



SCM REGULATION 32: PROCUREMENT OF GOODS OR SERVICES UNDER CONTRACTS SECURED BY OTHER ORGANS OF STATE

PURPOSE

The purpose of this Circular is to provide further elaboration to municipalities and municipal entities on the principles captured in regulation 32 of the Municipal Supply Chain Management Regulations 2005 (SCM Regulations) when procuring goods or services from contracts secured by other organs of state.

BACKGROUND

Section 217(1) of the Constitution of the Republic of South Africa Act, 1996 states that:-

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

Regulation 32 states that:

“A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if-

- a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;
- b) the municipality or entity has no reason to believe that such contract was not validly procured;
- c) there are demonstrable discounts or benefits for the municipality or entity to do so; and
- d) that other organ of state and the service provider have consented to such procurement in writing.

Sub regulation (1) (c) and (d) do not apply if-

- a) a municipal entity procures goods or services through a contract secured by its parent municipality; or
- b) a municipality procures goods or services through a contract secured by a municipal entity of which it is the parent municipality”.

Therefore, a municipality or municipal entity may dispense with the competitive bidding process in terms of regulation 32 of the Municipal SCM Regulations, provided that the municipality or municipal entity complies with the requirements stated above. The goods or services that were procured by the other organ of state are exactly the same in every respect

including the terms and conditions as that required by the municipality or municipal entity. The municipality or municipal entity will rely on the open competitive bidding processes that the other organ of state undertook in appointing the service provider, thereby saving on administrative efforts and costs.

Over the years, there has been an increased use of contracts secured by other organs of state by municipalities and municipal entities. Whilst not prohibited by the SCM Regulations, we have observed an inconsistent application of the requirements as outlined in regulation 32. This has resulted in municipalities and municipal entities incurring irregular expenditure due to the non-compliance with the regulation.

PRINCIPLES UNDERPINNING THE IMPLEMENTATION OF REGULATION 32

Before a municipality or municipal entity decides to become a participant in a contract secured by another organ of state, it must, as part of demand management, conduct a detailed analysis of the goods or services required. When procuring infrastructure, the municipality or municipal entity must also compare for example its topography or other features, to that of the other organ of state in order to ensure that the service provider will be able to deliver at an acceptable standard.

The contract must have been secured by means of a competitive bidding process applicable to that other organ of state and the municipality or entity has no reason to believe that such contract was not validly procured

This means that the municipality or municipal entity that intends to use a contract secured by another organ of state must verify and satisfy itself that the contract was procured through a procurement process that was fair, equitable, transparent, competitive and cost effective consistent with the public sector procurement principles set out in section 217 of the Constitution.

In order to verify this, the municipality or municipal entity must obtain copies of the bid advertisements, bid documents, minutes of evaluation and adjudication committee meetings, and any other relevant documents relating to the contract in order to review whether the other organ of state complied with applicable legislation and policies when it procured the contract. The bid adjudication committee and the internal audit unit of the municipality or the municipal entity that is requesting to procure under the contract secured by the other organ of state must review the obtained documentation from the organ of state, to certify that a competitive bidding process and due process was followed by the other organ of state in concluding the contract. The municipality or municipal entity must maintain confidentiality when processing all documentation, as may be appropriate.

There must be demonstrable discounts or benefits for the municipality or entity to procure goods or services under a contract procured by another organ of state

The municipality or municipal entity must assess the contract terms such as, unit of issue or type of service; delivery lead times and prices; length of contract in line with required goods or service; and undertake a comparative research to determine if this form of procurement is more advantageous than advertising a competitive bid. This must include the determination

of a reasonable price for the required goods or services; taking into consideration that the requesting municipality or municipal entity can only utilise the remaining portion of the contract that has not been utilised by the original contracting organ of state and not create an additional contract.

The value or price of the participating municipality or municipal entity's required goods or services must not exceed the value or price of the original contract.

The decision to participate must be informed by a detailed report that outlines the outcome of the above-mentioned assessment, confirming the legal status of the contract with the other organ of state, reasons for why the municipality or municipal entity could not arrange its own contract through a competitive bidding process; and set out the value the participation will bring to the participating municipality or municipal entity.

The detailed report mentioned above must be submitted to the participating municipality or municipal entity's bid adjudication committee for its consideration and recommendation to the accounting officer or delegated official, in terms of the municipality or municipal entity's delegation policy. Prior to the recommendation of the bid adjudication committee being submitted to the accounting officer or delegated official, it must be submitted to its internal audit unit to provide further assurance that the requirements as outlined in regulation 32 have been complied with, and thereafter submitted to the accounting officer or delegated official for his/her consideration and final approval of the participation.

The other organ of state and the service provider have consented to such procurement in writing

The accounting officer requesting to participate must first obtain written consent from the other organ of state as well as confirmation of the supplier's contractual performance. Once the accounting officer requesting for participation has obtained consent to procure under the contract and confirmation of the supplier's performance from the other organ of state; and has performed all internal due diligence checks, including ensuring compliance with the salient points listed below, may the accounting officer solicit the service provider's written consent.

Failure to obtain this written consent by the accounting officer requesting to procure under the contract secured by another organ of state will be construed as non-compliance with the regulations and associated expenditure being irregular expenditure.

SALIENT REQUIREMENTS APPLICABLE TO REGULATION 32

Over and above the requirements stated in Regulation 32, there are also other salient requirements which must be considered by the participating municipality or municipal entity as well as the organ of state that is approving the procurement under its contract. These include the following:

The contract must be valid

The municipality or municipal entity will not enter into a new contract with the service provider/s but will become a participant in an existing contract. The contract must therefore not have expired, or its validity modified to accommodate the procurement from the contract, and must be legally sound as proven in the motivated report mentioned above. The participating municipality or municipal entity will conclude an addendum to the agreement with the service provider/s that stipulates the duration of the participation agreement, which may not exceed the end date of the original contract.

The duration or variation of the contract

The municipality or municipal entity must confirm the duration of the contract between the service provider/s and the other organ of state and determine the remaining term of the contract. Once this has been confirmed, the municipality or municipal entity must assess whether the remaining period will be sufficient for the service provider/s to deliver on its requirements. In other words, the participating municipality or municipal entity will only be permitted to utilise the contract of the other organ of state for the balance of the remaining period of the contract.

The contract cannot be extended or varied by the participating municipality or municipal entity. It can only be extended by the original contracting parties in line with the contractual terms agreed to in the original contract. Should the contract between the original contracting parties be terminated for any reason before the contract end date, then that termination applies to the municipality or municipal entity participating on the contract as well. The accounting officer consenting to the participation on the contract must therefore inform the participating accounting officer of any contract amendments or variations made to the contract, in writing.

The goods or services must be the same and the quantity may not be increased

The municipality or municipal entity must assess whether the goods or services being provided to the other organ of state are similar to the goods or services required by the municipality or municipal entity. The goods or services required by the participating municipality or municipal entity must be exactly the same as advertised and adjudicated by the other organ of state and may not be increased from the originally contracted quantity. Therefore, the participating municipality or municipal entity will procure the required goods or services under the same scope or specification, terms and conditions as provided for in the original contract.

Contractual arrangements

The shared contract must have the same dispute resolution mechanism to settle contractual disputes, a combined periodic contract management performance review to appraise the shared contract, and to regularly report to the council of the participating municipality or the board of directors of the municipal entity, as may be appropriate, on the management of the contract, service level agreement and the performance of the shared contractor/s.

The exercising of contractual rights, obligations or remedies in terms of the contract must be exclusively dealt with in terms of the dispute resolution mechanism as stipulated in the original contract. Each contractual party must uphold their legal obligations to the contract.

Implications for the organ of state who is the contract owner

The application of regulation 32 in a procurement process effectively means that the accounting officer of the original contracting organ of state is willing to forfeit a portion of its contract that has not already been utilised to the accounting officer who is requesting to procure under that contract. It may also mean that the accounting officer may no longer procure goods or services from that contract anymore as the balance of the contract would have been allocated to the municipality or municipal entity that is requesting to procure under that contract. The accounting officer of the original contracting organ of state undertakes such decision with the knowledge that the original contracting organ of state no longer requires the remaining portion of that contract. The accounting officer of the original contracting organ of state must notify the accounting officer of the municipality or municipal entity that is procuring under the original contract of all changes to the contract.

Panel of consultants/list of approved service providers and framework agreements

Municipalities and municipal entities must not participate on a panel secured by another organ of state as a panel of consultants or a list of service providers or a panel of approved service providers is not a contract. Municipalities or municipal entities may only participate on framework agreements arranged by organs of state, for example, State Information Technology Agency (SITA), the relevant treasury; that are empowered by legislation to arrange such on behalf of other organs of state.

REPORTING

The accounting officer of the participating municipality or municipal entity must utilise the process of reporting as contained in SCM regulation 6, to also include any procurement through SCM regulation 32. The treasuries may request further information in terms of section 74 of the MFMA.

The participating accounting officer must also publish the details of the participation contract award on the municipality or municipal entity's official website in line with section 75 of the MFMA.

CONCLUSION

Municipalities and municipal entities are advised to review their existing SCM policies and effect the necessary amendments where appropriate for approval by the municipal council. .

This circular must be read together with MFMA Circular 62 which provided information to municipalities and municipal entities on demand management and procurement plans. This must also be read with MFMA Circular 80 which outlines some of the principles related to the procurement of goods or services under contracts secured by other organs of state.

Further clarifications or enquiries can be directed to the MFMA helpdesk facility email: mfma@treasury.gov.za

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