

## **BOARD NOTICES**

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### **BOARD NOTICE 92 OF 2006**

## **CONSTRUCTION INDUSTRY DEVELOPMENT BOARD**

### **CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ACT. 2000 (ACT NO. 38 OF 2000):**

### **EXPLANATORY MEMORANDUM**

This notice contains an explanatory memorandum that summarises and provides clarity on the

- 1) amendments to the regulations published in Government Notice No. 842; and
- 2) the amendments to the Standard for Uniformity

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PEPI SILINGA  
CHAIRPERSON: CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

# EXPLANATORY MEMORANDUM ON THE AMENDMENT OF THE CONSTRUCTION INDUSTRY DEVELOPMENT REGULATIONS AND THE STANDARD FOR UNIFORMITY IN CONSTRUCTION PROCUREMENT

## 1 CONTEXT

The development and current roll-out of the national Register of Contractors and Register of Projects takes place within the framework of policy established in the White Paper "Creating an Enabling Environment for Reconstruction, Growth and Development in the Construction Industry" (Mach 1999) and in the Construction Industry Development Board Act of 2000. (Act No. 38 of 2000). Refinements and adjustments to the regulations that govern the implementation of these registers are necessary from time to time to ensure that the registers remain focused on industry development objectives and address any shortcomings or unintended consequences.

These amendments to the regulations have arisen from:

- a) The need to recognize the specific needs of different clients in applying the register of projects;
- b) The need to enable greater flexibility in the procurement application of the register of contractors; and
- c) experience gained by the Board's assessment committee in the processing of applications for registration;

The amendments to the Standard for Uniformity in Construction Procurement have arisen from-

- a) the amendments to the Construction Industry Regulations, 2004; and
- b) the annual review of the Standard by industry stakeholders.

## 2 EXPLANATION OF AMENDMENTS TO THE REGULATIONS

### 2.1 AMENDMENTS TO IMPROVE THE ADMINISTRATION OF THE REGISTER OF CONTRACTORS

#### 2.1.1 Requirement for full financial statements (Regulation 7(4)b and 8(1)a)

The regulations now require that full financial statements are submitted for grading purposes, as opposed to summarized statements which lead to applicants submitting unacceptably scant statements that could not be verified.

Furthermore such statements need to be certified by an auditor in the case of a company established in terms of the Companies Act, 1973 (Act 61 of 1973) and an accounting officer in the case of a close corporation established in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984).

#### 2.1.2 Requirements for trusts (Regulation 7(4)(dA) and 8(1)(dA))

The regulations now require, where relevant, that a copy of trust deeds as contemplated in the Trust Property Act, 1958 be submitted with applications for registration as the trust deed determines the format of financial statements as well as the person who may compile and certify its financial statements.

### **2.1.3 Requirement for certified copies of shareholder certificates (Regulation 7(4)(d))**

The regulations now require that companies submit for registration purposes certified copies of the shareholders' certificates to enable the Board to verify the identity of the shareholders, especially in relation to potentially emerging status.

### **2.1.4 Cancellation by the Board of an application for registration (Regulation 7(8) and 8(1A))**

Much of the backlog in the processing of applications for the register arises from a reluctance or inability of an applicant to provide the necessary documentation, despite being repeatedly requested to do so. At the same time, the Board is forced to retain application fees relating to pending applications. The regulations now empower the Board to cancel an application after 90 days should the requested information not be forthcoming and return the annual fees to the applicant. The administration fee is not refundable.

### **2.1.5 Requirements for translations into the English language (Regulation 7(9) and 8(1B))**

The registration staff of the CIDB receives applications from international contractors, some of which are in foreign languages. The regulations now place the onus on the applicant for translating an application and supporting documentation into English.

### **2.1.6 Registration in a lower category by the Board (Regulation 10)**

The current regulation requires the assessment committee to inform an applicant of the fact that they have decided to register him or her in a category lower than the category applied for, before they register him or her in that category. This requirement, while in theory gives effect to the requirements of administrative justice, in practice had the opposite effect; it delays contractors from being able to tender for public sector contracts. The amended regulation allows the assessment committee to register a contractor immediately in the category that he or she qualifies for, if they notify him or her of the fact and provide reasons for the decision, and notify the applicant of his or her right to appeal the decision.

### **2.1.7 Requirements for establishing employable capital (Regulation 11(3 A))**

The method for determining employable capital is based on a contractor's financial statements of the two years immediately preceding the application. The current regulations do not deal with the situation when a contractor's application is very soon after his financial year end. As a result, the contractor cannot be assessed until his financial statements have been completed.

The new regulation provides for a window period to overcome this shortcoming. The financial statement of the two years immediately preceding the application may be used if an application is made within the first half of the new financial year of a company or within the first trimester of the new financial year of a close corporation.

## **2.2 EXEMPTIONS FOR MINING WORKS (Regulation 19)**

The regulations now exempt underground mining operations, which per definition are construction works, but for which registration in terms of the regulations is not considered necessary. This new regulation establishes certainty in identifying which projects need to be registered.

## **2.3 AMENDMENT OF REGULATIONS RELATING TO THE APPLICATION OF THE REGISTER OF CONTRACTORS IN PROCUREMENT**

### **2.3.1 Exemption from applying the register of contractors to contracts below a threshold of R30 000 (Regulation 23)**

The amended regulations obviate the need to apply the register of contracts on very small projects e.g. hanging a door, paint a room etc.

The value of R30 000 was decided on as it is also the threshold below which tenderers are not required to submit tax clearance certificates and organs of state are not required to apply preferences. This value includes VAT.

### **2.3.2 Applying the register of contractorsto multiyear contracts (Regulation 25)**

The amended regulations allow account to be taken of the nature of the contract when determining the contractor grading designation requirements for a contract. The annual value of contracts may be used to determine the required contractor grading designation where those contracts involving construction works such as:

- i) the routine maintenance of roads;
- ii) the construction of pipelines on an "as and when" basis;
- iii) the building of a limited number of class room blocks where a class room block is substantially complete before embarking on the construction of a subsequent class room block;

Previously the value of these types of construction works contracts was based on the total value of the contract which required a higher grade than necessary for this type of work.

### **2.3.3 Dealing with projects which could be categorized as falling into more than one class of construction works (Regulation 25(a)(i))**

There are situations in which more than one class of construction works may aptly describe a contract, e.g. fencing, which may fall under General Building or Civil Engineering Works or a steel bridge, which may fall under Structural Steelwork Fabrication and Erection or Civil Engineering Works. The calling for a single class in these circumstances as currently required by the regulations may prejudice qualified contractors.

The amended regulations address this concern by allowing clients to call for an alternative class of works.

### **2.3.4 Dealing with tender values in close proximity to the limit of a tender value range (Regulations 25(3)(a)(ii) and 25(7A))**

The current regulations require that tenders be advertised using the contractor grading designation based on the estimated tender value of the project for which the tender is invited. Some tenderers may be prejudiced by this requirement where the estimated tender value is just above the lower limit of a tender value range or the estimate is incorrect.

For example, if an estimated tender value is R32,5 million, grade 8 and higher contractors will be invited to submit tender offers. Such tenderers may tender an amount of R28 million, which is lower than the estimated amount and within the tender value range of grade 7 contractors.

The amended regulations overcome this concern by determining that when an estimated contract price is within 20 percent of the lower limit of a tender value range, the tender value range below that must be chosen. Thus in terms of the aforementioned example, tenders would have been invited from grade 7 and higher contractors.

Public sector clients have reported a problem where the tenders received are in relatively close proximity to the lower limit of a tender value range. In some cases, tender offers were received from tenderers who are registered in a lower contractor grading designation than that required, but who are able to perform the contract at the price tendered. In all instances, the margins exceeded were very small.

The amended regulations are designed to provide clients with a degree of latitude to evaluate tenders in such circumstances without compromising the risk management principles on which the register is based. The amended regulations permit tenders to be awarded to a contractor outside of his tender value range on condition that:

- i) the amount by which the tendered sum exceeds the tender value range is reasonable;
- ii) the award of a contract to such a contractor does not impose any undue risk; and
- iii) the report on the award of the contract to the CIDB indicates that this regulation was applied in the evaluation of tenders.

For example, the estimated value of a tender is R9,0 million and grade 6 and higher contractors are invited to submit tender offers. The following tenders are received:

Contractor	Contractor grading designation	Tendered Sum
A	grade 6	R 10,5 million
B	grade 6	R 11,2 million
C	grade 7	R 11,7 million
D	grade 7	R 12,0 million
E	grade 7	R 13,3 million
F	grade 7	R 12,6 million

Contractors A and C would in terms of the previous regulations be excluded from consideration as their respective tendered sums are above the tender value range for a contractor registered in a contractor grading designation of 6. The contract would have been awarded to Contractor F unless there were compelling and justifiable reasons not to do so. In terms of the amended regulations the award of the contract may be made to contractor A if the employer is satisfied that such an award does not impose an unacceptable risk, in which case, the state will save R1, 2 million.

### **2.3.5 Relaxation of requirements for the application of the register of contractors and register of projects in certain types of construction works (Regulation 38(4A))**

Clients have reported to the CIDB that the registration of projects and the application of the register of contractors in certain classes and types of works create a serious administrative burden in circumstances where using registered contractor is not necessarily desirable. The CIDB investigated this concern and found that the type of works relate mainly to installation, repair, maintenance or alteration and are industry specific e.g. continuous process systems involving chemical works, metallurgical works, oil and gas wells, acid plants, metallurgical machinery, equipment and apparatus, and works necessary for the beneficiation of metals, minerals, rocks, petroleum and organic substances and other chemical processes.

The amended regulations accordingly permit the Board to relax requirements relating to both the register of projects and the application of the register of contractors in relation to contracts that solely relate to installation, repair, maintenance or alteration on an industry specific basis.

The Board will, after consultation with the affected industries, publish these relaxations in the Gazette.

### **3. EXPLANATION OF AMENDMENTS TO THE STANDARD FOR UNIFORMITY IN CONSTRUCTION PROCUREMENT**

#### **3.1 Amendments linked to changes in the regulations**

The amended regulations allow for tenders to be invited from alternative classes of works. This necessitates that the standard wording for the Notice and Invitation to Tender be revised. The amended standard provides the revised wording for inclusion into this component document.

The manner in which the amended regulations deal with tenders which are in close proximity to the limit of a tender value range necessitates that the standard wording relating to eligibility criteria be amended. The revised standard accordingly amends the clauses for eligibility criteria which need to be included in the Tender Data or Submission Data

The revised wording is published in a separate Board Notice.

#### **3.2 Additional requirements relating to the evaluation of quality (functionality) in tender offers**

There is confusion as to what constitutes quality (functionality). Several clients, in contravention of National Treasury practice notes have included "specific goals or preference points" under the guise of "functionality". Others have used quality as the sole means to decide whether or not a tenderer has capacity and capabilities to perform the work.

In the absence of guidance as to what quality is, users of the standard are not clear as how to approach the evaluation of tenders in terms of price, quality (functionality) and preference.

The additional clauses to the standard describe what quality is and what it is not. They also include examples of what constitutes quality and provides guidance on how to evaluate quality criteria.

#### **3.3 Amendments to clause F.2.17 of the Standard Conditions of Tender**

Clause F.2.17 deals with the clarification of tender offers after the submission of tenders. The wording "no change in total of prices" has been changed to "no change in the competitive position". This change aligns with the Supply Chain Management Regulations issued in terms of the Municipal Finance Management Act which permits the accounting officer to negotiate the final price downwards. It also allows an adjustment to be made in the sum tendered for whatever reason, provided that it does not change the competitive position of tenderers.

The last sentence of this clause has been deleted as the subject matter is dealt with in the Form of Offer and Acceptance.

#### **3.4 Amendments to the prescribed tender validity period**

In certain type of procurements, e.g. high value procurement, a longer period is necessary to allow time for board approval in public entities. Accordingly the amended standard provides for a maximum tender validity period not exceeding 12 weeks