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TO ALL : HEADS OF DEPARTMENT
ACCOUNTING AUTHORITIES OF SCHEDULE 3C PUBLIC
ENTITIES

FROM : MR M. MAZIBUKO
HEAD OF DEPARTMENT

SUBJECT : NATIONAL TREASURY INSTRUCTION NOTE ON THE
AMENDED GUIDELINES IN RESPECT OF BIDS THAT
INCLUDE FUNCTIONALITY AS A CRITERION FOR
EVALUATION (ISSUED SEPTEMBER 2010)

Kindly receive the attached memorandum from the National Treasury with regard to the above matter, which is self-explanatory for your consideration.

It is requested of all Heads of Department to disseminate the content of this memorandum to their respective Supply Chain Management components and Accounting Authorities of the relevant public entities listed on Schedule 3C of the Public Finance Management Act (PFMA), reporting to their respective Executive Authorities.

It is hoped that you will find the above in order and act accordingly in line with the above directive from the National Treasury.

Thank you.


MR M. MAZIBUKO
HEAD OF DEPARTMENT

DATE: 09/09/2010





national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

**TO : ACCOUNTING OFFICERS OF ALL NATIONAL DEPARTMENTS AND CONSTITUTIONAL INSTITUTIONS
ACCOUNTING AUTHORITIES OF PUBLIC ENTITIES LISTED IN SCHEDULE 3A AND 3C OF THE PFMA
HEAD OFFICIALS OF ALL PROVINCIAL TREASURIES**

NATIONAL TREASURY INSTRUCTION NOTE ON THE AMENDED GUIDELINES IN RESPECT OF BIDS THAT INCLUDE FUNCTIONALITY AS A CRITERION FOR EVALUATION (ISSUED SEPTEMBER 2010)

1 PURPOSE

- 1.1 The purpose of this instruction note is to clarify and provide amended guidelines on the invitation and evaluation of bids¹ that include functionality.

2 BACKGROUND

2.1 Eastern Cape High Court

- 2.1.1 An issue was raised in the Eastern Cape High Court, Grahamstown, under case No. 230/09, in the matter between TBP Buildings & Civils (Pty) Ltd versus East London Industrial Development and others relating to a potential conflict between the prescripts of the PPPF Act and its associated Preferential Procurement Regulations. Section 2 of PPPF Act allows 80 or 90 points for price only, whereas regulations 8 (2) and 8 (3) of the Preferential Procurement Regulations allow for 80 or 90 points for price and functionality.

- 2.1.2 In the judgment of the said case, the judge noted the apparent conflict and dealt with the matter as an *obiter dictum* (i.e. an observation by a judge that is incidental to the case being tried, but not binding to any future courts)

2.2 Kwa-Zulu Natal High Court

- 2.2.1 An application was also lodged in the Kwa-Zulu Natal High Court, Pietermaritzburg, under Case No. 10878/2009, in a matter between Sizabonke Civils CC t/a Pilcon Projects versus Zululand District Municipality and others in which it was argued that Regulation 8 of the Preferential Procurement Regulations, 2001 is *ultra vires* in terms of section 2 (1) (b) of the PPPF Act. The applicant complained that Regulation 8 introduced points for "functionality" as part of points for price which was contrary to section 2 (1) (b) (i) of the PPPF Act which only deals with the scoring on price and other specific goals.

¹ Includes price quotations, advertised competitive bids, limited bids and proposals.

National Treasury Instruction Note on the amended guidelines in respect of bids that include functionality as a criterion for evaluation (issued September 2010)

2.2.2 The Court found that Regulations 8(2) to 8(7) of the Preferential Procurement Regulations, 2001, are *ultra vires* in terms of the PPPF Act and are therefore invalid.

2.2.3 The Court was further in agreement that although functionality is key to the procurement process, it should be dealt with separately from price and other specific goals.

3 GUIDELINES WHEN FUNCTIONALITY IS INCLUDED AS A CRITERION IN THE EVALUATION OF BIDS

3.1 "Functionality" means the measurement according to predetermined norms of a service or commodity designed to be practical and useful, working or operating, taking into account quality, reliability, viability and durability of a service or commodity.

3.2 The need to invite and evaluate bids on the basis of functionality depends on the nature of the required commodity or service. When functionality is utilised as an evaluation criterion, paragraphs 3.3 and 3.4 below must be adhered to.

3.3 When inviting bids an institution must indicate: -

- (i) whether the bids will be evaluated on functionality;
- (ii) the evaluation criteria for measuring functionality;
- (iii) the weight of each criterion; and
- (iv) the applicable values as well as the minimum threshold for functionality

3.4 The evaluation of the bids must be conducted in the following two stages:

3.4.1 Firstly, the assessment of functionality must be done in terms of the evaluation criteria and the minimum threshold referred to in paragraph 3.3 above. A bid must be disqualified if it fails to meet the minimum threshold for functionality as per the bid invitation.

3.4.2 Thereafter, only the qualifying bids are evaluated in terms of the 80/20 or 90/10 preference points systems, where the 80 or 90 points must be used for price only and the 20 or 10 points are used for HDI ownership and / or for achieving the prescribed RDP goals.

3.5 The guidance provided above replaces and prevails over the relevant guidelines contained in paragraphs 4.9 and 5.9 of the Supply Chain Management (SCM): A Guide to Accounting Officers/Authorities, paragraph 9 of Practice Note No. 3 of 2003 on the Appointment of Consultants dated 5 December 2003 and paragraph 2 of the SCM Circular dated 10 May 2005.

4 PRESCRIPTS OF THE CONSTRUCTION INDUSTRY DEVELOPMENT BOARD (CIDB)

4.1 In the case of bids relating to the construction industry, institutions are required to adhere to the prescripts of the Construction Industry Development Board (CIDB) as prescribed in Treasury Regulation 16A6.3 (a) (ii).

National Treasury Instruction Note on the amended guidelines in respect of bids that include functionality as a criterion for evaluation (issued September 2010)

5 APPLICABILITY

- 5.1 This instruction note applies to all national and provincial departments, constitutional institutions and schedule 3A and 3C public entities.

6 DISSEMINATION OF INFORMATION CONTAINED IN THIS INSTRUCTION NOTE

- 6.1 Heads of provincial treasuries are requested to bring the contents of this instruction note to the attention of accounting officers of their respective provincial departments.
- 6.2 Accounting officers of national and provincial departments are requested to bring the contents of this instruction note to the attention of accounting authorities of schedule 3A and 3C public entities reporting to their respective executive authorities.

7 AUTHORITY FOR THIS INSTRUCTION NOTE AND EFFECTIVE DATE

- 7.1 This instruction note is issued in terms of section 76(4)(c) of the PFMA and applies to all new bid invitations issued on or after 15 September 2010. Earlier adoption is however encouraged.

8 CONTACT PERSON

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SF NOMVALO
ACCOUNTANT-GENERAL
DATE: 3 September 2010