

ETHEKWINI MUNICIPALITY

EMC : CODE OF CONDUCT

Applicable to the Procurement of Goods, Services, Engineering and Construction Works

1. INTRODUCTION

- a) Section 217.(1) of the Constitution of the Republic of South Africa reads as follows:
“When an organ of state in the national, provincial or local sphere of governments, 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”.
- b) It goes without saying that, in addition to the foregoing requirements, it is essential that the procurement of goods and services, including engineering and construction works, by eThekwin Municipality should not be affected, or tainted, by illegal action, or default, at any stage of the process, by any party involved.
- c) The foregoing serves to establish the broad framework within which an action, or default, by any party to the procurement process should be judged. Any action, or default, which conflicts with the objectives of section 217.(1) of the Constitution, or which is illegal, is unacceptable.
- d) A party to the procurement process, who wittingly, commits an unacceptable action, or default, renders itself liable to the appropriate sanction, or even, in the case of an illegal action, or default, to prosecution.
- e) This document contains examples of actions, or defaults, by parties to the public procurement process, which are unacceptable. The lists of examples are, however, not exhaustive and each party must, itself, assess whether an action, or default, would be unacceptable in the light of section 217.(1) of the Constitution, or be illegal.

2. INVOLVEMENT OF PARTIES IN THE PROCUREMENT PROCESS

- a) The various parties that could be involved in the procurement of goods, services and engineering and construction works by a public process are the following, which are denoted by capital initial letters in this document.

Employer: Any Output Unit or Department within eThekwin Municipality procuring goods, services or engineering and construction works, including other public bodies/ partners assisting in, or exercising control over, the procurement process e.g. Procurement and Tenders Sub-Committee etc.

Official: An employee of the Employer.

Agent: One who acts on behalf of the Employer.

Consultant: A professional service provider engaged by the Employer.

Tenderer: One who submits a competitive bid for the supply of goods, services, or engineering and construction works to the Employer.

Contractor: The successful Tenderer to whom the Employer awards the contract for the supply of goods, services, engineering or construction works.

Subcontractor: One who contracts to a Contractor to assist the latter in the execution of his/her contract by supplying certain goods, services, or works.

Representative: A political, or other, representative of the public, or of the private sector, who serves on the Procurement and Tenders Sub-committee responsible for policy, oversight of the appointment process or approving any aspect of procurement by eThekweni Municipality.

3. UNACCEPTABLE ACTIONS AND ESSENTIAL PRACTICES

- a) Examples of actions which are unacceptable and essential practices, which would constitute unacceptable defaults if not observed, are given below. The schedules are not exhaustive, but serve to highlight unacceptable actions and defaults which are more commonly encountered.

3.1 The Employer

The Employer should, himself, or through his officials, or agents:

- 3.1.1 Not invite tenders without having a firm intention to proceed with the procurement.
- 3.1.2 Ensure that the basis on which tenders will be adjudicated is clearly set out in the tender documents and that tenders are adjudicated and awarded accordingly.
- 3.1.3 Ensure that the tender documents are clear and comprehensive and set out the rights and obligation of all parties.
- 3.1.4 Not breach the confidentiality of information, particularly intellectual property, provided by Tenderers in support of their tenders.
- 3.1.5 Not attempt to "trade off" Tenderers against each other in an attempt to obtain better offers.
- 3.1.6 Ensure that all Tenderers are fairly treated and that tenders are adjudicated without bias.
- 3.1.7 Ensure that, except when extra ordinary circumstances dictate otherwise, transparency is maintained in the tendering process. This implies, *inter alia*, inviting tenders as widely and publicly as possible, 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 adjudication process.
- 3.1.8 Ensure that his/her obligations in terms of contracts with Contractors and Consultants are scrupulously and timeously met, particularly in regard to making payments and giving decisions.

3.2 Officials

An Official should:-

- 3.2.1 Strictly observe all code of conduct laid down by the Employer.
- 3.2.2 Ensure that he is not responsible for an unacceptable action, or default, being attributed to the Employer.
- 3.2.3 Not allow himself/herself to be influenced in the execution of his/her duties by any consideration other than the legitimate and reasonable interests of the Employer.
- 3.2.4 Not accept any gifts, favours or other considerations, of anything more than token value from any other party to the procurement process.
- 3.2.5 Administer contracts in an even-handed manner.
- 3.2.6 Disclose any circumstance which may possibly be construed as constituting a conflict of interest and excuse himself/herself from deliberations in such matters

3.3 Agents

An Agent should, insofar as is relevant, act in the same way as the Official is expected to act in terms of Section 3.2.

3.4 Consultants

A Consultant should:

- 3.4.1 Strictly observe the code of conduct laid down by the body governing his/her profession.
- 3.4.2 Act in an impartial manner towards all other parties in the procurement process and take account of the legitimate and reasonable interests of them all.
- 3.4.3 Not accept gifts, favours or other considerations, of anything more than token value from any other party to the procurement process.
- 3.4.4 Not undermine the development objectives of the Employer through tokenism, fronting or any other misrepresentation.
- 3.4.5 Disclose any circumstance which may possibly be construed as constituting a conflict of interest and excuse himself/herself from deliberations in such matters.

3.5 Tenderers

A Tenderer should:

- 3.5.1 Not, except for the purpose of joint venture formation, become involved in collusion with other Tenderers, or potential Tenderers.
- 3.5.2 Not exchange information regarding tenders with any other Tenderer prior to the closing date for tenders.
- 3.5.3 Not knowingly price his/her tender in such a way as to gain an unfair advantage from an obvious error, or oversight, in the tender documents.
- 3.5.4 Not attempt, in any way, to influence the tender adjudication process.
- 3.5.5 Not approach any Representative or Official directly in connection with a tender, subsequent to the closing of all tenders.
- 3.5.6 Tenders only on projects for which they are capable of executing with the resources they are able to marshal in accordance with the terms and conditions of contracts.

3.6 The Contractor

The Contractor should:

- 3.6.1 Undertake the contract with the objective of fulfilling it in accordance with the needs of and in the best interests of the Employer and, in pursuit of this objective, co-operate with all other parties in the procurement process.
- 3.6.2 Aim to meet all statutory and contractual obligations fully and timeously in regard to, inter alia, conditions of employment, occupational safety, training, employment of subcontractors and fiscal matters.
- 3.6.3 Not attempt to influence the judgement, or actions, of Consultants, Officials/Agents, or Representatives by inducements of any sort.
- 3.6.4 Employ Subcontractors only on the basis of fair, unbiased, written subcontracts.
- 3.6.5 Not engage in unfair, or unethical, practices in order to drive subcontract prices down.
- 3.6.6 Not make unwarranted claims for additional payment, or time, in the belief that "nothing venture, nothing gain".
- 3.6.7 Not approach any Representative directly in connection with a contract.
- 3.6.8 Not undermine the development objectives of the Employer through tokenism, fronting or any other misrepresentation.

3.7 Subcontractors

A Subcontractor should, insofar as is relevant, act in the same way as the Contractor is expected to act in terms of Section 3.6.

3.8 Representatives

A Representative should:

- 3.8.1 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.
- 3.8.2 Not entertain representations, except through the Employer or such person as may be delegated by the Employer, from any Consultant, Tenderer, Contractor, or Subcontractor, in regard to a tender, or contract.
- 3.8.3 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.
- 3.8.4 Disclose any circumstance which may possibly be construed as constituting a conflict of interest and excuse himself/herself from deliberations in such matters.

3.9 Penalties

Where there is non-compliance with this code of conduct, sanctions and/penalties will be applied as follows:

3.9.1 Officials and Representatives

Reference to the Multi-Disciplinary Team in the first instance and thereafter, appropriate action by Management, if applicable.

3.9.2 Contractors/suppliers

Depending on the severity of the non-compliance, a contractor/supplier may be disqualified as a registered contractor/supplier for a period of not less than six months. Over and above that financial penalties may be imposed in terms of the Conditions of Contract.