

SUBMISSION

TO: THE CHAIRPERSON
KWAZULU-NATAL HOUSING ADVISORY COMMITTEE

SUBJECT: POLICY GUIDELINES: RING FENCING OF PROJECTS PACKAGED PRIOR TO
IMPLEMENTATION DATE OF THE PROCUREMENT POLICY

1. PURPOSE

To seek approval from the Minister of Housing for the ring fencing of projects that have been packaged prior to the implementation date of the procurement policy i.e. 1 April 2002 and which will not be required to be reinitiated in accordance with the procedures outlined in Chapter 3 of the Code, as amended.

2 BACKGROUND

(1) The new procurement regime came into effect 1 April 2002. This policy is intended to ensure compliance section 217 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996); and to ensure compliance with the general principles defined in section 2 of the Housing Act, 1997 (Act 107 of 1997). The relevant sections are quoted hereunder for ease of reference.

(a) **Constitution of the Republic of South Africa, 1996 (Act 108 of 1996):**

“217(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost- effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy which provides for -

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination

(3) National legislation must prescribe a framework within which the policy referred to in subsection 2 may be implemented”.

(b) Housing Act 1997, 107 of 1997

“2(1)(c) ensure that housing development-
(iv) is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance.

“2(1)(h) in the administration of any matter relating to housing development

(ii) observe and adhere to the principles of co-operative government and intergovernmental relations referred to in section 41 (1) of the Constitution; and

(iii) comply with all other applicable provisions of the Constitution”.

(2) The KwaZulu- Natal Housing Amendment Act 2000, 8 of 2000 provides for the determination of a procurement policy in respect of Housing Development. For ease of reference section 15 (A)(13) is quoted:

“ 15 (A) In addition to the powers assigned to the Minister by this Act or other legislation, the Minister must (shall)-

“ 13 determine a procurement policy which is consistent with section 217 of the Constitution in relation to housing development”.

(3) The implication of the new procurement regime is that project linked subsidy projects approved on or after 1 April 2002 must comply with the national procurement policy. The policy identifies 2 main activities which must be procured:

(a) land for green fields projects

(b) professionals and/or implementation agents, and/or contractors

(4) Due to the vast amount of work required in implementing the policy; shortcomings of the IDP's; and transitional requirements, MINMEC has agreed to phase in the procurement process. The implementation of the “green fields project linked” projects was identified as the first phase. It is the intention to expand the process to the other subsidy mechanisms.

(5) There are some practical issues that need to be addressed in implementing the new procurement regime as a number of projects have been packaged prior to implementation date of the procurement policy. The regions need clarity in the application of the procurement policy in respect of such projects.

(a) In some cases, land issues have already been negotiated whilst in others, the professional team has been appointed. It may not be feasible to insist on tendering procedures in some instances. Should these be revised to comply with the new policy, it is probable that the tendering process will be manipulated to allow the status quo to continue. This may also cause delays in project implementation, which

will be subject to price escalation and, thus reduce the cost effectiveness of the process. This will also defeat the intention of section 217(1) of the Constitution.

- (b) A number of projects have already been workshopped with communities and are at an advanced stage. Implementation agents are actively involved with the communities. In some instances the social compact agreements have been concluded. Some of these have been tied up in bureaucratic approval processes. These communities have agreed to a product in accordance with business plans and social compact agreements. Furthermore, professionals have incurred costs in the preparation of these projects, which may now have to be revised.
 - (c) Some projects are natural extensions or subsequent phases to existing approved projects. The difference in product and requirements may cause animosity in these areas.
- (6) The Preferential Procurement Policy Framework Act, 2000 and its regulations provide limited flexibility and a policy decision is required in addressing projects in the packaging stages. In many instances some professionals have already done some work, e.g preliminary layout plans, sketch plans for houses, preliminary designs, etc. Although there have been no agreements with these professionals, there may well be legal costs incurred, as well as delays in possible reappointment processes, should this be insisted upon.
- (7) In terms of section 4 of the Preferential Procurement Policy Framework Act, 2000, “Any procurement process implemented under a preferential procurement policy where the invitation to tender was advertised before the commencement of the Act, must be finalised as if this Act had not come into operation”. Regulation 2(3) of the Preferential Procurement Regulations provides for an organ of state “to deviate from the framework contemplated in section 2 of the act in respect of pre-determined tariff based professional appointments”.
- (8) The National Task Team advised that these matters be dealt with within the respective provinces. In view thereof the Department will have to decide whether it intends applying the exemption clause in the Preferential Procurement Regulations. It should be noted, however, that one sphere of government may not prescribe procurement processes to another sphere of government as this may contradict the principles of co-operative government and intergovernmental relations referred to in section 41(1) of the Constitution.
- Municipalities have their own procurement instructions to follow, but these will have to be in accordance with the Preferential Procurement Framework Act. A municipality may opt to apply the exemption clause.

3. MOTIVATION

- (1) The packaging of new projects are least affected as these will have to be done in accordance with the policy. Projects in various stages of packaging prior to 1 April 2002 are more problematic as implementation agents and/or other professionals may already have been involved in the process, but may not have been appointed through a formal tendering process. Some may have complied in terms of invitation tenders.
- (2) A number of projects are affected by the process. There will be a negative impact on cashflows for the next 2 financial years, should these projects be delayed by insisting that these professionals, who have already done work at risk, now be procured through a tendering process. An interim arrangement is required but this cannot be tolerated indefinitely.
- (3) Regional Offices have maintained the packaging categories (or equivalent thereof) "Possible", "Potential" and "Under Preparation". Projects in the "under preparation stage" are most severely effected. These projects would have been screened through the former RCC(Regional Coordinating Committee) process and recommended for the packaging of a Project Linked Subsidy application. Some of these projects have not been considered by the Minister for approval. It is suggested that a maximum 3 month deadline be given for these projects to be submitted, in their current format.
- (4) Some projects in the "potential" phase may also be affected. These projects should be given 6 months to be submitted to the Housing Advisory Committee. This will only apply to potential projects which have appointed professionals prior to the date of the implementation of the National Department of Housing Procurement Policy (1 April 2002).
- (5) Projects in the "possible" stage will have to be packaged in accordance with the Procurement regime. Although it may be argued that some of these may be transposed to the "Potential" phase, the implementation of the procurement regime in its pure form cannot be delayed indefinitely. These cases will only be considered on strong motivation, and an exhaustive list should be provided by the Regional Offices.
- (6) In order to facilitate the process of identifying exemption cases as highlighted in paragraphs 3 and 4 above, it is suggested that the regions provide an exhaustive list of projects, with motivation in respect of each case, to be exempted from reinitiating the procurement policy, as currently described in Chapter 3 of the National Housing Code. The time frames discussed in respect of each category should be used as a guide for consideration.
- (7) The Regional Offices were requested to provide the following information on projects that

were already in the pipeline at 1 April 2002, by 16 September 2002.

- (1) Name of the project, municipal area, estimated number of sites, subsidy instrument.
 - (2) Name of professionals and occupation.
 - (3) Extent of work done and proof thereof.
 - (4) Brief motivation on procurement process applicable to projects partly packaged before 1 April 2002.
- (8) Difficulties were being experienced in finalizing the lists at an extension of 1 month from the date of approval of this proposal, is deemed appropriate.

4. LEGAL IMPLICATIONS

- (1) Non-compliance with the Constitution is not being condoned, rather, the ring fencing of projects is aimed at ensuring continued delivery in projects where community expectations have been raised and commitments have been made.
- (2) The above policy guideline is further aimed at facilitating responsible cashflow achievements. It is acknowledged that delays and unnecessary bureaucracy must be minimised to achieve cost effectiveness in the industry, and to balance this with the requirements of legislation.
- (3) This guideline will reduce the risk of civil claims against the Department and/or organs of state in cases where work has been done.

5. RECOMMENDATION

That:

- (1) The ring fencing of projects packaged prior to 1 April 2002 which will not be required to be reinitiated in accordance with the procedures outlined in Chapter 3 of the Code, as amended, be approved.
- (2) The Regional Offices submit an exhaustive list of projects to be considered for exemption, for consideration by the MEC, within one (1) month of approval of this document.

CHIEF DIRECTOR
PROJECT MANAGEMENT

DATE

RECOMMENDATION SUPPORTED/NOT SUPPORTED

ADVOCATE E M KHOZA
CHAIRPERSON: KZN HAC

DATE

APPROVED/ APPROVED AS AMENDED/ NOT APPROVED

MR D H MAKHAYE, MEC
MINISTER OF HOUSING

DATE