



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

PUBLIC FINANCE MANAGEMENT ACT, 1999: DRAFT TREASURY REGULATIONS

FORMAT FOR COMMENTS ON THE DRAFT TREASURY REGULATIONS

DUE DATE FOR COMMENTS – FRIDAY 8 FEBRUARY 2013

1. COMMENTATOR DETAILS

Organisation Name	Professor Geo Quinot, African Public Procurement Regulation Research Unit, Stellenbosch University		
Organisation Type (Please indicate with a X)	Department		Private Individual
	Constitutional Institution		Private Organisation / Company
	Public Entity	x	Other
Telephone Number	021 808 3195		
Email Address	gquinot@sun.ac.za		

2. COMMENTS

Paragraph	Comments on the draft regulation	Proposed amendment to regulation	Notes to the drafter
Part 7	The much higher level of detailed regulations on public procurement contained in this section, in comparison with the dearth of regulation in the current Treasury Regulations, is to be welcomed. These new regulations will certainly help in making public procurement regulation clearer and place it on a more certain and transparent footing.		
20.1	It is not clear why the definition of “bid” does not include offers received under the “Written and Verbal Quotations” procedure provided for in sub paragraph 22.2.1(b). It is submitted that offers received under this procedure also be included in the definition of “bid” otherwise many of the rules referring to “bid” (including derivative definitions such as “bidder” or “contract”) will not apply to offers under that procedure.	“ bid means a written offer in a prescribed or stipulated form in response to an invitation by an institution for the provision of goods or services, through written and verbal quotations, formal written price quotations, advertised competitive bidding processes or proposals;”	
20.7.1(h)	It is not clear what the phrase “preference points for the price and socio-economic objectives” means. This may be a hang-over of the old Preferential Procurement Regulations, 2001 and does not seem to be in line with the new Preferential Procurement Regulations, 2011 under which preference points can only be awarded for B-BBEE status as indicated by the bidder’s B-BBEE certificate.	“(h) comparison of prices and allocation of preference points for B-BBEE contribution”	Consideration should be given if it is even necessary to include “and allocation of preference points ...” in sub para (h) given sub para (i), which seems to cover the BEC’s function in relation to point scoring. Sub para (h) could thus simply state “comparison of prices”.
20.8.4(b)	It is not clear that the requirement that the BAC scrutinise the terms of reference for the “ratio between	“(b) proper terms of reference were drawn up for the service required, clearly indicating the	

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	price and functionality” is in line with the Preferential Procurement Regulations, 2011. In line with the PPPFA the latter regulations do not allow points to be allocated to functionality in comparison with price as the old Preferential Procurement Regulations, 2001 unlawfully did. Functionality and price must be separately assessed under the new Preferential Regulations. Accordingly it does not make sense to refer to a ratio between functionality and price.	scope of the service required, the evaluation criteria, as well as the weights and values;”	
20.8.7	This sub para is a complete duplicate of 20.8.3.	Omit 20.8.7	
20.11.3	The reference to sub para 20.10.4(b) is incorrect. It should probably rather refer to 20.11.2.	“The verification referred to in sub paragraph 20.11.2 above must ...”	
22.2.1	It is proposed that this sub paragraph be expressly made subject to the thresholds set by Treasury for use of the various procurement methods to avoid uncertainty as to the open-ended nature of a contracting authority’s choice between different procurement methods.	“The accounting officer or accounting authority must apply the following, subject to the thresholds determined by National Treasury, when procuring goods or services, hiring or letting anything, acquiring or granting any right or disposing of movable state property:”	
22.2.1(b)(i)	Consideration should be given to whether the use of the word “may” is appropriate here. One should bear in mind that the choice between different procurement procedures are made in terms of the thresholds set by Treasury. Once that choice has been determined, i.e. once it has been determined what procurement procedure should be used, it should be mandatory to follow the requirements of that particular method. It is thus inappropriate to use the word “may” in this sub para since it creates the impression that when an authority adopts the “Written or Verbal Quotations” method he/she is not obliged to follow the rules set out for that procedure in sub para 22.2.1.(b).	“(i) the accounting officer or accounting authority must procure requirements ...”	Consideration should be given if it is even necessary to refer to “written quotations” in this particular sub para. It is not entirely clear what the difference will be between this procurement method and the one set out in sub para 22.2.1(c), Formal Written Price Quotations, where written quotations are obtained under both. If a difference in the form of the written quotations is contemplated, i.e.

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			informal under 22.2.1(b) and formal under 22.2.1(c), then it is proposed that more guidance be given on this difference in form. Otherwise “written” should simply be omitted from 22.2.1(b).
22.2.1(e)(i)	The use of the word “and” at the end of sub paragraph (cc) may create confusion as to the cumulative or alternative nature of the cases listed in sub paragraphs (aa) to (dd). The intention seems to be that these are alternative instances where a limited procurement method may be used. It is proposed that the word “and” be replaced with “or” to make this intention clear.	“(cc) ... initially submitted proposals; or ...”	
22.2.1(e)(i)(dd)	It is not clear why a limited bidding process would be justified when the supplier is the designer or manufacturer of goods or services simply for that reason. It is completely possible that more than one potential bidder may all be manufacturers or designers of a particular product or alternatively that while a particular supplier is the designer/manufacturer the particular goods or services may still be available in the market from various suppliers. In such cases there is really no justification for limited bidding. The same applies to the possibility of the supplier holding the intellectual property rights. That fact does not necessarily mean that such person is the only supplier, others may also be able to supply while respecting the rights of the IP holder. This sub paragraph provides preference to manufacturers of goods in relation to retailers. Such an approach may not be aligned to the constitutional imperative of competitive public contracting. To the extent that ownership of the IP rights or being the designer/manufacturer means that the particular supplier is the only one that can supply the goods/services, the option for limited bidding is	Omit sub paragraph (dd)	

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	captured in sub paragraph (bb).		
22.2.1(e)(ii)(cc)	It is not clear what the purpose will be of scoring a single bid in terms of preference points, which, in terms of the Preferential Procurement Regulations, 2011 can only really be applied if there is more than one bid.	Omit the sub paragraph.	
22.2.1(g)(ii)(dd)	The reference to paragraph 22.1(g)(i) is incorrect and should probably be 22.2.1(g)(i)	“(dd) does not comply with paragraph 22.2.1(g)(i) of these Treasury Regulations”	
22.2.1(h)	It is proposed that special attention be given to the composition of all bid committees where transversal term contracts are involved. It is desirable that such committees be constituted in a broader manner than the normal committee constitution in order to involve the expertise of client departments at all levels of the procurement process.		
22.2.1(h)(ii)	Consideration should be given to whether it is desirable to make participation in transversal term contracts mandatory in contrast to the current position where participation in such contracts are discretionary. A move to mandatory participation signals a shift back to central procurement as opposed to procurement at entity level, which is currently the procurement paradigm under the PFMA. It is quite likely that, given the nature of public procurement, over time most procurements are done through mandatory transversal term contracts with the result that we find ourselves back to a system of central tender boards, which we deliberately abandoned under the PFMA. It must thus be questioned whether the mandatory nature of participation in transversal term contracts is in line with the spirit of the PFMA and whether it attempts to depart from the basic scheme of the PFMA. If the latter is true, these regulations may be unlawful as they attempt to depart from their enabling statute, the PFMA.	Omit sub paragraph (ii)	
22.10.1(b)	It is not lawful to simply allow departure from a statutory provision such as the PPPFA by means of regulations as this sub paragraph attempts to do. Non-	Omit sub paragraph 22.10.1(b)	

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	<p>compliance with the PPPFA can only be done in terms of that statute itself and the PPPFA does not provide for organs of state to depart from its provisions simply because the funding for the procurement is sourced in a grant. The only possibility for exemption under the PPPFA is by means of section 3 of the Act, which contains a number of requirements that must be met in an individual case of exemption and that cannot be done in blanket form as sub paragraph 22.10.1(b) attempts to do. This sub paragraph is in all likelihood thus unlawful and invalid.</p>		
23.5.2	<p>It is not clear what the relationship of this sub paragraph is with sub paragraph 23.5.1, which expressly restricts variations to 15%. Given sub paragraph 23.5.1 it is thus not clear that accounting officers/authorities even have the power to grant variations in excess of 15%. However, sub paragraph 23.5.2 clearly envisages variation in excess of 15%. The question is thus where the power is granted to accounting officers/authorities to allow variations in excess of 15%. If the intention is that accounting officers should have the power to allow variations in excess of 15% and thereby depart from sub paragraph 23.5.1, such possibility should be expressly stated. If, however, accounting officers should not have the power to grant variations in excess of 15% sub paragraph 23.5.2 becomes redundant and should be omitted.</p>		
27.1.2(c)(i)	<p>It is not clear why accounting officers should only report on restrictions in terms of the Preferential Procurement Regulations and not only on restrictions in terms of these Treasury Regulations. It is proposed that the latter be added to the sub paragraph.</p>	<p>“(i) Accounting officers or accounting authorities must within 5 working days furnish the National Treasury with the prescribed information on the restriction of suppliers from doing business with the public section in terms of the Preferential Procurement Regulations, 2011 or these Treasury Regulations.”</p>	
27.1.2(c)(vi)	<p>It is not clear what the reference to “Regulation 3.5” in this sub paragraph refers to. It is clearly not regulation</p>		

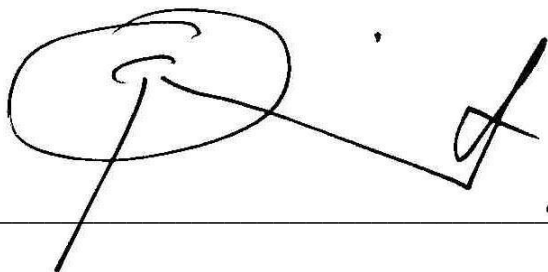
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	<p>3.5 of these Treasury Regulations. Perhaps it should refer to paragraph 23.5.1? The comments on sub paragraph 23.5.2 apply to this sub paragraph as well and any changes there will also affect this subparagraph.</p>		
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3. SIGN OFF PAGE

Date of submission of comments: 7 February 2013

Signature of organisation representative responsible for comments:

A handwritten signature in black ink, consisting of a large, stylized initial 'G' followed by a long horizontal line and a final flourish. The signature is positioned above a solid horizontal line.

Name: Geo Quinot

Designation: Director, African Public Procurement Regulation Research Unit; Professor of Law, Stellenbosch University

Date: 07/02/2013