



POSITION PAPER ON THE EVALUATION OF BEST VALUE FOR MONEY IN CONSTRUCTION INDUSTRY RELATED TENDERS

Construction Industry Development Board, 4 August 2010

EXECUTIVE SUMMARY

A recent court case (KwaZulu-Natal High Court, Pietermaritzburg in CASE NO 10878/2009) has declared part of the Preferential Procurement Regulations to be inconsistent with a section of the Preferential Procurement Policy Framework Act and therefore invalid. National Treasury has in response to this ruling, drafted a Practice Note determining that functionality / quality criteria may only be applied as pre-qualification criteria, meaning that such criteria is used to establish minimum requirements and tenders are then evaluated solely on the basis of price and preference. The method proposed by National Treasury will pose a solution to most construction works projects that are straightforward in their scope. However, this approach does not address the need to evaluate certain types of projects and the rewarding of excellence in the interest of industry development, in terms of value for money (see Section 2 of this paper). This has implications for the construction industry which follows the prescripts of the Construction Industry Development Board. Furthermore, the cidb Standard for Uniformity in Construction Procurement is now in conflict with this ruling.

The Standard for Uniformity in Construction Procurement, in giving effect to construction procurement and the developmental programmes of the cidb, recognises that tenders within the construction industry can be evaluated in terms of three basic parameters, namely financial offer (monetary value), preference (promotion of socio-economic goals) and quality (added value). Standard methods are provided to enable these three parameters to be evaluated. The application of a preference to the financial offer adjusts the price to make it more competitive (favourable) for those tenderers to whom a preference is granted. Tenders awarded on the basis of financial offer and preference enable the works, services and goods which cost the least, to be procured taking account of preferences (i.e. lowest price adjusted for a preference). Tenders awarded on the basis of financial offer, preference and quality enable best value for money to be established (i.e. most economically advantageous offer).

For the construction industry:

- Financial offer is most important in the evaluation of tenders where the works or services are straightforward, the inputs are relatively well known and the outputs can be readily defined.
- Quality is most important where works or services require considerable innovation, creativity and expertise or skill that has a high downstream impact. It is also most important in partnering approaches where the scope of work is ill-defined and the project partners are selected.

Currently between 25% and 60% of construction works tenders in organs of state are evaluated in terms of best value for money. "Value add" criteria have enabled major projects such as the 2010 Stadia to be constructed to the quality that was achieved, and in the time permitted for their construction. Such criteria have also contributed to a measured improvement in client satisfaction across a number of projects.

The withdrawal of the evaluation of tenders on the basis of best value for money will have a major impact on specific construction related projects. An analysis of the Constitution, Preferential Procurement Policy Framework Act and Promotion of Administrative Justice Act and a number of pertinent court cases suggest that it is conceivable to accommodate the evaluation of best value for money, despite the recent court ruling which invalidates parts of the Preferential Procurement Regulations.

The cidb is engaging with National Treasury, requesting that the cidb and National Treasury pursue a joint analysis of the current legislative framework to support the principles of best value procurement, as outlined in the cidb Position Paper.

1. INTRODUCTION

A court case in the KwaZulu-Natal High Court, Pietermaritzburg CASE NO 10878/2009 (Sikabonke Civils cc versus Zululand Land District Municipality, NRB Construction and Hire cc and National Treasury) has declared that parts of the Preferential Procurement Regulations are inconsistent with a section of the Preferential Procurement Policy Framework Act and are therefore invalid. However, this judgment did not declare the evaluation of functionality in tender evaluations to be invalid.

The National Treasury draft Practice Note determines that functionality / quality criteria may only be applied as pre-qualification criteria, meaning that such criteria is used to establish minimum requirements and tenders are then evaluated solely on the basis of price and preference in terms of the 80/20 or 90/10 preference point scoring system. This ruling is an appropriate response where tenders are to be evaluated on the basis of best price but not necessarily on best value for money. This position paper further details the concerns and possible solutions to retain current practices in pursuit of best value for money in construction procurement.

2. EVALUATION OF TENDER OFFERS IN THE CONSTRUCTION INDUSTRY

2.1 BACKGROUND

The General Procurement Guidelines¹ which were issued by Government as a “*prescription of standards of behaviour, ethics and accountability*” states that “*Proper and successful government procurement rests upon certain core principles of behaviour - the Five Pillars of Procurement*” One of these pillars is “value for money.” The Guidelines state that “*Price alone is often not a reliable indicator and departments will not necessarily obtain the best value for money by accepting the lowest price offer that meets mandatory requirements. Best value for money means the best available outcome when all relevant costs and benefits over the procurement cycle are considered*”.

In response to these prescripts and the relevant legislative framework, the cidb developed the Standard for Uniformity in Construction Procurement. This standard recognised that tender offers could be evaluated using different permutations of three basic criteria, namely, financial offer (monetary value), preference (promotion of socio-economic goals) and quality (added value), as this was assumed to be in accordance with the PPPFA Regulations where functionality (quality) was allowed to be part of price.

The application of a preference to the financial offer adjusts the price to make it more competitive (favourable) for those tenderers to whom a preference is granted. Tenders awarded on the basis of financial offer and preference (Method 2), enable the works, services and goods which cost the least, to be procured (i.e. lowest price adjusted for a preference). Tenders awarded on the basis of financial offer, preference and quality (Method

¹ See

www.finance.gov.za/legislation/pfma/supplychain/Policy%20to%20Guide%20Uniformity%20in%20Procurement%20Reform%20Processes%20in%20Government.pdf. These Guidelines state that they are to be “supplemented by individual Accounting Officer’s Procurement Procedures issued under the general authority contained in the Public Finance Management Act, 1999”.

4) encourage best value for money to be established (i.e. most economically advantageous offer).

Financial offer is most important in the evaluation of tenders where the works or services are straightforward, the inputs are relatively well known and the outputs can be readily defined. Quality is most important where works or services require considerable innovation, creativity and expertise or skill which has a high downstream impact. It is also most important in partnering approaches where the scope of work is ill-defined and the project partners are selected. Quality and price are important in specialist or complex works and services, usually characterised by their requirements for higher levels of skill, greater resources or ill-defined inputs.

2.2 CURRENT USAGE OF THE DIFFERENT METHODS OF EVALUATION IN THE CONSTRUCTION INDUSTRY

Client needs in the construction industry are unique and consequently each project has unique characteristics. Unlike the processes adopted in manufacturing, construction activities are not ongoing, but dynamic within a project. The team drawn together for a particular project will most often disband at project completion and seldom will the same team form again. Even if they do, the project will probably be substantially different.

The success of any construction project is usually measured in terms of cost, time and quality / performance i.e. the project does what it is supposed to do and is delivered within budget and time expectations. The selection of a suitable contractor to perform specific works has a major impact on the procurement outcomes in terms of time, quality and cost.

Currently, the dominant mode of delivery is the “design by employer” approach using priced based contracts. Evaluation Method 4 (prescribed by the Standard for Uniformity and providing for price, preference and functionality) is typically applied to ensure that the appointed contractor is able to add value in the delivery of construction works in terms of a number of areas, including construction methodologies (buildability), experience in projects of a similar nature, programming of the works, management of the site and supply chain, what innovation can be brought to a specific project in terms of managing risks relating to health and safety, environmental requirements and quality. The application of Method 4 (see Table 1 for its application across infrastructure clients) has been essential in the evaluation of many of the high profile projects (eg. without the application of Method 4 throughout the supply chain, the 2010 stadia may not have been constructed to the quality that was achieved and in the time permitted for their construction).

Table 1: Usage of different evaluation methods (cidb 2009 indicators)

Infrastructure Clients	Method 1 (Financial offer)	Method 2 (Financial offer + preference)	Method 3 (Financial offer + quality)	Method 4 (Financial offer + preference + quality)
Private sector	25%	10%	25%	40%
Public corporations e.g. ESKOM, ACSA	10%	35%	15%	40%
National Departments	10%	25%	5%	60%
Provincial Departments	15%	55%	5%	25%
Metropolitan Councils	10%	45%	10%	35%
Regional / district councils	13%	60%	2%	25%

Method 4 is also required for consulting appointments to design works where decisions at the design stage can have high downstream impacts. Design typically represents 1% to 2% of the overall lifecycle cost of a project, with construction accounting for approximately 6% to 18% of the cost. All the rest (80% to 93%) of the lifetime asset cost is accounted for by operations, annual and capital maintenance and decommissioning. Life cycle costs as well as initial costs are very dependent upon the selection of the consultant. Method 4 is typically applied to ensure that the appointed consultant is able to add value in the design in terms of a number of areas, including lessons and learning from past projects, skills set made available for the project, approach to tackling the project and familiarity with issues pertaining to the project.

There is a growing trend to assign single point accountability to a contractor for both the design and the construction of works. This allows integration of the design to take place ahead of construction. Where contractors take on design responsibilities in addition to construction responsibilities the use of Method 4 will increase and becomes more important.

The use of Method 4 will also increase where the client and the contractor adopt partnering approaches in terms of a framework agreement for a series of projects, or a contract for a complex single once-off project, based on target contracts, in terms of which they collectively share in the cost overruns and savings.

2.3 IMPLICATIONS OF WITHDRAWING METHOD 4

The withdrawal of Method 4 may have the following adverse impact on the construction industry.

- Alternative delivery models (which are needed in terms of government's turnaround strategy for infrastructure delivery) will be difficult, if not impossible to implement (e.g. those that have been included in the Infrastructure Delivery Improvement Programme (IDIP) Toolkit 2010 currently being developed in conjunction with National Treasury and other stakeholders).
- Construction related tenders will be evaluated primarily on the basis of price and not best value for money, which could lead to poorer procurement outcomes, as clients will have limited means at their disposal to select a suitable contractor / consultant to perform the works or service associated with the more complex projects.

The implication of the withdrawal of Method 4 suggests that functionality can only be applied as pre-qualification criteria (using a minimum threshold), as proposed by the draft National treasury Practice Note. Some notable implications of this methodology are as follows:

- It removes one of the cidb's primary instruments for incentivising improved performance in the development of contractors.
- It could unfairly eliminate tenders, disrupting service delivery and limiting competition if the minimum threshold is raised artificially or subjectively in the pursuit of improving quality.
- A major concern is that the raising of the threshold may fail to support empowerment. The emerging sector may be adversely affected if they cannot reach the required threshold, resulting in limited work opportunities.
- Excellence and innovation will not be rewarded. This could lead to a drop in performance as there will no basis or incentive to differentiate between satisfactory or superior performance (as illustrated in Figure 1 below).

Clients satisfied on 82% of the projects in 2009 –up from 77% in 2007 (greater application of method 4?) .

18% were neutral or dissatisfied

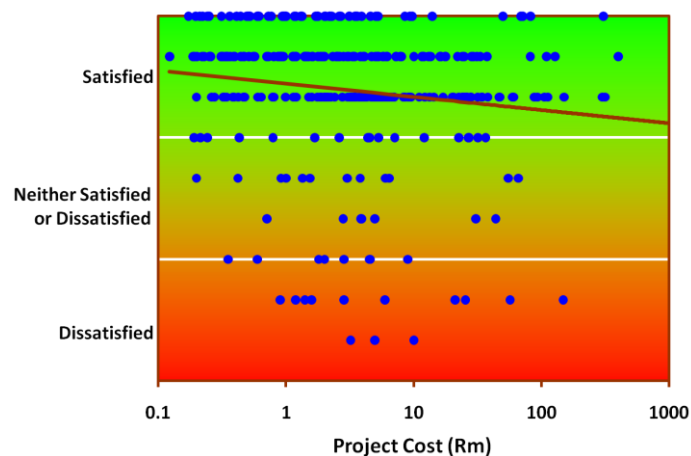


Figure 1: cidb 2009 indicators – overall performance

The unintended consequences of applying quality as pre-qualification criteria to construction contracts will be that:

- some tenderers will be unfairly eliminated as the threshold will inevitably become an unjustifiable artificial or subjective barrier or eliminator; or
- competition will be limited as the threshold is raised in the pursuit of improving quality (see Figure 2.)

As the pool of superior to excellent contractors shrink, tenders may have to be cancelled if the threshold is set too high. This can disrupt much needed service delivery.

(cidb piloting of the best practice contractor recognition scheme)

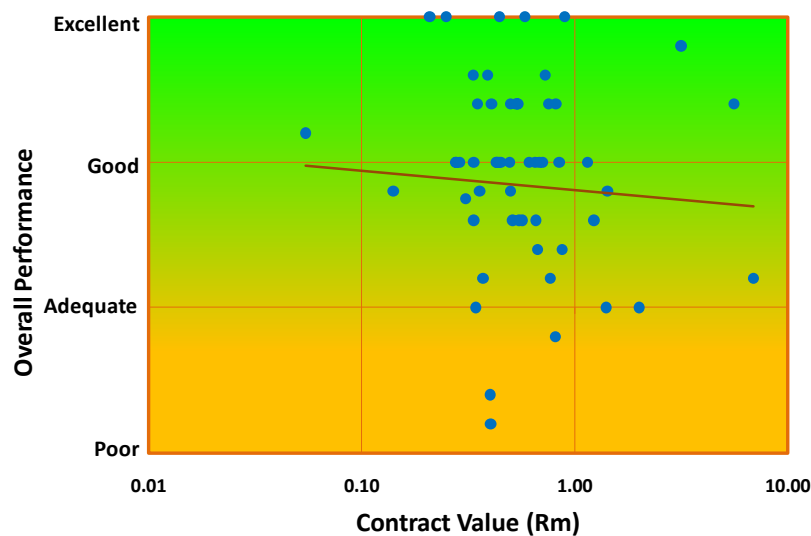


Figure 2: Distribution of contractors on the basis of their performance

3. THE CONSTITUTIONAL IMPERATIVES FOR PROCUREMENT

The Constitution in Section 217(1) sets the boundaries for a public procurement system, namely that it must be fair, equitable, transparent, competitive and cost-effective. Section 217(2) provides for an exception to this rule, stating that an organ of state may despite section 217(1) allow preferences in accordance with a procurement policy i.e. the procurement system may incorporate measures to promote objectives other than those associated with the immediate objective of the procurement itself.

Section 217(3) determines that a National Act must give effect to the preference allowed in terms of subsection (2). The Preferential Procurement Policy Framework Act, 2000, (PPPFA) purports to be that Act.

4. PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT

The principles embodied in the Preferential Procurement Policy Framework Act, 2000, are that the Act:

- a) give effect to Section 217(2) of the Constitution which instructs government to promulgate a National Act prescribing a procurement policy that gives effect to:
 - I. *categories of preference in the allocation of contracts; and*
 - II. *the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
- b) specifies the quantum and nature of deviations from the principles for the procurement system embodied in Section 217(1) of the Constitution.

The prescribed framework requires that:

- An organ of state must determine its preferential procurement policy. (The Act defines a “preferential procurement policy” as a “procurement policy contemplated in section 217(2) of the Constitution”.)
- The preference is applied to price (sum in money) in the form of points to adjust the price to make it more competitive (favourable) for those tenderers to whom a preference is granted. (A maximum of 90 or 80, depending on the value of the contract, is awarded to the most competitively priced tender and up to 10 or 20 points, as relevant, is awarded to those who qualify for a preference. These points establish the quantum of the price premium that an organ of state may pay for granting a preference.²)
- Specific goals for which a preference may be granted need to be specified in the invitation to submit a tender. (The Act does not restrict the content specific goals to only those are mentioned in section 2(d) of the Act)
- Only “acceptable tenders” are scored in relation to price and preference. (The Act defines “acceptable tenders” as “any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”.)³
- A tender must be awarded to the tenderer scoring the highest number of points.
- An exception to the rule to award a tender on the basis of the highest number of points is allowed where other “objective criteria” in addition to specific goals justify the award of the tender to another.

The award of a tender is an administrative decision. Tenderers in the tender process are accordingly entitled to fair administrative action and have the legitimate expectation that their tender will be evaluated fairly, properly, justly and without bias, in accordance with the

² The formulae provided in the Preferential Procurement Regulations permit a maximum price premium of 11,1% in the case of the 90 / 10 preferencing mechanism and 25% in the case of the 80 / 20 mechanism.

³ The *cidb* Standard for Uniformity in Construction Procurement contains Standard Conditions of Tender. These Standard Conditions of Tender contain a number of conditions which need to be satisfied for a tender to be evaluated e.g. clause F.2.1 (Eligibility criteria), F3.8 (Test for responsiveness) and F3.13 (Acceptance of tender offer). These standard Conditions of Tender establish what a tenderer is required to do in order to submit a compliant tender; make known to tenderers the criteria by which the tenderer will be evaluated and establish the manner in which the employer will conduct the process of offer and acceptance.

The Standard for Uniformity in Construction Procurement requires that tender documents make reference to these standard conditions of tender and make them tender specific through Tender Data.

Promotion of Administrative Justice Act, 2000, and in the public interest. Those evaluating tenders must do so in an objectively rational manner.⁴

It is the view of the cidb that the inclusion of objective criteria as an additional consideration in the award of tender enables best value considerations to be considered in the award of a contract after best price adjusted for a preference has been considered.⁵ This is in line with the first pillar of procurement (value for money) contained in the General Procurement Guidelines⁶ issued by government as a “*prescription of standards of behaviour, ethics and accountability*”. The first pillar “value for money” recognises that “*price alone is often not a reliable indicator and departments will not necessarily obtain the best value for money by accepting the lowest price offer that meets mandatory requirements. Best value for money means the best available outcome when all relevant costs and benefits over the procurement cycle are considered*”.

In addition, objective criteria need to be justifiable in terms of the requirements of just administration. The objective criteria need to be disclosed to tenderers in the tender document as well as the manner in which the objective criteria are to be evaluated and combined with price to arrive at a best value decision. This needs to be done in such a manner that independent evaluators will arrive at the same conclusion.⁷

5. GUIDANCE BY THE COURTS ON THE INTERPRETATION OF THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000

Our advisors suggest that the following court rulings indicate the courts view the Preferential Procurement Policy Framework Act, 2000:

5.1 In the (then) Transvaal Provincial Division in *Grinaker LTA v The Mpumalanga Tender Board, 2002(3) All SA 336, the following principles transpired:*

- The tender evaluation process requires a two- phased approach – first to determine the score on price and preference and secondly, to determine whether there are

⁴ See High Court of South Africa (Transvaal Provincial Division) case No 18276/2001) and KwaZulu Natal High Court, Pietermaritzburg, case no 10878/2009.

⁵ The judge in the High Court of South Africa (Transvaal Provincial Division) case No 18276/2001) in his judgement cited another case when considering “objective criteria” - “ *The task of the Tender Board has and always been and will be primarily to ensure that government gets the best price and value for that which it pays. if that were not the prime purpose of the Tender Board and policy considerations were to override these considerations, the very purpose of the Tender Board is defeated and no Tender Board needs to exist.*”

⁶ See

www.finance.gov.za/legislation/pfma/supplychain/Policy%20to%20Guide%20Uniformity%20in%20Procurement%20Reform%20Processes%20in%20Government.pdf

⁷ The cidb Standard for Uniformity in Construction Procurement defines quality as “the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs”. It provides a standard methodology for the combining of financial offer, preference and quality. This is set out in detail in the Standard Conditions of Tender as Method 4 and is made tender specific through the Tender Data which is contained in tender documents. The following two clauses in Standard give effect to the administrative law requirements:

- 4.3.5** Where quality is evaluated, at least three persons who are fully conversant with the technical aspects of the procurement shall undertake such evaluation. Quality shall be scored in terms of the prompts for judgement with fixed scores assigned to each prompt, either individually and averaged or collectively, as appropriate.
- 4.3.6** To ensure consistency in scoring, members of the evaluation panel shall be provided with prompts for judgments or qualitative indicators relating to all quality criteria and any subcriteria that are linked to a specific score. Such prompts shall be communicated to respondents or tenderers in procurement documents. The rating of submissions shall be based on the information submitted or, where relevant, from interviews, and not on mere speculation or suspicion or the personal knowledge of a panel member.

“*other objective criteria*” that warrants the award of the tender to a tenderer that has ‘*not scored the highest on price and preference*’.

- Specific Goals and objective criteria are distinctive concepts – Paragraph (f) refers to criteria in addition to those contemplated in paragraphs (d) and (e). The implications are clear: paragraphs (d) and (e) which refer to specific goals contemplate criteria by which it may be judged whether the goal has been achieved or not. – Section 2(1)(f) of the PPPFA intended objective criteria “*over and above*” those intended in section 2(1)(d) and (e): “The Legislature did not intend that criteria contemplated in paragraphs (d) and (e) should be taken into account twice, firstly in determining what score was achieved out of ten in respect of the criteria contemplated in these paragraphs, and secondly, in taking into account those selfsame criteria to determine whether objective criteria justified the award of the contract to another tenderer than the one who had scored the highest points.”

5.2 Eastern Cape High Court, Grahamstown in Case No 230/09

“There is in my judgement nothing offensive either in using quality or functional assessments as an initial threshold requirement, as well as then using them again as part of the second assessment amongst those who passed the threshold. The repetition is not unfair (the same scores are used); it does not affect equity requirements (those are met in the BBBEE points allocation); the process remains competitive (not only in relation to price), and effectiveness is enhanced (price and functionality counts).”

5.3 KwaZulu Natal High Court, Pietermaritzburg, case no 10878/2009 –

“....the words price does not include functionality. They are entirely distinctive concepts.....the only discretion allowed in the Act is as to the allocation of the balance of the maximum of 10 points after a minimum of 90 points have been allocated for price”.

5.4 The Transvaal High court in Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others 2008 (4) SA 346 (T):

Judge Murphy, in addition to other findings that are not relevant to this document, states that there must be a *rational connection between a finding of an adjudication committee and the facts before that committee*. Facts just gleaned from a tender submission and not required by the tender invitation, does not constitute such a rational connection. The test of a rational connection is one that may ensure objectivity in a case where doubt exists.

6. THE PREFERENTIAL PROCUREMENT REGULATIONS (2001)

The Preferential Procurement Regulations (2001) permitted the splitting of price into price and functionality, neither of which are terms defined in the Act. The Regulations thereafter permitted the preference points to be added to the combined score for price and functionality. This approach to addressing functionality in tender offers changes the prescribed quantum of points allocated to price and preference.

The KwaZulu Natal (KZN) High Court, Pietermaritzburg, found that the Preferential Procurement Regulations (that requires the points for price and functionality to be combined before adding the preference in a manner such that the maximum points for price plus functionality does not exceed 80 or 90 points, depending upon the value of the tenders. The court declared Regulations 8(2) to 8(7) to be invalid as they are inconsistent with Section 2(1)(b) of the Act.

The KZN judgment however, does not support or preclude the application of functionality in respect to tenders as Regulation 8(1)⁸ which introduces functionality into the Regulations. The judgment merely takes away any discretion in applying points to price. Accordingly, Regulation 8(1) remains valid.

National Treasury's draft Practice Note sets out a method to address functionality⁹, if it is desirable to evaluate such criteria in tender submissions. This method requires that functionality be scored in the first instance. Thereafter, only tenders who score above the minimum threshold value stated in the tender documents, are scored in terms of price and preference. This approach amplifies what constitutes an "acceptable tender" as the Act only permits "acceptable tenders" to be evaluated. This methodology ensures that the tenderer with the highest points satisfy minimum functionality requirements.¹⁰ It does not address the exception to the rule provided for in Section 2(1)(f) and Regulation 9 which recognise that highest points does not necessarily equate to best value for money.

7. THE CIDB'S PROPOSED APPROACH TO ESTABLISHING BEST VALUE FOR MONEY

7.1 CIDB IMPERATIVES

The methodology proposed by National Treasury will pose a solution to the majority of construction projects. However, the cidb is tasked with the development of a high-performance, quality-driven construction industry, where excellence is demonstrated in the delivery and end product of construction projects. For this purpose it is imperative that excellence be awarded. This is in conflict with the draft proposal.

7.2 LEGAL BASIS FOR PROMOTING BEST VALUE

The Transvaal High Court has provided guidance in this regard in the LTA Grinaker as well as the Potchefstroom cases referred to above. In the LTA Grinaker case, the Judge indicates that objective criteria as contemplated in section 2(1)(f) of the PPPFA, intend criteria that are not related to the goals of equity ownership by historically disadvantaged people .

⁸ Regulation 8(1) reads " An organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price".

⁹ The practice note defines functionality as "*the measurement according to predetermined norms of a service or commodity designed to be practical and useful, working or operating, taking into account quality, reliability, viability and durability or a service or commodity.*"

¹⁰ This methodology can be readily implemented by applying CIDB Standard for Uniformity in Construction Procurement. The tender documents need to contain eligibility criteria framed around the scoring of quality and the Method 2 (financial offer and preference) needs to be identified in the tender Data as the method by which tenders will be evaluated.

The guidance that the cidb derives from the Potchefstroom case with regard to the evaluation of functionality, is that irrelevant facts gleaned from a tender submission that was not required in the tender invitation, cannot be relied on in the award of a tender to a tenderer that did not score the highest points. There must be a “rational connection between the outcome of the decision and the facts upon which the decision was based” if the decision to award a tender is to be objective.

Section 2(1)(f) of the Preferential Procurement Policy Framework Act allows the existence of “objective criteria” over and above the criteria that relates to the goals included in section 2(1)(d) and (e) of the Act, as a justification to award a tender to a tenderer who does not score the highest on price and preference. The objective criteria cannot stand isolated, though. They have to be rationally connected to a stated (in the tender documentation) outcome.

The cidb affirms that functionality (in which concept we include the concept of quality and award of excellence for which the criteria are described in the Standard for Uniformity in Construction Procurement) is rationally connected to the project in cases where a higher level of functionality than just “acceptable”, is required.

7.3 THE STANDARD FOR UNIFORMITY IN CONSTRUCTION PROCUREMENT

The cidb’s Standard for Uniformity in Construction Procurement is a prescript issued in terms of the Construction Industry Development Board Regulations, 2004. This standard is recognised in terms of the Supply Chain Management Regulations issued in terms of both the Public Finance Management Act, 1999, and the Local Government: Municipal Finance Management Act,¹¹. The Standard for Uniformity provides a method for combining financial offer, preference and quality in the evaluation of tender offers in order to determine which offer represents best value for money ie. to address the exception to the rule regarding the award of a contract to the tenderer who scores the highest number of points based on financial offer and preference. This Standard accordingly establishes the basis on which Section 2(1)(f) of the Act and Regulation 9 of the Regulations may be applied within the construction industry. This method is currently not aligned with the KZN court ruling.

The alignment of the precise application of methodology of combining financial offer, preference and quality with the recent court ruling and the Preferential Procurement Policy Framework Act can take place in one of two ways¹²:

- a) Score quality out of 100. Apply the 90/10 or 80/20 points to financial offer and preference to “acceptable tenders” as provided for in the Act. Combine the points for quality and combined points for financial offer and preference for a preference in the proportions nominated in the tender documentation to represent best value for money and award the contract to the tenderer with the highest number of points.

¹¹ See Regulation 16A.6.3(a)(ii) issued in terms of the Public Finance Management Act and Regulation 1 (other applicable legislation) and 21(a)(2) and (3) issued in terms of the Local Government: Municipal Finance Management Act. See also Practice Note 1 (General Conditions of Contract (GCC) and Standardised Bidding Documents) issued by National Treasury.

¹² Internationally, best value is always determined on the basis of a weightings and points allocation between the criteria which are established to determine best value for money.

- b) Set a score for quality which is representative of the proportions in which quality and financial offer adjusted for a preference are to be combined in order to determine best value for money. Apply the 90/10 or 80/20 points to financial offer and preference to “acceptable tenders” as provided for in the Act. Add the points for quality and points for financial offer adjusted for a preference. Award the contract to the tenderer with the highest number of points.

Both methods will yield the desired outcome and do not adjust the proportion of points awarded for financial offer and preference i.e. the mathematical relationship between points for financial offer and points for preference.

8. SUMMARY AND RECOMMENDATION

Noting that the High Court of KwaZulu Natal has ruled that there is a conflict between the PPPFA and the regulations, this ruling impact on, amongst others, the current version of the cidb Standard for Uniformity in Construction Procurement.

Notwithstanding this, legal opinion obtained by the cidb has demonstrated that it is conceivable to incorporate quality or functionality into construction procurement through the provision of “objective criteria” contemplated in the PPPFA. This would require minor changes to the cidb’s Standard for Uniformity in Construction Procurement.

Accordingly, it is proposed that:

- 8.1 The cidb and National Treasury pursue a joint legal analysis of the merits detailed in the position paper to retain functionality / quality in the scoring mechanism to award a tender on the principles of best value for money in construction procurement.
- 8.2 Subject to the successful outcome of the engagement with National Treasury, to request that Treasury’s proposed Practice Note be expanded to include the evaluation of best value for money within the construction industry, in accordance with the provisions of the Constitution, the Preferential Procurement Policy Framework Act, the Promotion of Administrative Justice Act and the (to be amended) cidb Standard for Uniformity in Construction Procurement, where such evaluation is justified.
- 8.3 The cidb Standard for Uniformity in Construction Procurement be amended so that it fully aligns with the judgment that necessitated the Treasury ruling, and other related court cases.
- 8.4 A co-operative structure be established between National Treasury and the cidb to consult on a regular basis on overlaps in mandates which impact upon supply chain management and cidb prescripts and related legislation.