

PREVENTION & COMBATING ABUSE OF SCM SYSTEM

Update on the provisions of the
revised National Treasury SCM
Instruction No. 03 of 2016/17

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Rationale for the revision of the Instruction

In reviewing Instruction note 3, OCPO adopted the following principles / approach:

1. Ensure that the revised Instruction does not encroach on the institutional accountability conferred upon Accounting Officers and Accounting Authorities by the PFMA:

The Constitutional Court has held that “*conduct by an organ of state that has no foundation in some law breaches the principle of legality, which is a subset of the rule of law, a foundational value of the Constitution.*” ... “***So, the functionary entrusted with the regulation making power cannot stray from the parameters set by the empowering legislation***”.

The application of this statement effectively means that National Treasury cannot step in where it believes there is a failure by AOs/AAs to implement their mandated legislative powers. **In other words, AOs/AAs are accountable for the decisions they take, since the PFMA vests accountability on the AOs/AAs.**

Rationale for the revision of the Instruction continued...

2. To find other “legally cognisable means” to get institutions to do what they must do.

Once again, drawing lessons from case law, the Constitutional Court has also held that if the Minister is of the view that organs of state are failing to do what they are required to do, **she or he must find other legally cognisable means to get them to do what they must do**, for example, she or he might engage organs of state politically or she or he could introduce a bill in parliament with a view of amending the legislation.

To this end, OCPO had to, firstly, test all inputs received against this principle, and secondly, find legally cognisable means, which in this case was to provide for reporting requirements that would strengthen the transparency of procurement within institutions, thus forcing AOs/AAs to be accountable because the proverbial light would be shone on what they are doing, which would serve as a deterrent to abuse of the SCM system. Furthermore, these reports would be a useful tool for OCPO and equivalent units in the provincial treasuries to identify areas of possible intervention and support and to strengthen the monitoring of the implementation of the PFMA.

The amendment of the regulations under the PFMA and the development of the Public Procurement Bill may be the mechanisms that can be used to provide such opportunities for National Treasury / Minister of Finance to improve efficiencies in the Public Procurement domain.

Rationale for the revision of the Instruction continued...

3. To bridge the disparity between government departments, constitutional institutions and public entities listed in schedules 3A and 3C on the one hand, and the SOCs and government business enterprises on the other hand within public procurement, created by the non-inclusion of SOCs and government business enterprises in the SCM regulations (TR16A), particularly when it comes to compliance with ethical standards and avoiding abuse of the SCM system.

To this end, the revised instruction differs somewhat from the strict format of being a directive, but has, in various places, short narrative to provide context to the SOCs and government business enterprises, who are not governed by the GCC, SBDs, etc.

4. Considered the extensive inputs by stakeholders, some of which were diametrically opposed to others, thus the OCPO had to ensure that a balance was struck between competing interests, while maintaining respective legislative mandates.

Purpose, Background (Context) of revised Instruction

- This Instruction is issued to provide measures to—
 - improve accountability and transparency in the procurement of goods and services;
 - reduce the abuse of the Supply Chain Management (SCM) system; and
 - ensure value for money
- Therefore, there is a shift in focus to reporting to various accountability structures and enabling the relevant treasuries, including National Treasury (OCPO), to perform its monitoring role **within the confines of the prevailing legislation.**
- All relevant role players, including AOs/AAs, are enabled to operate within their mandates.

Register and Investigation of Complaints, Allegations of Abuse

- Provides for a register to be established/maintained within the institution that deals with logging complaints/allegations of abuse of the SCM system (was previously provided for in the original IN3)
- Initially, the draft had included requiring a report of the allegation of abuse against the head of the relevant treasury to be sent to the Executive Authority, to solicit opinion on how such allegations should be treated, bearing in mind that the drafting team was concerned that the Instruction would be over-reaching.
- Comments received from internal stakeholders also had a similar concern and were of the view that National Treasury (OCPO) cannot prescribe what an Executive Authority should do, and a decision was taken that the Executive Authority can be notified, however, it would be incumbent on the respective Executive Authority to take appropriate action, without prescribing it in an Instruction.

Treatment of Disclosures and Declarations

- Provides for institutions to identify and manage all potential conflicts of interests and other disclosures made by a person participating in procurement processes to enable the AO/AA to make informed decisions about the person participating in the SCM process.
- The review that OCPO performed brought to the forefront a number of inconsistencies that exist within broader public sector legislation and the expectation that SCM prescripts resolve them e.g. not all employees of the state are barred from public sector procurement, despite the utterances in various platforms which give that impression.
- The Public Administration Management Act, 2014 defines “employee” and “public service” and when reading these together, they exclude employees of SOCs, therefore it is not clear as to what basis/what legislative prescript may SCM/public procurement use to determine what an employee can and cannot do. Ironically, the PAMA includes municipalities in its application as far as employees that may not conduct business with the state and therefore, it is not clear why SOCs could not be included in the application of PAMA.
- With regards to the extension of the application, the previous SBDs 4, 8 and 9 were not applicable to schedule 2, 3B and 3D public entities, but the revised SBD 4 includes these other entities as well.

Restrictions of persons from conducting business with the state

- During the review, OCPO established that when it comes to the restriction of suppliers for PFMA related transgressions, there was a challenge in that the GCC was not issued with application to the Schedule 2, 3B and 3D public entities, hence the vacuum in the case of these entities as regulation 14 of the PPR, 2017 could not be used to restrict a supplier for a transgression that is not related to preferential procurement.
- Hence in this instruction we have unpacked the process to follow when restricting a person in terms of the PFMA.

Deviations from normal bidding process and Expansions / variations

- The power to approve procurement by other means, i.e. deviations from inviting competitive bids, which includes limited bidding (sole source, single source, multiple source), expansions/ variations, written price quotations not within the threshold determined by National Treasury Instruction or prescribed in the institution's SCM Policy, has been vested once again in the AO/AA (essentially returned to the AO/AA) and is no longer vested in the relevant treasuries. (Note: the original instruction note 3 provided for relevant treasuries to approve deviations in cases where it was not a sole source or emergency procurement)
- The Instruction provides for monthly reporting on procurement by other means to the relevant treasuries and the AGSA.
- Moreover, a provision has been introduced in the Instruction to further provide for **reporting in the institution's annual report** where procurement by other means has occurred. It thus elevates the transparency of this type of procurement and reduces the obscurity of such transactions.
- As a result, OCPO will provide input to the Compliance Reporting Framework that will be issued by the OAG.

It is believed that these reporting interventions will strengthen transparency, which was a key concern/subject in the Zondo Commission of enquiry into state capture report (state capture report).

Bid committees

- It should be noted that in light of the various governance infractions observed by National Treasury (OCPO), which have subsequently been confirmed by the state capture report, OCPO took the view that it was necessary to re-emphasise the need for bid committees and to concretise this requirement, even for SOCs, who are not governed by TR16A.
- This paragraph aims to ensure that there is a system in place for the specification, evaluation and adjudication of bids by all institutions and not just the institutions to which chapter 16A applies.
- Whilst it appears that SOCs do follow some committee system, even though they call it different names e.g. cross functional teams, it is not clear to what extent the principle of segregation of duties and governance provisions relating to bid committees has been accommodated within SOCs. This provision is trying to instil a principle that a bid cannot be evaluated by one person, as this opens the risk of non-compliance, abuse and corruption significantly (e.g. paragraph 341 and 343 of the state capture report which speaks to procurement of “certain projects without the participation, knowledge or approval of the business owners of those projects” (in a bid committee system, project owners are members of the committee)).

General requirements

- The AO/AA—
 - may not invite price quotations or bids where no provision has been made in the budget;
 - must ensure that cash flow is sufficient to meet contractual obligations;
 - must pay suppliers within 30 days of receipt of invoice or the period provided for in the contract;
 - may not place orders with suppliers for goods and services to be received in the current financial year and arrange with suppliers to be invoiced and payment to be made in the next financial year, except in the case of a multi-year contract; and
 - must ensure that no pre-payments are made prior to receipt of goods and services, unless required by the contract with the supplier.

Most of these provisions were included in the revised Instruction to emphasise the compliance requirements as these are some of the main areas that are abused, even though these are not necessarily SCM provisions, but they play out in the SCM arena. Furthermore, some of these are contained in prescripts that are not applicable to schedule 2, 3B and 3D public entities, hence they were included here.

General comments and observations

- The revised instruction makes provision for reporting to the relevant treasuries and the Auditor-General of South Africa (AGSA), as well as in the institutions' annual reports:
 - The intention of the monthly reporting to the relevant treasury and AGSA is to ensure that where there are glaring matters of non-compliance, OCPO and those equivalent units in the provincial treasuries can act on it; and the AGSA may, in terms of section 5(1)(d) of the Public Audit Act, consider a special investigation or audit if the AGSA deems it to be in the public interest to do so, based on the report it receives from the institution. In other words, the idea / approach is to provide for transparency with the belief that early detection can assist with the intervention by NT, the relevant treasury and the AGSA, and even lead to referral of cases to law enforcement, if so required.
 - The purpose of providing for reporting in the annual report is to ensure that the public also has access to this information and it is not hidden away in an obscure report that is difficult to access or even interrogate (and to also provide for ease of reference for the structures to whom AOs/AAs are required to report).
 - Most of the comments to the draft Public Procurement Bill as well as some remarks from the State Capture report have highlighted the lack of transparency when it comes to procurement processes, and the aim of these reports is to further enhance transparency. It is anticipated that transparency will also help to hold accounting officers / authorities accountable for the decisions that they take.

Repeal and withdrawal of Instructions, Practice Notes and Circulars

- The following prescripts were considered in the review and will therefore be repealed by the instruction:
 - National Treasury SCM Instruction Note 3 of 2016/17
 - Instruction Note No 32 dated 31 May 2011 related to enhancing compliance monitoring and improving transparency and accountability in Supply Chain Management (SCM).
 - Supply Chain Management Circular postponing implementation of certain paragraphs in Instruction Note No 32 dated 31 May 2011 related to enhancing compliance monitoring and improving transparency and accountability in Supply Chain Management (SCM).
 - Practice Note Number 7 of 2009/2010 dated 2 October 2009 and the SBD4 document
 - Practice Note No SCM 5 OF 2006 on the restriction of suppliers and augmentation of general conditions of contract
 - National Treasury Practice Note on prohibition of restrictive practices: certificate of independent bid determination: standard bidding document (SBD 9).
 - Practice Note No SCM 4 of 2006 on Standard Bidding Document: Declaration of bidder's past supply chain management practices (SBD 8)
- This will serve to reduce the fragmentation of prescripts in the Public Procurement / SCM arena and reduce the regulatory burden of compliance by SCM practitioners as the issues that were contained in these prescripts are reduced to a single document, which approach is aligned to the objects of the Public Procurement Bill.

End