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Update on emergency procurement measures

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On 19 March 2020 the National Treasury issued Instruction No 8 of 2019/2020: Emergency Procurement in response to the national state of disaster (the "first Treasury Instruction")[1] which set out measures to assist and regulate organs of state in their procurement processes during the national state of disaster. Various stakeholders made representations raising concerns about the procurement process outlined in the instructions, particularly that the approach adopted has excluded a number of domestic suppliers and that it covered too wide an array of goods, especially goods that can be manufactured locally.[2] In response to these representations, and on 28 April 2020, National Treasury issued Instruction Note No 5 of 2020/2021 ("Treasury Instruction 5"), which repeals the first Treasury Instruction in totality.

A criticism that has been levelled against the first Treasury Instruction is that by specifying the suppliers with whom organs of state could contract for the provision of COVID-19 related goods, National Treasury inadvertently excluded participation by local small, medium and micro enterprises ("SMMEs"). Thus, in order to correct this, Treasury Instruction 5 specifically prescribes procedures for the emergency procurement of COVID-19 Personal Protection Equipment ("PPE") and cloth masks for ease of supply by local SMMEs, and seeks to create an environment for the stimulation of economic participation in supply and manufacturing by these SMMEs.

Checks and balances

Emergency procurement processes are innately susceptible to abuses by corrupt officials, if adequate measures are not put in place to create checks and balances aimed at keeping organs of state accountable and ensuring that all procurement takes place in terms of a system that is transparent, equitable, fair, cost effective, and competitive. In recognition of this, Treasury Instruction 5 requires accounting authorities and officers to ensure that authorised or delegated officials properly account when committing public funds, and that any procurement for COVID-19 specific items takes places in terms of an internal financial control, risk management and reporting system. Furthermore, organs of state are required to conduct regular audit checks in order to proactively identify any irregularities in the procurement process.

Contract variation

The variation (without approval) threshold in relation to contracts for goods related to COVID-19 has been increased from 15% or R15 million in the first Treasury Instruction, to 25% or R25 million of the original contract price in Treasury Instruction 5. This increased threshold will remain in place until the COVID-19 pandemic is declared to be over. However, in recognition of the need for more stringent regulation of emergency procurement during the national state of disaster, expansions, extensions or variations in excess of the above thresholds will only be allowed in exceptional circumstances, and subject to prior written approval by the relevant treasury.

Instructions for the procurement of PPE and masks

Whereas the first Treasury Instruction provided, in Annexure A Table 2, a list of preventative items for the containment and management of the COVID-19 pandemic and suppliers of those items with whom National Treasury had negotiated alternative arrangements, Annexure A to Treasury Instruction 5 only provides a list of PPE items and cloth masks with specifications and maximum prices. For the duration of the national disaster, institutions are permitted to obtain these items from any supplier, provided that:

- Items are to the specifications as determined by the World Health Organisation and the National Department of Health for PPE and the Department of Trade, Industry and Competition in relation to cloth masks.[3]
- the prices are lower than, or equal to the prices listed in Annexure A;

- the supplier from whom the items are procured is registered on the Central Supplier Database ("CSD")* and any other database that may be approved by National Treasury; and
- In relation to cloth masks, institutions may only purchase from suppliers that are registered with Department of Small Business Development ("DSBD")** and are on the CSD.

In keeping with the government's mandate to stimulate economic participation by local SMMEs, institutions are encouraged to procure from small enterprises that fall under the designated group in terms of the Preferential Procurement Regulations, 2017.

Treasury Instruction 5 retains some of the general compliance instructions set out in the first Treasury Instruction, including that where an institution has already concluded a contract with a supplier for items listed in Annexure A (of Treasury Instruction 5), that institution must honour that contract, and that where the items in Annexure A are included in an existing Facilities Management Contract, institutions may negotiate with the Facilities Management Service Provider to provide these items. In this regard, the existing Facilities Management contracts may be expanded or varied, within the variation thresholds discussed above.

Institutions are further instructed to refrain from procuring items at prices above the maximum prices listed in Annexure A. However, a variation of up to 10% of the prices listed in Annexure A will be allowed, provided that any deviation must be approved by the accounting officer or authority, based on a justifiable reason.

Use of Transversal Contracts

The provisions relating to Transversal Contract which allow institutions that are already participants on the transversal contracts to continue placing orders as usual, have been retained in Treasury Instruction 5. Furthermore accounting officers and authorities are permitted to obtain PPE items listed in Annexure A from transversal contract suppliers, without first obtaining participation approval from the National Treasury's Transversal Contracting Unit. An important amendment however is that transversal contract suppliers' prices will default to Annexure A prices, and may only be varied by up to 10%.

**Visit https://secure.csd.gov.za/Account/RegistrationProcess for more information on how to register on the CSD.*

***Visit https://smmesa.gov.za/ to register your business with the DSBD.*

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[1] In paragraph 9 of Treasury Instruction 8, this instruction is referred to as Instruction No 3 of 2020/2021: COVID-19 Disaster Management Central Emergency Procurement Strategy for PFMA Organs of State.

[2] Media Statement issued by National Treasury on 28 April 2020.

[3] The cloth mask specifications are set out in Annexure B.

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