

- Where an institution has already concluded a contract with a supplier for the provision of items listed in Annexure, that institution must honour that contract;
- Where items are included in an existing Facilities Management Contract, institutions may negotiate with the Facilities Management Service Provider to provide these items. In addition, institutions may expand or vary contracts, provided that this is done only for the procurement of items that will aid in the prevention of the spread of the virus. In terms of paragraph 3.5.1 (ii) of the Treasury Instruction, accounting officers and authorities may expand contracts for goods by up to 15% or R15 million. Paragraph 9.2 of the Practice Note stipulates that expansions greater than 15% or R15 million must be approved by National Treasury. This requirement is however waived in respect of goods required to combat COVID-19; and
- Institutions must not pay prices which are in excess of the prices listed in Annexure A.

Lastly, the Treasury Instruction provides that institutions may approach any other supplier to obtain quotes and may procure from such supplier, provided that:

- The items are to the specification as determined by the National Department of Health;
- The prices are equal to or lower than the prices listed in Annexure A; and
- The supplier is listed in the Central Supplier Database.



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