This Practice Note discusses actions that organs of state can take against contractors for non-performance by a contractor. The Practice Note concludes that all issues of non-performance of contractors on contracts issued by organs of state should first be dealt with in terms of the contractual procedures between the employer and the contractor.

It is recommended that non-performance of contractors is dealt with directly in terms of the contractual conditions and procedures entered between the employer and the contractor, and thereafter be reported to the National Treasury for blacklisting in terms of Section 13 of the Preferential Procurement Regulations (June 2011).
1. Background

This Practice Note discusses actions that organs of state can take against contractors for non-performance by a contractor, where non-performance includes:

- Abandoning of a contract in whole or in part before practical completion;
- Failure to comply with the conditions of contract and non-achievement of practical completion other than due to reasons caused by the client; or
- Failure to rectify major construction defects after practical completion but within the defects liability period so as to comply with the conditions of contract.

Actions that can be taken, or are required to be taken, include:

a) Recovering all costs, losses or damages incurred or suffered as a result of poor performance;

b) Blacklisting the contractor on the National Treasury database of restricted suppliers, and restricting the contractor from obtaining business from any organ of state for a period not exceeding 10 years.

Note that the term contractor here refers to a person or organisation that contracts to construct, refurbish, rehabilitate, extend, alter, repair, maintain or demolish or components thereof.

The Practice Note concludes that all issues of non-performance of contractors on contracts issued by organs of state should first be dealt with in terms of the contractual procedures between the employer and the contractor, and should thereafter be reported to the National Treasury.

2. The Preferential Procurement Policy Framework Act

2.1 Legislative Framework

Section 13 of the Preferential Procurement Regulations (June 2011) states that:

1. Where any of the conditions of the contract have not been fulfilled, an organ of state must take action against a contractor, and
In addition to any other contractual or other remedy that it may have against the contractor, an organ of state may:

a) Disqualify the contractor from the tendering process;
b) Recover all costs, losses or damages it has incurred or suffered as a result of that contractor’s performance;
c) Cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
d) Restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years, after the audi alteram partem (hear the other side) rule has been applied; and
e) Forward the matter for criminal prosecution.

2.2 Taking Action Against a Contractor

(This section is adapted from National Treasury’s Practice Note Number SCM5 of October 2006 and MFMA Circular No. 43 of May 2007.)

Guidance on procedures that an organ of state should follow in order to restrict a contractor from obtaining business from any organ of state are given in National Treasury’s Practice Note Number SCM5 of October 2006 and MFMA Circular No. 43 of May 2007, namely:

a) Inform the contractor or person(s) by registered mail or by delivery of the notice by hand of the intention to impose the restriction, provide the reasons for such decision and the envisaged period of restriction;
b) Allow the contractor and/or person(s) fourteen (14) calendar days to provide reasons why the envisaged restriction should not be imposed;
c) If requested, allow the contractor and/or person(s) the right to present evidence in person;
d) Consider any reasons submitted by the contractor and/or person(s); e) impose the restriction or amended restriction;
e) Inform the contractor and/or person(s) of the decision; and
f) Inform the National Treasury within five working days of such restriction, particulars of the person(s) to be restricted, (including, where applicable, names of the restricted persons, identity

Where a contractor is restricted from obtaining business with the public sector, National Treasury must be informed within five working days.
numbers, trade name of enterprises, company registration numbers, income tax reference numbers and vat registration numbers), the reason(s) for the restriction, the period of restriction and the date of commencement of the restriction.

According to SCM Regulation 38(1)(c) the Accounting Officer must check the National Treasury’s database prior to awarding any contract to ensure that no recommended bidder or any of its directors is listed as a person prohibited from doing business with the public sector.

The names of such contractors will also be reflected in the cidb Register of Contractors by means of a link to the National Treasury database, but these contractors will not necessarily be deregistered from the cidb Register of Contractors unless the cidb institutes a formal investigation which results in the contractor being restricted/suspended from doing business with the state, following any transgression or breach of the cidb code of conduct.

2.3 What Action Should be Taken?

The Preferential Procurement Regulations, National Treasury’s Practice Note Number SCM5 of October 2006 and MFMA Circular No. 43 of May 2007 do not give guidance on what action should be taken under what condition. However, the general principle is that the action should be commensurable with:

a) The consequences of non-compliance with the contract conditions;

b) The cost of rectifying the non-compliance with the contract conditions; and

c) Any costs associated with court proceedings and for the cost of any decision that may result in the event of an appeal by the contractor.

Examples of actions that should be considered for non-performance with the contract conditions on construction works contracts are given below:

<table>
<thead>
<tr>
<th>Non-Performance</th>
<th>Actions to be Considered</th>
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<tbody>
<tr>
<td>Abandoning of a contract in whole or in part before practical completion</td>
<td>• Restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.</td>
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<td></td>
<td>• Recovery of all costs, losses or damages that have been incurred or suffered.</td>
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2.4 Taking Action Against a Contractor

Taking action against contractors for non-performance must first be dealt with in terms of the contractual obligations and contractual procedures between the employer and the contractor, and should thereafter be reported to the National Treasury. The process for instituting action against a contractor is summarised below:

a) The organ of state must in writing, notify the contractor of non-performance and order specific performance from the contractor to remedy the non-performance;

b) The contractor must be given a reasonable period of not less than 14 days working days to remedy such non-performance;

c) In the event that the contractor fails to remedy non-performance within a prescribed period, the organ of state must issue a notice of its intention to terminate the contract;

<table>
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| Failure to comply with the conditions of contract and non-achievement of practical completion other than due to reasons caused by the client | • Restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.  
• Recovery of all costs, losses or damages that have been incurred or suffered. |
| Failure to rectify major construction defects after practical completion but within the defects liability period so as to comply with the conditions of contract | • Restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.  
• Recovery of all costs, losses or damages that have been incurred or suffered. |
• The termination of the contract as a result of non-performance by the contractor must be done in accordance with the provisions of the contract;

  e) The project manager employed by the organ of state must issue a report on the status of the works executed by the contractor; and

  f) The organ of state must register the termination of the contract on the cidb Register of Projects.

3. Augmentation of Tender Notices and Contract Documentation

To align with National Treasury’s Practice Notes (Section 2) and the cidb Code of Conduct (Section 3), the tender notice or contract documentation should include the sub-paragraphs below:

1. Where the employer terminates the contract due to default of the contractor in whole or in part, the employer may decide to:
   a) Refer the breach in contract to the cidb for investigation as a breach of the cidb Code of Conduct in terms of the cidb Regulations; or
   b) May impose a restriction penalty on the contractor in terms of Section 13 of the Preferential Procurement Regulations.

   The outcomes of such investigations in terms of both the cidb Regulations and the Preferential Procurement Regulations may prohibit the contractor from doing business with the public sector for a period not exceeding 10 years.

2. If the employer intends imposing a restriction on the contractor or any person associated with the contractor in terms of Section 13 of the Preferential Procurement Regulations, the contractor will be allowed a time period of not more than fourteen calendar (14) days to provide reasons why the envisaged restriction should not be imposed. Should the contractor fail to respond within the stipulated fourteen (14) days the employer may regard the contractor as having no objection and proceed with the restriction.
3. Any such restriction imposed on any person by the employer will also be applicable to any other enterprise or any partner, manager, director or other person who wholly or partly exercises or exercised or may exercise control over the enterprise of the first-mentioned person, and with which enterprise or person the first-mentioned person is or was in the opinion of the employer actively associated.

4. If such a restriction is imposed, the employer must, within five (5) working days of such imposition, furnish the National Treasury, with the following information:
   i) The name and address of the contractor and/or person restricted by the purchaser;
   ii) The date of commencement of the restriction;
   iii) The period of restriction; and
   iv) The reasons for the restriction.

5. If such a restriction is imposed, the contractor will also be identified on the cidb Register of Contractors for the duration of the suspension by means of a link to the National Treasury database. These details will be loaded in the National Treasury’s central database of suppliers or persons prohibited from doing business with the public sector.
4. Summary and Conclusions

In a survey undertaken by the cidb\textsuperscript{1}, around 12% of projects surveyed had levels of defects which are regarded as inappropriate. It is estimated that this translates into a cost of around R3,5 billion per year. It is incumbent on organs of state to minimise this cost of poor quality, and to recover these costs wherever it is practical to do so. It is also incumbent of organs of state to take action against contractors where the employer has terminated the contract due to default of contractors who terminate contracts (in whole or in part).

This Practice Note summarises the legislative framework that requires organs of state to take action against non-performing contractors. The Practice Note then summarises actions that organs of state can take for non-performance.