

# Inform Practice Note #32

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Application of the  
Potentially Emerging (PE) Status

cidb's Inform Practice Notes provide guidance and clarity in achieving client objectives in construction procurement and delivery. Practice Notes inform clients and practitioners on how to embrace best practice and how to deal with issues that may arise. They are aligned with, but do not replace regulation.

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## Overview

The construction Industry Development Regulations have a provision to support the development of emerging contractors through the application of the Potentially Emerging status (PE) as one of the policy instruments to advance transformation of the construction industry. Client may award a contract to contractors graded with a PE status in one grading designation higher than the one that they are registered in, provided that risk to the client is adequately covered and managed.



## 1. Introduction

The Potentially Emerging (PE) status was introduced in the Construction Industry Development (CID) Regulations in 2004 to advance the development of emerging contractors by providing, subject to certain requirements, for emerging contractors to tender for work at one grade higher than the contractor's registered grading designation. However, the PE status is largely being applied by public sector clients in a manner that conflicts with the Regulations. This Practice Note seeks to clarify the requirements to create an enabling environment within which clients may apply the PE status as an instrument to support the development and transformation agenda.

## 2. Regulatory Framework

2.1 Contractor development is a deliberate and managed process to achieve targeted developmental outcomes that improves a contractor's:

- Grading status;
- Performance and quality; and
- Equity and targeted ownership.

2.2 The CIDB Act (Act No. 38 of 2000) requires the promotion and implementation of policies, programmes and projects aimed at, amongst others, the support of the emerging enterprise sector. In this regard, the cidb has orchestrated a wide range of initiatives/activities, and established various instruments to facilitate Contractor Development (CD). These initiatives include:

- Regulation;
- Frameworks and Policies;
- Best Practice Standards;
- Implementation Guidelines;
- Practice Notes; etc.

2.3 The introduction of Regulation 5 in support of the development of emerging contractors through the use of the PE status, is one such mechanism. The purpose of including the PE status in the regulation is to provide for a structured manner within which development opportunities at a higher grade could be granted to emerging contractors, while not prejudicing the quality of work. The Regulation defines a PE status contractor as an enterprise of which the majority of black persons have ownership, and financial and managerial authority for that company or entity.

The following are the specific clauses in the Regulations that cover the issue of PE status.

- 2.1 Regulations 6(1)(b) and (d) of the Regulations provide that both the BEE level and the PE status of a contractor are recognised as categories of registration.
- 2.2 Regulation 5 defines a targeted development programme, and states that from the register of contractors, a client may identify potentially emerging contractors within particular contractor grading designations for the purpose of development programmes that target the improvement and progress of contractors.
- 2.3 Regulation 7.4(k) requires that (k) if a contractor is registered under an emerging contractor development scheme, proof of that registration must be provided to the cidb.
- 2.4 Regulation 13 states that the Board must identify whether a contractor who has applied for registration in the category contemplated in Regulation 6(1)(b), can be classified as a potentially emerging enterprise by:
  - (a) Identifying the principals who are previously disadvantaged persons;
  - (b) Establishing whether the principals who are previously disadvantaged persons own at least fifty percent of the enterprise;
  - (c) Establishing whether the principals who are previously disadvantaged persons possess and exercise:
    - (i) The authority to manage the assets and daily operations of the enterprise; and
    - (ii) Appropriate managerial and financial authority in determining the policies and directing the operations of the enterprise.
- 2.5 Regulation 25(8) states that within the framework of a targeted development programme promoted by a client or employer, that client or employer may accept for evaluation, tender offers or expressions of interest by a contractor who is registered as a potentially emerging enterprise in terms of these Regulations at a contractor grading designation, one level higher than the contractor's registered grading designation, if that client or employer:
  - (a) Is satisfied that such a contractor has the potential to develop and qualify to be registered in that higher grade; and
  - (b) Ensures that financial, management or other support is provided to that contractor to enable the contractor to successfully execute that contract.

### 3. Creating an enabling environment for the application of the PE Status

The PE status may be applied using the following procurement models:

#### 3.1 Direct Targeting Model

3.1.1 In the direct targeting model, a contractual relationship exists between the client and the contractors to be developed within the Contractor Development Programme (CDP). The client provides (or outsources) the development support to the contractors.

3.1.2 This model must be aligned to the NCDP Framework and Practice Note #29.

3.1.3 Where a CDP exists, clients may apply the requirements of Regulation 5 to restrict tendering to those contractors registered within the CDP. The CDP being promoted must be stated in the tender advert notice.

3.1.4 It is imperative that the client issues a policy statement to reflect their intention and commitment to the targeted development of emerging contractors (as guided in Section 3.1.5 below).

3.1.5 Client Policy Statement: NCDP-compliant CDP: Clients should update their Supply Chain Management (SCM) Policy (or develop a separate policy) to state the CDP specifically for the development of PE status contractors. The wording in the policy can be reflected as follows:

- I. The {insert name of client} undertakes to support the development of emerging contractors in the construction industry through the use of the Potentially Emerging (PE) policy instrument developed by the cidb.
- II. The {insert name of client} undertakes to establish and resource a Contractor Development Programme in line with the cidb Guidelines for Establishing Contractor Development Programmes.
- III. The {insert name of client} undertakes to allocate projects to the Contractor Development Programme, within which the PE status can be applied.

## 3.2 Indirect Targeting Model

A client may specify the intention to develop contractors through the application of a Targeted Development Programme (TDP) through an open procurement process. The risk to the client must be adequately managed while balancing the intention to:

- Improve the grading status of the contractor; and/or
- Support the improved performance and quality of work of the contractor.

It has become a common practice for clients to advertise tenders for PE status contractors without having a TDP in place. Clients are cautioned that the application of the PE status on the tender notice and invitation to tender in the absence of a TDP is regarded as transgression of the CID Regulations.

## 3.3 Elements of a Targeted Development Programme

3.3.1 A TDP is a deliberate commitment by a client to specific development objectives, such as the establishment of a TDP for the development of PE status contractors. This therefore implies that a client must provide adequate support mechanisms to satisfy the development outcomes specified in a TDP. Guidance on establishing various elements of support can be found in the cidb Guidelines for Implementing Contractor Development Programmes.

3.3.2 A TDP essentially requires that:

- The client commits to creating access to development opportunities to improve the grading status of a PE status contractor. In this regard, the client will have the discretionary powers on the selection of projects on which PE status contractors will be invited to tender on, in an open competitive process.
- Support mechanisms, such as training and mentorship, may be provided to support the development objectives. Other support mechanisms may also be identified for application within a TDP.

3.3.3 In the scenario of open tendering in which PE status contractors compete with non PE status contractors, clients must ensure that functionality criteria and a risk assessment phase are applied to the tender process. The functionality criteria or risk assessment must be the same for both the PE status contractors and non PE status contractors. This option can be accessed by clients as per the conditions stated in section 3.3.4

3.3.4 Client Policy Statement: Generic TDP: Clients update their Supply Chain Management (SCM) Policy (or develop a separate policy) to state the TDP specifically for the development of PE status contractors. The wording in the policy can be reflected as follows:

- I. The {insert name of client} undertakes to support the development of emerging contractors in the construction industry through the use of the Potentially Emerging (PE) policy instrument developed by the cidb.
- II. The {insert name of client} will provide developmental support to a PE status contractor that is awarded a contract through an open competitive procurement process, but such developmental support shall not be a prerequisite for the contractor to complete the project and shall not influence the eligibility or functionality assessment in the award of the tender.
- III. Such developmental support shall be determined by a needs analysis. Support conditions, not limited to those listed below, may be specified in the signed contract, on agreement between the client and PE status contractor:
  - Mentorship
  - Training
  - Reduced (or no) guarantees
  - Financial support.

3.3.5 In an open competitive tender process, the PE status shall not influence the eligibility or functionality assessment in the award of the tender. A PE status contractor must be evaluated on the same criteria as a non-PE status contractor so that the quality is not compromised. (See section 3.3.6 for the wording in the invitation to tender as specified in the cidb Standard for Uniformity).

### 3.3.6 Tender Notice and Invitation to Tender

“It is estimated that tenderers should have a cidb contractor grading of ... or ... or higher. ... or ... potentially emerging enterprises who satisfy criteria stated in the Tender Data may submit tender offers.”

This means that the PE status contractor and the non-PE status contractor will be evaluated on the same criteria stated in the tender data. During the evaluation process, contractors must meet the eligibility criteria and thereafter be evaluated on functionality criteria. Those contractors that meet the functionality threshold may then be further evaluated on the price and preference model. The contractor that scores the highest points may be awarded the tender.

## 4. Procurement process:

- 4.1 An invitation to allow the participation of the PE status tenderers on a particular project is at the discretion of the client, on condition that such an invitation is supported by that client’s policy statement on the use of the PE status as a policy instrument for contractor development.
- 4.2 The invitation to tender must reference the name of the development programme in compliance with the cidb prescripts.
- 4.3 The PE status contractor tenderers responding to an open tender that is not restricted to participants of a TDP (such as a CDP) must be cognisant of the fact that they will be subjected to the same rules and conditions for tendering as prescribed by the cidb for non-PE status contractor tenderers.
- 4.4 The Standard for Uniformity in Construction Procurement clearly requires that if, for a particular contract, the client chooses to use the provisions, then the tender notice must be worded as described in 4.5.7 of the Standard for Uniformity in Construction Procurement. It is clear from 4.5.7 of the Standard for Uniformity in Construction Procurement that if the wording of 4.5.7 is not used in the tender notice then the provisions may not be used.

Clause F.2.1 of the cidb Standard Conditions of Tender prohibits a tenderer from submitting a tender unless he or she is eligible to do so. Clause F.3.8 obligates the client to reject a tender offer should it not comply with the requirements of the conditions of tender. The eligibility criteria cannot be amended after the closing of tenders to make a tenderer eligible for the award of a contract.

- 4.5 Where participation in a TDP is made a condition of the tender, if the award is made to a PE status contractor, the developmental support stated as part of the client's policy statement, must be made available to the contractor.
- 4.6 All awards to cidb registered contractors must be registered on the cidb Register of Projects, as prescribed.

## 5. Reporting

- 5.1 Regulation 18(1) of the cidb prescripts require that an employer must, within 21 working days from the date on which a contractor's offer to perform a construction work contract is accepted in writing by the employer, register the award and indicate the application of PE status in terms of that award (as per Regulation 21(3)).
- 5.2 Clients must adhere to the guidelines for a TDP or CDP in the identification and award of projects through an indirect or direct procurement model for the purpose of development of PE status contractors.
- 5.3 Non-compliance to Regulation 25 (8) may result in a negative audit finding. According to Regulation 21(4), if an organ of state fails to register a project in terms of these regulations, the cidb is compelled to report that failure by that organ of state to the Auditor-General as an offence.
- 5.3 The Office of the Auditor-General has included the cidb prescriptions in the performance audit programme for public sector clients. Clients are therefore cautioned to ensure compliance to regulatory requirements for the application of the PE status to avoid being reported to the Office of the Auditor-General.

## 6. Conclusion

- 6.1 From Regulations 5 and 25 (8) it is clear that it is the choice of the client to use, or not to use the provision.
- 6.2 From Regulation 25 (8) it is clear that the client may use the provisions only if they ensure that financial, management or other support is provided to that contractor to enable the contractor to successfully execute the contract.
- 6.3 From Regulation 25 (8) it is clear that, regardless of whether a contractor enjoys classification as potentially emerging, the client must be satisfied that such a contractor has the potential to develop and qualify to be registered in a higher grade before using the provision.

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