

South Africa

Fluxmans Inc

11 Biermann Avenue
Rosebank 2196
Johannesburg
Republic of South Africa

Tel: (27) (11) 328 1700
E-mail: gbrett@fluxmans.com
Website: www.fluxmans.com

1.Does your legal system provide specific procedures for the award of contracts by contracting authorities?

1.1Yes - The awarding of contracts by a public sector institution to a private party must be structured on a combination of financial, technical and Black Economic Empowerment (“BEE”) components in order to achieve optimal value for money in government’s delivery of infrastructure and services. To this end the award of contracts by public sector institutions is governed by particular pieces of legislation, regulations and practice notes. The most important of these include:

- 1.1.1 the Constitution of the Republic of South Africa;
- 1.1.2 the Promotion of Administrative Justice Act;
- 1.1.3 the Preferential Procurement Policy Framework Act (“the PPPFA”) which prescribes that all procurement procedures must also include a preference for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination;
- 1.1.4 the Public Finance Management Act (“PFMA”);

1.15 the Municipal Finance Management Act (“MFMA”); and

1.16 Treasury Regulations and Treasury Practice Notes issued in terms of the PFMA and MFMA. The PFMA and Treasury Regulations and Practice Notes issued in terms of the PFMA govern national and provincial government departments and public entities while the MFMA and Treasury Regulations and Practice Notes issued in terms of the MFMA govern the municipal sphere.

2. Do the procedures for the award of contracts depend on the kind of goods, services etc, which are to be procured?

2.1 Generally No – The general position is that a contract must be awarded through a selection process that must be fair, equitable, transparent, cost effective and competitive. Each stage of the procurement process must be in accordance with the law and prescribed procedures; there must be accountability, responsiveness and openness in the decision making of the institution; all bidders at each stage of a procurement process must have an equal chance of competing for the contract; and no action taken by the institution may prejudice their competitiveness.

2.2 There are however provisions that may add certain nuances to this position such as the fact that:

2.2.1 in the case of municipalities, if a contract will impose financial obligations on the municipality beyond three years, the municipality may only enter into that contract if certain requirements are met which include liaising with the relevant stakeholders as well as the public on the proposed terms of the contract;

2.2.2 in the case of Public Private Partnerships (“PPP’s”) entered into by provincial and national departments, when undertaking the feasibility study for approval by the Treasury Department, the accounting officer or authority of the particular institution must undertake a feasibility study that meets with certain requirements depending on whether:-

2.2.2.1 the PPP involves the performance of an institutional function; or

2.2.2.2 the PPP involves the use of state property for its own commercial purposes in a service delivery project.

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?

3.1 Generally No – However, with BEE being a key evaluation component in the awarding of contracts, and in compliance with the PPPFA, the BEE component of a tender bid will constitute 10% of the bid evaluation weighting. The price and technical components will be weighted within the remaining 90%, as appropriate to the project. BEE in the bid will be evaluated against a balanced scorecard designed for the project, and bidders must achieve a minimum threshold of 50% of the total BEE points. If a bid fails to pass this BEE threshold, it should not be evaluated further.

4. In what way does the contracting authority have to inform the market about the intended procurement?

4.1 Procurement opportunities are brought to the attention of the public through various channels including the government tender bulletin and newspapers.

4.2 Members of the public have the right to be informed of decisions which can materially and adversely affect their rights, property and reasonable expectations. To this extent, an institution must thus comply with empowering legislation when deciding to procure and, to the extent that empowering legislation is silent on the procedures to follow in informing the public, must decide between holding a public enquiry and following notice and comment procedures.

5.Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

A contract can only be entered into with an institution, entity or person legally competent to operate a business activity.

6.Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

Yes - Bidders are allowed to submit bids as consortia and as main contractor and subcontractor. With BEE being an imperative for the success of any bid, bids are generally submitted by consortia and contracting partnerships that have been formed to enhance BEE credentials. As a matter of fact, at the Request For Qualification (“RFQ”) stage of the bidding process, all BEE elements and targets which the institution intends for the project are communicated clearly with potential bidders so that appropriate consortia and contracting partnerships can be formed and the necessary financing sourced. It is with this in mind that as a matter of principle no contract may be issued to the market by an institution without a BEE balanced scorecard for the project containing a clear and appropriate set of BEE elements, targets, minimum thresholds and weightings.

7.Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

As far as PPP’s are concerned, potential bidders are typically special purpose vehicles incorporated in the Republic of South Africa as private limited liability companies for the sole purpose of exercising the rights and performing the obligations under the PPP agreement. It would not be impossible to submit a bid for a contract from abroad but the chances of the bid being successful are very minimal considering that if a bid does not have a BEE component it will not be considered at all.

8.If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

8.1 Yes there will be certain additional supporting documents and most certainly these will be indicated in the bidding documentation. Examples include:-

- 8.1.1 the necessary tax clearance certificates;
- 8.1.2 documents indicating the legal status and profile of the bidder;
- 8.1.3 documents indicating the BEE profile of the bidder;
- 8.1.4 documents evincing the requisite South African Bureau of Standards qualification; and
- 8.1.5 documents indicating a history of involvement in similar projects.

9.Is a multinational bidding consortium allowed to submit a bid?

As far as PPP’s are concerned, potential bidders are typically special purpose vehicles incorporated in the Republic of South Africa as private limited liability companies for the sole purpose of exercising the rights and performing the obligations under the PPP agreement. It would not be impossible for a multinational bidding consortium to submit a bid provided that the consortium has the requisite BEE credentials. If the requisite BEE credentials are not present then

the chances of the bid being successful are very minimal considering that if a bid does not have a BEE component it will not be considered at all.

10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?

Bid documents will specify which one/s of the many South African official languages can be used in submitting the bid. In similar vein, they will specify as well the form in which the bids must be submitted.

11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

No – The time limits relating to when bids have to be submitted by are specified in the bid documents. In the case of PPP's, the process, beginning from the RFQ stage and ending at the bid submission date, and also depending on the type of PPP, can take anything between 4 and 50 weeks.

12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?

As a general rule, bidders are not usually entitled to claim their costs for preparing their bid.

13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

13.1 The awarding of contracts by a public sector institution to a private party must be structured on a combination of financial, technical and BEE components in order to achieve optimal value for money in government's delivery of infrastructure and services.

13.2 The BEE component of a bid will constitute 10% of the bid evaluation weighting. The price and technical components will be weighted within the remaining 90%, as appropriate to the project. BEE in the bid will be evaluated against a balanced scorecard designed for the project, and bidders must achieve a minimum threshold of 50% of the total BEE points. If a bid fails to pass this BEE threshold, it should not be evaluated further.

13.3 The Bid evaluation panel does however, subject to provisions in the governing pieces of legislation and regulations, also set their own systems and criteria for the evaluation of bids. Where this has been done it will be saliently spelled out in the bid documentation.

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

14.1 Yes – the decision to award a contract by an institution amounts to an administrative action. In South Africa everyone has the right to administrative action that is lawful, reasonable and procedurally fair and everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

14.2 Any person, including foreign bidders, may institute proceedings in a court or a tribunal for the judicial review of an administrative action and the court or tribunal has the power to judicially review the administrative action if certain conditions are satisfied, including amongst others, the presence of procedural unfairness.

15.If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?

No – it does not depend on any conditions related to the kinds of goods or services to be procured.

16.If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?

If a bidder is not successful in enforcing primary legal protection then, to the extent that: (a) it has suffered damage, (b) as a result of, (c) a wrongful and, (d) culpable (e) conduct of the institution, it will be entitled to institute a claim in damages.

17. Can your office:

17.1give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

Yes

17.2represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?

Yes

17.3Please name a contact person within your office for questions of public procurement law

Gavin Brett (gbrett@fluxmans.com), +27 11 328 1700; and
Jack Phalane (jphalane@fluxmans.com), +27 11 328 1700
www.fluxmans.com