

## Inform Practice Note #29

July 2012

### Allocating Sustainable Work Opportunities to Contractor Development Programmes

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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#### Synopsis:

This Practice Note focuses on regulatory issues impacting on the allocation of construction works contracts for developmental objectives, and specifically on allocating work opportunities to contractors enrolled within contractor development programmes.

The Practice Note highlights that allocation of construction works contracts for developmental objectives is provided for within the South Africa's legislative framework, provided that sustainable, fair, equitable and transparent practices are provided for – such as that provided for within the National Contractor Development programme (NCDP) Framework and Guidelines.

The Practice Note concludes that clients that do not subscribe to the NCDP Framework and the guidelines of the NCDP in the identification and allocation of projects for the purpose of development and training of contractors may be subjected to the transgressions outlined in National Treasury Practice Note 2 of 2006 on the prohibition of set asides.

## Demystifying 'set asides' and 'ringfencing':

There has been a high level of uncertainty or a lack of clarity with regard to providing work opportunities to contractors enrolled within Contractor Development Programmes (CDPs). Part of this lack of clarity has arisen from the interpretation of National Treasury's Practice Note 2 of 2006 on the prohibition of set asides or ringfencing.

This Practice Note aims to demystify perceptions around set 'asides' and 'ringfencing' which may hinder provision of work opportunities to contractors enrolled within CDPs.

Defining Contractor Development: A deliberate and managed process to achieve targeted developmental outcomes that improves contractor:

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

## 1. Introduction

There has been a level of uncertainty or a lack of clarity with regard to the legislative framework for providing work opportunities through direct targeting to contractors enrolled within a Contractor Development Programme (CDP). Part of this lack of clarity has arisen from the interpretation of National Treasury's Practice Note 2 of 2006 on the prohibition of set asides, which has been interpreted as precluding the allocation of work opportunities for developmental objectives.

This Practice Note focuses on regulatory issues impacting on the allocation of construction works contracts for developmental objectives, and specifically on allocating work opportunities to contractors enrolled within contractor development programmes.

In addressing the allocation of construction works contracts for developmental objectives, this Practice Note first highlights key elements of the Framework of the National Contractor Development Programme (NCDP), within which the allocation of work opportunities to CDPs is a key element to support contractor development. The Practice Note also highlights elements of the NCDP Guidelines for CDPs, which includes fair, equitable and transparent practices for the enrollment of contractors into CDPs, and for the development of contractors.

The Practice Note then reviews the legislative framework for allocating construction works contracts for developmental objectives. The Practice Note then highlights that allocation of construction works contracts for developmental objectives is provided for within the legislative framework, provided that sustainable, fair, equitable and transparent practices are provided for – such as that provided for within the NCDP Framework and Guidelines.

The Practice Note concludes that clients that do not subscribe to the NCDP Framework and the guidelines of the NCDP in the identification and allocation of projects for the purpose of development and training of contractors may be subjected to the transgressions outlined in Practice Note 2 of 2006.

## 2. The National Contractor Development Programme

The National Contractor Development Programme (NCDP) is a government framework comprising of a partnership between the cidb, national and provincial public works and other willing clients and stakeholders, in



public works

Department:  
Public Works  
REPUBLIC OF SOUTH AFRICA



which the participating stakeholders:

- Commit their resources to develop previously disadvantaged contractors; and
- Align their individual contractor development programmes or initiatives with the principles set out in the NCDP framework (and guidelines), towards meeting the objectives of the NCDP through their own pre-set development and service delivery targets.

The objective of the NCDP is to increase the capacity, equity ownership, sustainability, quality and performance of cidb registered contractors, as well as improving skills and performance in the delivery and maintenance of capital works across the public sector. In addition to specific contractor development instruments (including both direct and indirect targeting), the NCDP also addresses an enabling environment required for contractor development.

Key principles for establishing and operating CDPs are given in the cidb Guidelines for Implementing Contractor Development Programmes, which provide for sustainable, fair, equitable and transparent practices, including:

- Work opportunities are typically provided through direct contracts with the developing contractors within the CDP; and
- Contractors will enter the programme based on predefined criteria and will receive support to enable contractors to exit the programme on the basis of achieving predefined criteria relating to skills, qualifications, certification, sustainability, quality, etc.

### 3. The Legislative Framework

In understanding the regulatory issues impacting on the allocation of financial resources through construction works contracts to contractors enrolled within CDPs, it is necessary to separate:

- i) The allocation of projects or work opportunities to CDPs for developmental objectives; and
- ii) The procurement regime for awarding such work opportunities which have been allocated to a CDP.

Section 217 of the Constitution requires that a procurement system must be fair, equitable, transparent, cost-effective and competitive – which governs the procurement regime for awarding such work opportunities. Section 217 allows for the deviation from these principles with the aim to develop previously disadvantaged individuals. This deviation is implemented through the Preferential Procurement Policy Framework Act (PPPFA), Act No. 5 of 2000. In addition, Section 195 of the Constitution requires that public administration must be development-oriented.

Legal opinion obtained by the cidb confirms that clients and

Government departments and Officials that do not subscribe to the NCDP Framework and the guidelines of the NCDP in the identification and allocation of projects for the purpose of development and training of contractors may be subjected to the transgressions outlined in Practice Note 2 of 2006.

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government departments can:

- Identify projects which by their nature have the ability to assist in the development of a contractor;
- Allocate a portion of their budget for these developmental projects for the exclusive expenditure only to contractors within their predetermined development programmes – this portion of the budget must be reasonable in relation to the delivery standard required from government; and
- Award individual projects to contractors enrolled in the CDP's through a competitive tendering process within the CDP.

## 4. Allocating Work Opportunities to Contractor Development Programmes

In line with the above legal opinion obtained by the cidb, it is the cidb's view that the allocation of such projects for developmental purposes should be to development programmes with clearly defined developmental criteria and objectives – such as that provided for in the NCDP. Specifically, the following criteria within the NCDP Framework and the cidb Guidelines for Implementing Contractor Development Programmes are aligned to the requirements of fair and transparent development of contractors within the cidb Register of Contractors, namely:

- The process for contractors to enter the programme must be through open competition. Contractors that wish to enter the programme must be registered with the cidb on the Register of Contractors, and are evaluated based on a demonstration of a minimum level of contracting and financial capacity.
- Contractors that have qualified for entry into the programme (CDP) are subjected to a developmental programme which must be attained within a prescribed period e.g. 3 years.
- All contractors must exit within the prescribed period. Graduation criteria apply to those that have attained the necessary qualification within the period.

The protection and advancement of those that have qualified into the individual CDP's that comply with the cidb Guidelines for Implementing Contractor Development Programmes is therefore provided for in terms of the legislative framework. This therefore allows for the selection and allocation of projects to the individual CDP's, provided that competitive tendering amongst contractors enrolled in the CDP's, takes place for the award of the individual projects.