

OUTA

ORGANISATION UNDOING TAX ABUSE

30 November 2020

OUTA'S COMMENTS ON THE NEWLY PUBLISHED MFMA SUPPLY CHAIN MANAGEMENT REGULATIONS

Submission to the Director-General, National Treasury

Submitted by:

STEFANIE FICK

Executive Director: Accountability Division

Email: stefanie.fick@outa.co.za

Contents

CHAPTER 1: INTRODUCTION	3
1. PRELUDE	3
2. OUTA'S COMMENTS.....	4
CHAPTER 2: CONCLUSION	11
3. REMARKS AND RECOMMENDATIONS	11

CHAPTER 1: INTRODUCTION

1. PRELUDE

- 1.1 The Organisation Undoing Tax Abuse (“OUTA”) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation.
- 1.2 Part and parcel to OUTA’s mission is the challenging of legislation and the regulatory environment. This includes participating and engaging with government on all spheres, on legislation such as the Local Government: Municipal Finance Management Act, 2003 (“MFMA”).
- 1.3 OUTA hereby makes its submission in response to a call for public comment on the MFMA amendment of Municipal Supply Chain Management Regulations, 2005 as per Government Gazette notice 1095, Government Gazette number 43810.
- 1.4 At the outset, OUTA wishes to emphasise that an increased threshold imposed by the new regulations goes against the principles of transparency and public accountability.
- 1.5 The new regulations do not in any way contribute to the financial well being of our struggling municipalities and suggest that “simplified” revenue streams are created for service providers and not for the municipality. The imposition of increased thresholds on municipal transaction only compound a culture of lack of financial controls, project monitoring and indifference towards procurement transgressions.

2. OUTA'S COMMENTS

2.1 OUTA submits that the promulgation of the new regulations conforms to the category of issues that the Minister may address as per section 168 of the Local Government: Municipal Finance Management Act, 2003 ("MFMA"). However, in terms of the current regulations, municipalities regardless of their category, are not required to have an open bidding process for any transaction below a R200,00.00 threshold.

2.2 Considering the proposed increased thresholds by the new regulations, OUTA submits that distinction between categories of municipalities and the different thresholds applicable thereto is superficial.

2.3 Amended regulation 12(1)(c)(i):

"A supply chain management policy must, subject to regulation 11(2), provide for the procurement of goods and services by way of— formal written price quotations for procurement of a transaction value over— R10 000 up to R300 000 (VAT included), in the case of a local municipality."

2.3.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R10 000 - R300 000 threshold, rendering the proposed regulation arbitrary.

2.3.2 No rational explanation is given as to why a minimum threshold should be implemented. The difference between an amount of R10 000 and R9 999 is marginal.

2.3.3 OUTA submits that additional regulations be published providing for a calculated breakdown as to why R10 000 - R300 000 is to be considered the preferred threshold for local municipalities.

2.4 Amended regulation 12(1)(c)(ii):

“A supply chain management policy must, subject to regulation 11(2), provide for the procurement of goods and services by way of— formal written price quotations for procurement of a transaction value over— R10 000 up to R200 000 (VAT included), in the case of a district municipality.”

2.4.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R10 000 – R200 000 threshold, rendering the proposed regulation arbitrary.

2.4.2 No rational explanation is given as to why a minimum threshold should be implemented. The difference between an amount of R10 000 and R9 999 is marginal.

2.4.3 OUTA submits that additional regulations be published providing for a calculated breakdown as to why R10 000 – R200 000 is to be considered the preferred threshold for district municipalities.

2.5 Amended regulation 12(1)(c)(iii):

“A supply chain management policy must, subject to regulation 11(2), provide for the procurement of goods and services by way of— formal written price quotations for procurement of a transaction value over— R10 000 up to R750 000 (VAT included), in the case of a metropolitan municipality.”

2.5.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R10 000 – R750 000 threshold, rendering the proposed regulation arbitrary.

2.5.2 No rational explanation is given as to why a minimum threshold should be implemented. The difference between an amount of R10 000 and R9 999 is marginal.

2.5.3 OUTA submits that additional regulations be published providing for a calculated breakdown as to why R10 000 – R750 000 is to be considered the preferred threshold for metropolitan municipalities.

2.6 Amended regulation 12(1)(d)(i):

“a competitive bidding process for – procurement above a transaction value of R300 000 (VAT included) in the case of a local municipality.”

2.6.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R300 000 threshold, rendering the proposed regulation arbitrary.

2.6.2 No indication is given whether the threshold considers Consumer Price Index (“CPI”) or annual inflation, rendering the proposed provision arbitrary.

2.6.3 OUTA submits that additional regulations be published providing for a calculated breakdown as to why R300 000 is to be considered the preferred threshold for local municipalities.

2.7 Amended regulation 12(1)(d)(ii):

“a competitive bidding process for – procurement above a transaction value of R200 000 (VAT included) in the case of a district municipality.”

2.7.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R200 000 threshold, rendering the proposed regulation arbitrary.

2.7.2 No indication is given whether the threshold considers CPI or annual inflation, rendering the proposed provision arbitrary.

2.7.3 OUTA submits that additional regulations be published providing for a calculated breakdown as to why R200 000 is to be considered the preferred threshold for district municipalities.

2.8 Amended regulation 12(1)(d)(iii):

“a competitive bidding process for – procurement above a transaction value of R750 000 (VAT included) in the case of a metropolitan municipality.”

2.8.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R750 000 threshold, rendering the proposed regulation arbitrary.

2.8.2 No indication is given whether the threshold considers CPI or annual inflation, rendering the proposed provision arbitrary.

2.8.3 OUTA submits that additional regulations be published providing for a calculated breakdown as to why R750 000 is to be considered the preferred threshold for metropolitan municipalities.

2.9 Amended regulation 12(2)(b)(iii):

“a competitive bidding process be followed for any specific procurement of a transaction value lower than the prescribed competitive bidding thresholds specified in subregulations (1)(i) to (iii).”

2.9.1 OUTA contends that subregulation (2) be amended in addition to the insertion of the amended regulation 12(2)(b)(iii). The presence of “may” as contemplated in regulation 12(2), read in isolation, implies that an accounting has a discretion when determining whether a competitive bidding process be followed for transactions below the threshold as contemplated in amended regulation 12(1)(c)(1) – (iii).

2.9.2 It is common cause that South African municipalities are in financial destitute and regularly requires assistance from the provincial executive. However, regulation 12(2) fails to integrate municipal accountability by being suggestive as opposed to prescriptive. As alluded to in the Auditor General’s media release dated 1 July 2020, while addressing the intention of municipal audit reports, “It is no longer about an accelerated drive to achieve a particular audit conclusion, but whether the *municipality is investing in qualitative and preventative controls to avert this systematic decline in financial fortunes within a sphere where all matters.*”

2.9.3 OUTA contends that qualitative and preventative control measures cannot be subjected to a municipal discretion and must accordingly be encapsulated in enforceable directive.

2.9.4 OUTA proposes an amendment to regulation 12(2) as follows:

“A supply chain management policy must provide for the accounting officer to –”

2.9.5 Universal and prescriptive municipal supply chain management policies, in addressing the aspect of regulation 12(2)(b), will aim to cultivate a culture of compliance and transparency and move towards an era of satisfactory audits.

2.10 Amended regulation 35(2)(a):

“Contract for the provision of consultancy services to a municipality or municipal entity must be procured through competitive bids if — the value of the contract exceeds R300 000 (VAT included), in the case of a local municipality.”

2.10.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R300 000 threshold in relation to consultants in the case of local municipalities, rendering the proposed regulation arbitrary.

2.11 Amended regulation 35(2)(b):

“Contract for the provision of consultancy services to a municipality or municipal entity must be procured through competitive bids if — the value of the contract exceeds R200 000 (VAT included), in the case of a district municipality.”

2.11.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R200 000 threshold in relation to consultants in the case of district municipalities, rendering the proposed regulation arbitrary.

2.12 Amended regulation 35(2)(c):

“Contract for the provision of consultancy services to a municipality or municipal entity must be procured through competitive bids if — the value of the contract exceeds R300 000 (VAT included), in the case of a metropolitan municipality.”

2.12.1 OUTA contends that no rational and/or factual explanation is given for the implementation of a R750 000 threshold in relation to consultants in the case of metropolitan municipalities, rendering the proposed regulation arbitrary.

2.13 Provision must be made for a prescriptive competitive bidding process, irrespective of the value of the services so rendered by consultants. It is common cause that multiple consultants have in the past been procured to render the same service to a municipality resulting in separate invoicing for services rendered (splitting), bringing such invoicing below the thresholds as set out in regulation 35(2). Cumulatively, such consultants rendering the same service may jointly invoice an account for R400 000 to a district municipality, while being deemed to be separate consultants for the purposes of regulation 35(2)(b).

2.14 OUTA proposes that no distinction be made in relation to thresholds applicable to consultancy services and that competitive bidding be prescriptive in all instances where consultancy services are sought.

CHAPTER 2: CONCLUSION

3. REMARKS AND RECOMMENDATIONS

- 3.1 Should stricter procurement control measures not be prescribed to municipalities, OUTA contends that a system of cover quoting and over emphasis on invoice-based procurement will become the method of choice implemented by municipalities.

- 3.2 While the proposed regulations' aim curtail a practice commonly known as quotation splitting, the regulations fail to address the aspect of accountability should splitting occur within a municipality. OUTA is weary of the fact that no safeguard exists to prevent this practice in totality – thus corruption may still become prevalent.

- 3.3 Accordingly, OUTA proposes for the inclusion of a provision defining and criminalising the splitting of invoices as opposed to mere reliance on section 173 of the MFMA for accountability purposes.