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REF: SCM 3/ 2008

DATE: 17 APRIL 2008

**TO: All
HEADS OF DEPARTMENTS: PROVINCIAL DEPARTMENTS
CHIEF FINANCIAL OFFICERS AND SCM HEADS
PROVINCIAL TREASURY
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SUPPLY CHAIN MANAGEMENT CIRCULAR NO. 3 of 2008

- 1. POLICY ON THE CESSION/ TRANSFER OF CONTRACTS**
- 2. POLICY ON THE AWARDING OF MULTIPLE CONTRACTS TO ONE SUPPLIER**

This circular is applicable to all provincial departments. All heads of departments are required to disseminate the contents of this circular to all chief financial officers and supply chain management managers of their departments.

1. Your attention is hereby drawn to Circular No. 3 of 2008 issued by KZN Provincial Treasury.
2. The document can be downloaded in electronic format from the KZN Provincial Treasury website at: <http://www.kzntreasury.gov.za>.
3. Kindly advise all SCM Heads, CFO's and Departmental Heads of the contents contained herein.

Please find attached hereto the KZN Provincial Treasury SCM Circular No. 3 of 2008.

Kind regards


MR M. MLANGENI

**ACTING GENERAL MANAGER: SUPPLY CHAIN MANAGEMENT
For HEAD OF DEPARTMENT: PROVINCIAL TREASURY**



PROVINCE OF KWAZULU-NATAL
PROVINCIAL TREASURY

MEMO

To: Mrs. P Zulu
Senior General Manager: Financial Management


From: Mr. M MLANGENI
Acting General Manager: Supply Chain Management

Date: 4th March 2008

Subject: Re: Policy on the Cession/ Transfer of contracts & Policy on
the awarding of multiple contracts to one supply.

Please find the attached documents for your approval.

Kind Regards


Mr. M Mlangeni
Acting General Manager

Approved



14/04/2008



**KWAZULU NATAL
PROVINCIAL GOVERNMENT**

**POLICY ON THE CESSION/
TRANSFER OF CONTRACTS**

PROVINCIAL TREASURY

2007

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POLICY ON THE CESSION OF CONTRACTS

1. Definitions

“Cedent” shall mean an individual who transfers personal rights and/or obligations from his/her/its estate to that of another.

“Cessionary” shall mean one who accepts transfer of personal rights and/or obligations from the estate of another and becomes the holder of that personal right and obligation.

“Cession” shall mean a bilateral juristic act whereby rights and/or obligations are being transferred from the cedent to the cessionary.

“Out and out cession” shall mean a complete alienation of all rights and/or obligations by the cedent in favour of the cessionary.

2. Introduction

Due to the large number of contracts being ceded for a variety of reasons, a need has arisen to develop a policy which establishes a framework for the cession of contracts in Provincial Government. The Kwa-Zulu Natal Supply Chain Management Policy Framework allows for the promotion of socio-economic development goals, i.e. the enhancement of SMME's and HDI's using SCM leverage. Many of these businesses do however experience difficulties in executing contracts awarded to them and for various reasons are unable to complete such contracts. These difficulties vary from mismanagement, financial difficulty, liquidation, death of contracting parties and professional changes within the business. These are but few of the many scenarios which may arise and which give cause for the ceding of contracts.

The process of cession should be considered only as an absolute last resort, where cancellation or re-advertisement would be prejudicial to the department, given the inherent complexity of the cession process and the numerous difficulties that may be experienced as a result hereof. Due to these difficulties, suppliers may elect to:

- Cede the contract or parts of the contract to other suppliers, who might be in a position to fulfil the contract.

3. Procedure for the Cession of a Contract

The following principles and procedures are to be applied and followed with respect

to the cession of contracts.

- 3.1 A clear need must exist for the ceding of a contract, in that the options of cancellation and re-advertisement must have been excluded.
- 3.2 The authority to approve the cession rests with the Accounting Officer (Head of Department) of the department or his/her delegate. The approval of the Accounting Officer must be done on the basis of the recommendation of the risk assessment of the Provincial SCM Compliance Unit.
- 3.3 To effect a valid cession, departments must ensure that they use the official cession forms issued by Provincial Treasury. All signatures appearing on the document must be in the original. Substantiating documentation supporting the legal standing of the cessionary (that it is a valid, legal entity) and the signatories (that they have the authority to represent the cedent or cessionary) must be attached to the aforementioned official form.
- 3.4 The department must establish if the cession will prejudice any rights or obligations which the department as a party to the contract may have had. Every attempt must be made to place the department in the same position it would have been with respect to the original contract. If this is not possible, careful consideration must be given as to whether the cession would be in the best interest of the department, due regard being held to the following:
 - Service delivery.
 - Preferential procurement objectives
 - Total cost
- 3.5 It should be determined by the relevant department if the cession will constitute a sub-contract or an out and out cession of the contract.
- 3.6 The department must ensure that where the cession will entail a sub-contract that all parties are registered with the Provincial Suppliers Database before the cession takes place.
- 3.7 The Cessionary must thus be an identified supplier who is registered on the Suppliers Database and which is a legal entity meeting all statutory requirements.
- 3.8 The Cedent and Cessionary must enter into the contract unconditionally and shall be held liable for all penalties which may accrue. To this end, the Cedent and Cessionary must understand that all conditions binding the Cedent will apply to the Cessionary, which includes time limits, financial conditions and material conditions. Should the Cessionary fail to fulfil these

conditions, he/she/it will be responsible for all penalties accruing thereto.

- 3.9 A duly authorised official within the SCM Unit of the department must attest all cession documentation, in addition to the other contracting parties.
- 3.10 The cession of a contract must not compromise the terms and conditions of the contract.
- 3.11 The law of Cession allows for a cession contract to be entered into without the debtor (department) participating therein or even being aware of it. For this reason it is recommended that departments include in their conditions of bidding, provisions in respect of cessions, which must prevent a contractor from ceding a contract without the prior knowledge and approval of the department concerned. This will reduce the risk attached to contract administration.

4. Requirements for a Valid and Effective Cession

- 4.1 The right and/or obligation to be transferred must lie with the cedent.
- 4.2 Departments must ensure that the nature of the contract and required service delivery warrant the cession process..
- 4.3 An Agreement must exist between the cedent and the cessionary to give and to accept transfer of a right and/or obligation, which is capable of cession.
- 4.4 Compliance with common law and contractual formalities.
- 4.5 Cession must not be illegal.
- 4.6 The department must not be prejudiced by the cession.
- 4.7 Cedent and cessionary must have the necessary legal capacity to give effect to a valid cession.
- 4.8 The cession document should be expressly concluded.
- 4.9 The contracting parties must agree on the nature of the transaction and the subject matter of the cession (rights and/or obligations to be transferred).
- 4.10 No statutory prohibitions on cession as dictated to by Section 23(6) of the Insolvency Act 24 of 1936 and Section 9 of the Credit Agreements Act 75 of 1980 should exist.
- 4.11 Before considering a cession process, departments should ensure that an

appropriate "cooling off" period has lapsed in respect of the said contract, in order not to encourage instances of fronting.

5. Conclusion

It is emphasised that where a department is to enter into a cession contract that all of the guidelines set out above be adhered to and that the cession process be followed with absolute discipline.

Departments are requested to advise Provincial Treasury in all instances wherein cession is proposed before the approval by the Accounting Officer is given.

CESSION/TRANSFER OF CONTRACT

CONTRACT NUMBER:

CONTRACT

TITLE/DESCRIPTION:

.....
.....
.....
.....

CONTRACT PERIOD:

The Transferor/Cedent and Transferee/Cessionary hereto acknowledge that the prior approval of the Accounting Officer (Head of Department) or his/her delegate is a prerequisite for the legal transfer of rights and obligations under the above-quoted contract and this agreement will only be binding and enforceable when the duly authorised signatory of the Accounting Officer (Head of Department) countersigns the agreement to certify that such approval has been granted and thereby ratifies the agreement. Subject to such ratification, it is undertaken as follows:

CONTRACT NUMBER:

A. I,
(Full names in BLOCK letters)

the undersigned, in my capacity as

for the Contractor, Messrs

Provincial Suppliers Database Registration Number.....

(called the Transferor/Cedent) hereby cede all my rights and obligations under the
above-quoted contract to Messers.....

.....
(called the Transferee/Cessionary)

Provincial Suppliers Database Registration Number.....

This is done and executed at

on this day of 20.....

In the presence of the undersigned witnesses:

.....
(Signature of Transferor/Cedent)

WITNESS (1)

WITNESS (2)

.....
(Initials and Surname)

.....
(Initials and Surname)

.....
(Signature)

.....
(Signature)

CONTRACT NUMBER:

B. I,
(Full names in BLOCK letters)

the undersigned, in my capacity as

for the Contractor, Messrs

Provincial Suppliers Database Registration Number.....

(being the Transferee/Cessionary), hereby assume and accept full responsibility and liability for the herein mentioned contract, under the same terms, conditions and contracted prices, as it was held by the aforementioned Transferor/Cedent.

This is done and executed at

on this day of 20.....

In the presence of the undersigned witnesses:

.....
(Signature of Transferee/Cessionary)

WITNESS (1)

WITNESS (2)

.....
(Initials and Surname)

.....
(Initials and Surname)

.....
(Signature)

.....
(Signature)

CONTRACT NUMBER:

C. I,
(Full names in BLOCK letters)

the undersigned, in my capacity as
of the DEPARTMENT of
/PARLIAMENT having been duly authorised to do so , hereby certify that approval
has been granted by the said /Department/Parliament* for the cession/transfer of
the herein mentioned contract from the named Transferor/Cedent to the named
Transferee/Cessionary with effect from:

..... (Date)

This is done and executed at on this
day of 20.....

.....
(Signature)

*Please delete whichever is not applicable.

POLICY ON THE AWARDING OF MULTIPLE CONTRACTS TO SINGLE SUPPLIERS

1. Introduction

The concept of preferential procurement is augmented in the Constitution of the Republic of South Africa (Act 108 of 1996). The Preferential Procurement Policy Framework Act (PPPFA) was subsequently promulgated to ensure fair and equitable allocation of business opportunities to historically disadvantaged individuals and entities. However, as it became increasingly apparent that a strict application of the allocation of preference points, in terms of the PPPFA, with respect to the awarding of contracts and the pursuance of socio-economic goals were not achieving the desired objectives, the KwaZulu Natal Province elected to adopt the KZN Supply Chain Management Policy Framework. The KZN SCM Policy Framework allowed for a radical approach to targeted procurement within the threshold framework of the PPPFA. The Province recently conducted a detailed spend analysis in order to accurately identify recipients of government spend. This spend analysis revealed that in most instances, departments were awarding multiple contracts to one supplier, which in certain instances had an adverse effect on the development and sustainability of small businesses or conversely resulted in the enriching of already developed enterprises.

The KwaZulu Natal SCM Policy Framework, has adequately identified mechanisms to ensure Black Economic Empowerment within the Province. These mechanisms include:

- (i) the application of preference points with respect to certain categories of suppliers;
- (ii) identification and definition of HDI's, SMME's, women and cooperatives, who are to benefit from the application of the preference point system; and
- (iii) the identification of clear and concise socio-economic goals concerning the targeted group of suppliers.

It was initially envisaged that in making governmental contracts accessible to small businesses, more job opportunities would be created for historically disadvantaged individuals, and would therefore play an integral role in job creation and poverty alleviation. At no stage was it intended that these business opportunities should have a negative effect on the growth and development of the black businesses, neither was it intended to enrich a small portion of the intended recipients. Clearly, the objectives of the Constitution, PPPFA and the KZN SCM Policy Framework are being negated by the detrimental effect of multiple contracts being awarded to single suppliers.

2. Reasons for the Development of Small Businesses

The use of preferential procurement as an instrument to effect socio-economic change through the promotion of employment and business opportunities to marginalized sectors of society, is commonly employed in both developed and developing countries. South Africa has integrated preferential procurement into the procurement of goods and services, in an effort to achieve the identified socio-economic targets. Therefore, public sector procurement reform has been aimed at the development of HBI businesses and SMME's, in order to redress the skewed patterns of business ownership arising from the previous political dispensation and to bring about reductions in the poverty levels by creating more job opportunities. Such reform is effected in many ways and include:

- (i) Providing access to the markets for small businesses and increasing the market share of those businesses that are owned, managed or controlled by historically disadvantaged individuals, through preferential procurement;
- (ii) Addressing the impediments to effective and profitable participation of businesses in government procurement through interventions, such as the provision of bid information at relevant business centers,

Having identified the objectives of preferential procurement, it is mandatory therefore that appropriate mechanisms be implemented to ensure maximum efficiency and sustainability of the said objectives.

3. Processes of Preferential Procurement

3.1 Bid Award Process

The bid award process involves the awarding of contracts in a manner that is fair, competitive and equitable. To this end, all bid awards are made in terms of the number of points awarded, in accordance with the 80/20 or 90/10 preference point mechanism. It is the function of the Bid Evaluation Committee to ensure, where practicable, that all preference points claimed are correct and are a true reflection of the business entity. In addition hereto, it is the function of the Bid Evaluation Committee to ensure that all bidding suppliers have the necessary capacity to fulfill the contractual obligations attached to a particular tender, prior to making a recommendation to the Bid Adjudication Committee. In addition, the Bid Evaluation Committee should consider the number of awards previously awarded to the said supplier to determine if in the interests of the "equitable distribution" of opportunities, it is fair that same be awarded to the said supplier.

Examination of the bid evaluation and bid award process has shown the following shortcomings:

- (i) Preference Points are not verified at evaluation stage;
- (ii) No verification of the capacity of suppliers and their ability to successfully complete contracts, is undertaken;
- (iii) Bid Adjudication Committees rely solely on the recommendation of the Bid Evaluation Committee and therefore sometimes fail to adequately apply their minds in the awarding of contracts, particularly where a supplier has been awarded a contract in previous awards.
- (iv) Strict application of the "Lowest acceptable bid" is over-emphasised, while some of the primary goals of the Province as a whole are ignored.

3.2 Quotation Process

Some departments have adopted a blanket approach with respect to quotations, in that quotations are inadvertently awarded to the supplier quoting the lowest price. Further, quotations are awarded only to those suppliers identified by the respective officials, thereby increasing the risk of the appointment of one supplier. As a result thereof, little cognizance is taken of the capacity of the supplier and whether the supplier is indeed an emerging small business deserving of the opportunity. Therefore, not only do departments fail to ensure the enhancement of preferential procurement, but fail to determine the capacity of the supplier to deliver the goods or services required, or the quality of the goods or services to be delivered. It is for this reason therefore that multiple contract awards are made to suppliers, who in some instances lack the capacity and ability to fulfil their contractual obligations **OR** that some suppliers have monopolised their respective industries, through the receipt of multiple government contracts.

4. Recommendations

Due to the flaws in the procurement process followed by some departments, as set out above, the following recommendations are made in terms of which the awarding of multiple contracts to one supplier, are regulated. These recommendations are as follows:

- (i) Preference Points must be awarded in accordance with the preference point system specified in the KZN SCM Policy Framework.
- (ii) Bid Evaluation Committees must verify and where practicable confirm accuracy of preference points claimed by suppliers and where necessary may overlook a bid, where there is clear and tangible proof that a supplier has repeatedly received awards from the department.
- (iii) The BEC must assess the capacity of the prospective suppliers and establish the existence of technical capability and capacity to execute the contract.

- (iv) The BEC and BAC's must ensure that the contract for which the supplier is bidding falls within the principal business activity of the said supplier;
- (v) Bid Evaluation and Adjudication Committees should ensure that a broad base of historically disadvantaged entities are awarded government contracts, as opposed to a few selected entities. It is recommended that this process be facilitated in the following manner:
 - (a) Where applicable, a department should attempt to utilize the services of suppliers in the designated targeted categories on a rotational basis. This process should be executed in consultation with the prospective suppliers.
 - (b) Departments should expressly indicate in the conditions of tender that the awarding of tenders are not dependent solely on the factors of price and preference points and that where necessary, departments may rely on other factors such as the equitable distribution of opportunities.
 - (c) Bid should be designed to specifically target Historically Disadvantaged Individuals and SMME's and should be designed to ensure the upliftment of these targeted groups as whole and not certain selected entities.
 - (d) Bid Evaluation and Adjudication Committees must, prior to assessment, enquire as to the number of contracts held by a single supplier/bid and should as far as possible attempt to ensure an equitable distribution of contracts amongst suppliers/bidders and hence avoid the awarding of many contracts to one supplier, as a result of exclusive reliance on the allocation of points.
 - (e) In instances where contracts are awarded on the basis of equitable distribution, a department must motivate such decisions and place it on record for audit and future reference purposes.
 - (f) Departments must ensure that satisfactory close-out reports with respect to all contracts are filed, in order to monitor and evaluate performance by suppliers. These reports must be examined by the relevant internal SCM committees, prior to further awards being made to the same supplier.
 - (g) In instance of sole suppliers, a decision to utilize the services of a sole supplier must be explicitly indicated and recorded.

5. Conclusion

Departments are urged to apply absolute discretion in the application of this Policy, given the possible legal consequences. Departments are to ensure that all required information is obtained prior to the taking of a decision, to pass over a supplier on the basis of equitable distribution of resources.