

GENERAL NOTICES ALGEMENE KENNISGEWINGS

NOTICE 2215 OF 2003

DEPARTMENT OF PUBLIC WORKS

**PUBLIC COMMENT - CODE OF CONDUCT FOR ALL PARTIES ENGAGED
IN CONSTRUCTION PROCUREMENT - IN TERMS OF THE
CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ACT, 2000
(ACT NO.38 OF 2000)**

The Construction Industry Development Board has in terms of section 5(4) of the Construction Industry Development Board Act, 2000 (Act 38 of 2000) published the following draft Code of Conduct.

The Construction Industry Development Board (CIDB) is a Schedule 3A public entity established in terms of the Construction Industry Development Board Act, 2000 to provide leadership to stakeholders to stimulate sustainable growth, reform and improvement of the construction sector for effective delivery and the industry's enhanced role in the country's economy.

The Act mandates the CIDB to establish and promote uniform and ethical standards "that regulate the actions, practices and procedures of parties engaged in construction contracts..." and stipulates that:

"To promote uniform and ethical standards within the construction industry the Board:

.....Must publish a code of conduct for all construction-related procurement and all participants involved in the procurement process..."

The Code of Conduct for the Parties engaged in Construction Procurement has been prepared by the CIDB executive and has been peer-reviewed by a focus group comprising some fifty knowledgeable practitioners, representing a broad spectrum of stakeholders including public and private sector clients, investors, voluntary associations of established and emerging business, contractors, the consulting professions, subcontractors, materials suppliers, and others.

The Board intends finalizing the draft code and publishing it in terms of the Section 5(4) of the Act following the receipt of public comment.

Comments are invited and should be addressed to:

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Construction Industry Development Board

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Comments should reach the CIDB by not later than 1st October 2003

CODE OF CONDUCT FOR THE PARTIES ENGAGED IN CONSTRUCTION PROCUREMENT

PREAMBLE

Good corporate governance is being introduced throughout the world as a business imperative offering competitive advantage. Investors and employers prefer to do business with those business enterprises that uphold the key elements of corporate governance, namely *discipline, transparency, independence, accountability, responsibility, fairness and social responsibility*.

To participants in the construction industry, good corporate governance is of particular importance and many of the employers (clients), as well as contractors, material manufacturers and suppliers are under obligation to adhere to the provisions of the King Report on Corporate Governance for South Africa, 2002. Professional service providers are also obliged, in their role as trusted adviser, to assist clients to comply with these provisions.

In this context the development of the construction industry will be promoted by participant and stakeholder organisations that:

- Have clearly stated and enacted corporate values;
- Ensure that they perform efficiently, responsibly, accountably, transparently, and with probity;
- Recognise the legitimacy of interest of defined stakeholders;
- Engage in long-term relationships;
- Adopt agreed codes to tackle corruption and persist in the enforcement thereof;
- Give due recognition to the respect for human rights;
- Respect the well-being of employees treating them fairly and with cultural sensitivity;
- Practice and encourage greater environmental responsibility;
- Avoid the use of harmful products and processes;
- Promote collaborative partnerships with communities;
- Work to build capacity; and
- Engage with and share best practice.

A code of conduct for all participants in the construction procurement process is a necessary condition for the achievement of these principles.

The construction industry operates in a uniquely project-specific environment, continuously combining different clients, consulting professions, as well as different contractors and subcontractors in a variable supply chain. Procurement arrangements, which also vary considerably, bind this supply chain and define the obligations, liabilities and risks that link the parties together in the delivery process.

The conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively. A high standard of conduct is essential to the growth, development and sustainability of enterprises and to the objectives of empowerment and transformation. It impacts directly on project costs, timely completion and quality delivered. Poor conduct opens a window on corruption and inflates the cost of development to South African society.

A common code of conduct to guide and regulate the behaviour of parties engaged in construction-related procurement is necessary to establish the standards of behaviour that participants may expect from each other and against which their behaviour can be measured.

This code of conduct represents an important step in the management of integrity and the creation of an environment within which business can be conducted in a fair and transparent manner. It is also forms an essential first line of defense in combating the scourge of corruption.

In developing this six-point Code of Conduct the CIDB Executive and the peer-review Focus Group, have deliberately avoided the pitfall of detail. Instead the Code of Conduct is published with a set of examples that illustrate good conduct and, by implication, conduct that would breach this code.

1 PARTIES INVOLVED IN CONSTRUCTION PROCUREMENT

This Code of Conduct applies to the various parties involved in public and private construction procurement that relates to the provision of supplies, services, engineering and construction works and disposals. The parties that may be directly and indirectly involved include the following:

Agent:

a natural person who is not an employee of the employer who acts on the employer's behalf;

Note: An agent can act in terms of a contract with an employer, in which case, the agent is also a contractor. An agent may also be a tenderer prior to the award of the contract.

Contractor:

a natural or juristic person or partnership who contracts with an employer to perform a contract;

Note: Contracts can relate to services, supplies and engineering and construction works or disposals.

Employer:

a natural or juristic person, partnership, or organ of state entering into the contract with the contractor for the provision of supplies, services, or engineering and construction works;

Note: An institution (a public body i.e. a department, trading entity, constitutional institution, municipality, public entity or municipal entity) which contracts with a contractor is an employer. A contractor who engages a supplier, service provider or a subcontractor is also an employer.

Employee:

a natural person in the employ of the employer who acts on behalf of any of the parties;

Note: An employee includes an official.

Representative:

an elected representative who holds a public office or a member of a board or controlling body of an employer who is not an employee;

Subcontractor:

a natural or juristic person or partnership who is contracted by the contractor to assist the latter in the performance of his contract by providing certain supplies, services, or engineering and construction works.

Tenderer:

a natural or juristic person or partnership who submits a tender offer or an expression of interest to perform a contract in response to an invitation to do so.

2 PRINCIPLES GOVERNING THE CONDUCT OF PARTIES

In the interests of a healthy industry that delivers value to clients and society; the parties in any public or private construction-related procurement should in their dealings with each other:

- 2.1 Behave equitably, honestly and transparently.
- 2.2 Discharge duties and obligations timeously and with integrity.
- 2.3 Comply with all applicable legislation and associated regulations.
- 2.4 Satisfy all relevant requirements established in procurement documents.
- 2.5 Avoid conflicts of interest.
- 2.6 Not maliciously or recklessly injure or attempt to injure the reputation of another party.

3 ACCEPTABLE CONDUCT

The code of conduct serves to establish the broad framework within which an action, or default, by any party to the procurement process may be judged. Any action, or default, which conflicts with the code, is unacceptable.

The following examples are not exhaustive, but serve to highlight acceptable actions and defaults that are more commonly encountered.

Conduct of the agent

An agent should:

- Strictly observe the code of conduct laid down by the body governing his profession.
- Act in a fair and equitable manner towards all other parties in the procurement process and take account of the legitimate and reasonable rights of them all.
- Not accept gifts, favours or other considerations, of anything more than token value from any other party to the procurement process.
- Not unnecessarily, or through lack of diligence, cause delay by the contractor or the client in fulfilling their obligations.
- Not undermine the development objectives of the employer through tokenism or fronting.
- Disclose any circumstance which may possibly be construed as constituting a conflict of interest and recuse himself from deliberations in such matters.
- Not engage in practices that gives one tenderer an improper advantage over another.

Conduct of the contractor

A contractor should:

- Undertake the contract with the objective of satisfying the requirements of the employer by observing the spirit as well as complying with the letter of the contract and, in pursuit of this objective, co-operate with all other parties in the procurement process.
- Aim to meet all statutory and contractual obligations fully and timeously in regard to conditions of employment, occupational safety, training, fiscal matters etc.
- Not attempt to influence the judgement, or actions, of agents, employees, or representatives by inducements of any sort.
- Employ subcontractors only on the basis of fair, unbiased, written subcontracts.
- Not engage in unfair or unethical practices in dealings with subcontractors.
- Not make spurious claims for additional payment or time.
- Not approach any representative directly in connection with a contract, save for a legitimate purpose.
- Not undermine the development objectives of the employer through tokenism or fronting.
- Not engage in collusive practices that have direct or indirect adverse impacts on the cost of the project to the employer.

Conduct of the employer

The employer should, himself, or through his employees, or agents:

- Not invite tenders without having a firm intention to proceed with the procurement.
- Ensure that the basis on which tenders will be evaluated is clearly set out in the tender documents and that tenders are evaluated and awarded accordingly.
- Employ contractors only on the basis of fair and equitable written contracts
- Ensure that the procurement documents are clear and comprehensive and set out the rights and obligations of all parties.
- Not breach the confidentiality of information, particularly intellectual property, provided by tenderers in support of their tender submissions.
- Not attempt to "trade off" tenderers against each other in an attempt to obtain better tender offers.
- Ensure that all tenderers are fairly treated and that tender offers are evaluated without bias.
- Ensure that transparency is maintained in the tendering process. This implies, under normal circumstance, inviting tenders as widely and publicly as possible, stating clearly any prequalification criteria and considering only those who qualify, opening tenders in public and reading out / making available key information, such as tender prices, basic award criteria and times required for completion, and, in due course, making known to unsuccessful tenderers the outcome of the evaluation process.
- Ensure that his obligations in terms of contracts with contractors and agents are scrupulously and timeously met, particularly in regard to making payments and giving decisions.
- Ensure that legal requirements and principles are upheld in relation to safety, health, the environment and sustainable delivery management.

Conduct of the employee

The employee should:

- Strictly observe any code of conduct laid down by the employer and the provisions of all legislation and regulations governing procurement.
- Perform his duties in an unbiased and conscientious manner, bearing in mind the legitimate interest of all parties to the procurement process and the public.
- Ensure that he is not responsible for an unacceptable action, or default, being attributed to the employer.
- Not allow himself to be influenced in the execution of his duties by any consideration other than the legitimate and reasonable interests of the employer.
- Not accept any gifts, favours or other considerations, of anything more than token value from any other party to the procurement process.
- Administer contracts in an even handed manner.
- Disclose any circumstance which may possibly be construed as constituting a conflict of interest and recuse himself from deliberations in such matters.

Conduct of the representative

A representative should:

- Perform his duties in an unbiased and conscientious manner, bearing in mind the legitimate interest of all parties to the procurement process and the public.
- Not entertain representations from any agent, tenderer, contractor, or subcontractor, in regard to a procurement, except through the employer or such person as may be delegated by the employer to act in the procurement,
- Not allow himself to be unduly influenced by, or accept any gifts, favours or other considerations from any party which might have an interest in the procurement process.
- Disclose any circumstance which may possibly be construed as constituting a conflict of interest and recuse himself from deliberations in such matters.

Conduct of subcontractors

A subcontractor should, insofar as is relevant, act in the same way as the contractor is expected to act and behave in a circumspect manner and not undermine the position of any contractor that has been provided a price in relation to a particular tender.

Conduct of tenderers

The tenderer should:

- Not, except for the purpose of joint venture formation or collective action to deal with unfair conditions or other faults in documentation, become involved in collusion with other tenderers, or potential tenderers.
- Not exchange information regarding tenders with any other tenderer prior to the closing time and date for tenders.
- Not knowingly price his tender in such a way as to gain an unfair advantage from an obvious error, or oversight, in the tender documents.
- Not attempt, in any way, to influence the tender evaluation process.
- Not approach any representative or employee directly in connection with a tender.

4 ENFORCEMENT OF THE CODE OF CONDUCT

Section 29 of the Construction Industry Development Board Act, 2000 makes provision for the enforcement of this code of conduct. To this end, the Board may convene and conduct an enquiry into any breach of the code and to subpoena any person to appear in person at or produce documents relating to an inquiry. The Board may, as appropriate, sanction those who breach the code of conduct by issuing a warning or a fine, referring the matter to the South African Police Services, referring the matter where a breach is in respect of an official to the accounting officer for action in terms of the Public Service Act, deregistering contractors for a period of time or referring the matter to a statutory body that has jurisdiction over the matter. Regulations are being prepared in this regard.

Sanctions by the Board are, however, a reactive way to enforce the code of conduct. A more proactive way is for all parties to commit to adhere to the code and to do business only with those who do likewise. Should this be done, adherence to the principles of the code will form an integral part of all business processes.