PROCUREMENT IRREGULARITY SERVICE

A SERVICE IN AID OF PREVENTING IRREGULAR PROCUREMENT ACTIVITIES AND CURING LEGAL BREACHES THROUGH NON-LITIGIOUS AND LITIGIOUS INTERVENTION.

“Bribery in government procurement is estimated to be adding 10-20% to total contract costs.”

“Weak governance in public procurement hinders market competition and raises the price paid by the administration for goods and services, direct [sic] impacting public expenditures and therefore taxpayers’ resources. The financial interests at stake, and the close interaction between the public and private sectors, make public procurement a major risk area.”

-- Organisation for Economic Co-operation and Development: Principles for Integrity in Public Procurement ---

As stated by the OECD, public procurement is a major risk area and there are many opportunities at various junctures, for unethical people to defraud competitors, government and the public in general.

Bidders spend large amounts of money and valuable management time preparing for bids, only to pull at the short end of the straw because there are other forces at play. This can be absolutely infuriating and extremely bad for business.

Various activities have been outlawed in South Africa in terms of the Prevention and Combating of Corrupt Activities Act, Prevention of Organised Crime Act, Preferential Procurement Policy Framework Act, Broad Based Black Economic Empowerment Act, Public Service Act, Public Finance Management Act, Promotion of Administrative Justice Act, Promotion of Access to Information Act, Companies Act, the Constitution and others.

If you have seen any of the following warning signs before, during or after a tender, you might have been the victim of serious tender irregularities:
PRE-TENDERING

Needs Assessment

- Lack of adequate needs assessment
- Prioritisation of a need does not seem to make sense and it would appear that the matter is being pushed for with an alternative agenda.
- Shortages appear to have been artificially manufactured to create a procurement need where one does not exists
- A need for procurement has arisen from the cancellation or anticipated cancellation of the services of a previous service provider under suspicious circumstances
- An invitation of a private individual or organisation to a meeting for future procurement activities of an organ of state are discussed and the conversation
- A clear and business case has not been made for the goods or services, but the need for procurement is being advocated for or being pushed hard
- The business case doesn't or doesn't adequately address future phases of the goods or services that may be required
- The products or services are already available internally, but despite that being the case, there is a push for the goods or services to be acquired externally

Planning and budgeting

- Budget is clearly unrealistic and will not be sufficient to do the work. Claw backs often done through variation orders and compensation events at a later stage.
- The budget appears not to be a realistic estimate of the costs of the goods or services. Either too high or too low.
- There aren't sufficient funds available for the procurement of the goods or services or the funds are required to be shifted away from other priorities under circumstances that appear suspicious.

Committee selection: Bid Specification Committee

- The identification and selection of members based on their willingness to either cooperate with irregular schemes or turn a blind eye thereto.
- The selection of members with a chequered past
- The selection of members that can be linked to some of the bidding parties either through blood relations, friendship, political affiliation or other affiliation.

Committee selection: Bid Evaluation Committee

- The identification and selection of members based on their willingness to either cooperate with irregular schemes or turn a blind eye thereto.
- The selection of members with a chequered past
- The selection of members that can be linked to some of the bidding parties either through blood relations, friendship, political affiliation or other affiliation.

Committee selection: Bid Adjudication Committee

- The identification and selection of members based on their willingness to either cooperate with irregular schemes or turn a blind eye thereto.
- The selection of members with a chequered past
• The selection of members that can be linked to some of the bidding parties either through blood relations, friendship, political affiliation or other affiliation.

Definition of requirements

• Certain specified requirements included which are skewed to favour a specific bidder, with the purpose of unduly benefiting that bidder
• Selection of award criteria that are not clearly defined and objectively defined
• The specifications do not conform with the needs in the business case
• The specifications contain proprietary brand names for suspicious reasons.
• The specifications do not meet the optimum whole-life-costs and/or price

Choice of procedure

• Single source bidding where there are various players in the market that can perform the service
• Procurement based on “urgency” where it is clear that the urgency was self manufactured
• Choice to “piggyback” off the services of another service provider already providing other services, instead of competitively bidding
• Tender is broken up into smaller bids, which brings the approval authority below a certain threshold
• Tender is broken up into smaller bids, resulting bringing the threshold under R200 000.00 to where only three quotes are required and not a competitive tender
• An RFI procedure is followed where similar procurement has been done in the past, and on the face of it, the RFI procedure appears to be an attempt to solicit information for dissemination to another party to facilitate an undue benefit.

TENDERING PHASE

Invitation to tender

• The tender has not been advertised as prescribed by regulations
• The advertisement contains time periods of less than 14 days within which to submit the bid
• Bid documents not available online, but must be collected in circumstances that appear to be suspicious.
• Award and evaluation criteria are not announced in advance of the closing of the bid
• Sensitive or non-public information disclosed to a party
• Officials at briefing session seem nervous
• Officials at briefing session making unusual amount of contact with certain attendees.

Evaluation

• Approached during the evaluation stage by another bidder and requested to sub-contract for them should they win
• Approached by a person alleging to have the ability to influence the awarding of the bid, requesting a payment to be made in exchange for the awarding of the bid
• After submission of a bid, the bid is cancelled for suspicious reasons
• The bid submitted by another party is suspiciously similar to one of the other bids submitted.
Award

- Conflict of interest between government official and successful bidder
- Directors, shareholders or employees of company appear to have political links that resulted in differential evaluation of the bids
- Requests for access to information regarding the bid are refused or not provided in whole
- Company not informed that they were unsuccessful with the bid
- Approached by another bidder to perform services after award
- Unknown company with little or no track record is awarded the bid
- Bid amount disproportionate to the size of the winning bidder’s company
- Bid awarded to company which appears unlikely to have been able to comply with critical or technical criteria
- Bid awarded to a bidder at a higher price than its competitors with no reasonably discernable reason for doing so.
- The bid is awarded for a price that is clearly not market related.

POST TENDERING PHASE

- Scope and/or specifications of the bid is changed after the fact
- Altering legitimate purchase orders.
- Falsifying documents to obtain authorisation for payment.
- Forging signatures on payment authorisations.
- Submitting for payment false invoices from fictitious or actual suppliers.
- Improper changes to supplier payment terms or other supplier details.
- Intercepting payments to suppliers.
- Sending fictitious or duplicate invoices to suppliers.
- Improper use of company credit cards.
- Marked up invoices from contracts awarded to supplier associated with an employee.
- Sale of critical bid information, contract details or other sensitive information
- Contract manager extremely lenient on variation orders
- Approached by official attempting to extort money for the making of payments
- Withdrawal of a lower bidder without apparent reason and their subsequent sub-contracting to a higher bidder.
- Flexible evaluation criteria.
- Acceptance of late bids.
- Consistently accurate estimates of tender costs.
- Poor documentation of the contract award process.
- Consistent favouring of one firm over others.

BEFORE, DURING AND AFTER THE TENDER

- Any suspicious deviations from the Supply Chain Management Policy
- A person closely related to a tender appears to be living a lifestyle or having acquired goods or services that appear on the face of it not to be commensurate with his/her income.
- Irregular, fruitless or wasteful expenditure is incurred with regards to a specific bid without good cause or under suspicious circumstances

- A public or private official or a person somehow related to the bid has received any one or combination of the following forms of gratification before, during or after the bid under suspicious circumstances:
  - money, whether in cash or otherwise
- any donation
  - Donations to a political party
  - Donations to a charity
  - Donations to church
  - Donations to school (children or other)
- Gift
  - Clothing
  - Accessories
  - Vehicles
- Loan
  - In circumstances where a loan would ordinarily not have been granted to an individual or organisation
- Fee
- reward
- valuable security
- Property
- interest in property of any description whether movable or immovable, or
- any other similar advantage;
- the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage
  - Waiver of an administrative fine as a result of a statutory breach
  - The avoidance of the loss of a job
- any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation
  - Appointment to a position
  - A raise
  - More beneficial employment conditions
  - A promotion
  - Extension of employment agreement
- any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part
  - Failure of a party to take the actions required to collect outstanding amounts on a home loan/bond.
- any forbearance to demand any money or money's worth or valuable thing
- any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty
- any right or privilege
- any real or pretended aid, vote, consent, influence or abstention from voting
- any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage

Prevention

Prevention is better than cure, and more and more bidders are seeking to improve their chances of success by being diligent.
We do this through the following activities:

- Vetting of competitors and persons related to them for any obvious conflicts of interest.
- Vetting of competitors to determine whether a competitor complies or likely to comply with the critical, functional and technical criteria of the bid.
- Establishing whether there are any signs that the specifications of a tender have been written to favor a specific bidder.
- Establishing in advance whether the tender procedures have been conducted in a legally compliant manner.
- Assisting the client to timeously obtain the written reasons for being unsuccessful with a bid in order to make an informed decision whether to take the matter any further.
- Informing the bid evaluation committee of any information regarding a competitor which is in their interests to know.
- Requesting the bid evaluation committee to disqualify a competitor that does not comply with any criteria that warrants disqualification.

Cure/ After the fact

- Assisting a client to obtain information regarding the bid.
- Investigating the circumstances that lead to a bidder being unsuccessful.
- Compiling and submitting a case to the relevant organ of state after the fact in order to inform them of any irregularities.
- Requesting the relevant organ of state and/or Treasury to blacklist a bidder for fraudulent conduct or performance related issues regarding the bid.
- Escalating a matter to Parliament regarding bidding irregularities.
- Exposing bidding irregularities through appropriate media channels.
- Demanding that an organ of state investigate the conduct of certain officials.
- Putting together and submitting a case to the public protector on any irregularities in the tendering.
- Putting together and submitting a case to the SAPS where irregularities exist or are suspected to exist.
- Facilitating an application for the review and setting aside of the decision to award a bid to a specific bidder.
- Facilitating an action for damages as a result of procedural or substantive irregularities.

Should you have any questions regarding this proposal or would like to arrange a follow up meeting to discuss this matter, please feel free to contact Ivan Herselman at ivan@argumentum.co.za

Regards

Ivan Herselman
(Admitted advocate of the High Court of South Africa)