

SUBMISSION

TO: THE CHAIRPERSON
KWAZULU-NATAL HOUSING ADVISORY COMMITTEE

SUBJECT: POLICY GUIDELINES: PROCUREMENT OF LAND AND PROFESSIONAL SERVICES
FOR LOW INCOME HOUSING PROJECTS - ALL SUBSIDY MECHANISMS

1 PURPOSE

To formulate interim provincial guidelines for the implementation of the procurement policy for all subsidy mechanisms with regard to:

- (1) the requirement to call for land availability
- (2) contractors and/or professional teams

2 BACKGROUND

- (1) The new procurement regime came into effect 1 April 2002. This policy is intended to ensure compliance with 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); and The KwaZulu-Natal Amendment Act, 2000 (Act 8 of 2000). 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 and local spheres 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 providing for-
 - (i) categories of preference in the allocation of contracts; and
 - (ii) 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;

(c) KwaZulu-Natal Amendment Act 2000, 8 of 2000

(1) “15A In addition to the powers assigned to the Minister by this Act or other legislation, the Minister must (shall)-
“15A(13) determine a procurement policy which is consistent with section 217 of the Constitution in relation to housing development”.

(2) Section (2) and (3) of section 217 of the Constitution have been effected through The Preferential Procurement Policy Framework Act, 2000 Act 5 of 2000 and its Regulations.

(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 that 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 (Intergrated Development Plans); 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) The Provincial Guidelines are herewith submitted for consideration. These will also aid in expanding the procurement policy guidelines to other subsidy instruments.

3 MOTIVATION

3.1 Procurement of Land

Details on the procurement of land are outlined in the document Provincial Land Acquisition Land Prioritization Guidelines currently being drafted. These are briefly outlined herein for ease of reference.

(1) The revised Chapter 3 of Part 3 of the Housing Code at this stage is only related to project linked greenfield developments and since the principles of procurement as outlined in legislation are to be adhered to in respect of all subsidy mechanisms, the model in respect of greenfield developments may not be suitable to the other subsidy mechanisms.

(2) Interim guidelines are therefore necessary to guide this department and municipalities on overall procurement of land and professional services, and to comply with the provisions of

the Provincial Housing Act as amended. The following guidelines are proposed in respect of land acquisition and appointments of professionals.

- (3) The interim guidelines are 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 with the requirements of legislation.
- (4) The revised Chapter 3 of Part 3 of the Housing Code establishes the rules relating to Project linked greenfield housing developments.
- (5) In Chapter 3 Project linked greenfield developments are divided into two distinct phases, viz:
 - phase 1 - identify and secure land for development
 - phase 2 - project development
- (6) In order to ensure that land is procured in a fair, equitable, transparent and competitive manner, land must be identified through a structured process involving the inviting of proposals in relation to IDP's (Integrated Development Plans).
Note: Where the IDP is incomplete an actual confirmed needs survey based on preliminary development planning of the municipal area may be used in these areas.
Reference to the IDP requirement, in this document, should be read in the context of the aforementioned provision.
- (71) The proper identification of land is therefore vital to the entire development process. If proper land identification is not performed, the project will not be approved. If the project is approved without proper land identification various land/legal and technical development problems will arise during the course of the development which could effectively block the project.

4 GUIDELINES

4.1 Procurement of Land

- (1) Details on the procurement of land are outlined in the draft KwaZulu-Natal Land Acquisition Policy and prioritization guidelines.
- (2) It is again emphasized that, whereas the principles of section 217 of the Constitution is to be adhered to in respect of all subsidy mechanisms, the model in respect of greenfields project linked subsidies may not be suitable to the other subsidy mechanisms (consolidation, institutional, KZN rural, national rural, informal land rights, in-situ upgrades and individual subsidy mechanisms).

4.1.1 Consolidation subsidies

In these cases the site is already partially developed and/or transferred to the individual. The

subsidy was developed to provide equity between the current capital subsidy and the former “site-and-service” subsidies. No new land is procured.

4.1.2 **Institutional Subsidies**

When an institution is developing its own land, no procurement is required. However, the development thereof still needs to adhere to municipal bylaws and regulations applicable to residential development in the area. The Department of Housing’s investment needs to be secured, e.g by registering the property in the name of the municipality or an appropriate arrangement negotiated with the Department of Housing and the Municipality. Where land is to be acquired for new institutional projects, such land should be identified in accordance with the processes in respect of project linked subsidies and such land must be registered in the name of the Municipality (See 4 (4.1) (1)).

Where buildings are acquired by Municipalities for the provision of rental accommodation, such buildings must be procured in a fair, equitable transparent, competitive and cost-effective manner.

4.1.3 **Ingonyama Trust Areas**

It is not applicable in these areas as communities already reside on land designated to them. This situation compares, in most cases, with an “in situ upgrade”, except that the tenure arrangements will be different. The requirement to call for land in these areas is not required but that the following land issues will have to be addressed, prior to approval:

- the traditional authority and municipality have must have agreed on development in that area.
- land audits are completed.
- the general principles for land development as defined in Chapter 1 (Section 3) of the Development Facilitation Act, 1995 (Act No 67 of 1995), must be adhered to.
- normal procedural issues in obtaining development rights, as outlined in the Additional Rural Guidelines for Housing Development on traditional land, are to be adhered to.

4.1.4 **Other Private Rural Land**

Development in these areas will have to conform to the procurement policy requirements.

4.1.5 **Individual Subsidies**

The requirement should not apply as the individual will select his/her site of own accord in

the open market.

4.1.6 **People's Housing Process (PHP)**

These projects may take many forms (Rural, Institutional, Project Linked ,green fields, in-situ upgrade or both, and /or consolidation). It is suggested that the guidelines for the procurement of land in these projects be read in conjunction with the guidelines of the subsidy instrument.

4.2 **Procurement of professional services**

4.2.1 **Project linked subsidies**

- (1) one sphere of government may not prescribe procurement processes to another sphere of government as this may contradict the principles of co-operative governance 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.
- (2) A municipality must confirm that the services of its outsourced professionals and/or implementation agents have been done in accordance with its tender regulations. It may be argued that the monitoring of compliance with local government legislation is the responsibility of the Department of Local Government and Traditional Affairs. However, in view of Housing Funds being applied in the delivery of houses, the Department of Housing has a responsibility to ensure that the correct processes are followed. All spheres of government should be made to ensure a fair, transparent, competitive and cost effective process in the appointment of professionals.
- (3) The current practice of “invitation tenders” are accommodated within the National policy framework. The use of this practice should be limited to special circumstances, e.g. special project, cessions and change of professionals. The concern here is that this practice stimulates limited competition and do not necessary assist in the employment of SMME's , and historically disadvantaged groups. These matters need to be addressed in a transparent manner.
- (4) In considering these issues, it should be noted that the Department will be contracting with the municipality as developer. The onus is on the municipality to comply with the Constitution, procurement and local government legislation. This however, does not absolve the Department from ensuring that State funds are spent in accordance with legislation.

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- (5) It is further submitted that, should the existing Procurement Policy be expanded to the other subsidy mechanisms, the following should be considered:

4.2.2 **Consolidation Subsidies**

The procurement of professionals on these projects should be in accordance with the procedures for project linked subsidies, the only difference being that certain professions may not be required. In most cases, top structure construction is required. In some instances services may be rehabilitated and/or tenure is to be secured, where this has not been finalised. There are few projects of this nature in the Province.

4.2.3 **Institutional Subsidies**

The institution can be the developer. Where such an institution is required to subcontract any professional services and or implementation agents, these need to be tendered in accordance with the procedures in respect of green fields project linked subsidies.

4.2.4 **Ingonyama Trust Areas**

It is suggested that development in these areas should adhere to the principles of procurement defined in respect of green fields project linked subsidies. The historical cases should be considered in accordance with the policy guideline on ring fencing of projects.

4.2.5 **Other Private Rural Land**

Development in these areas should conform to the procurement policy requirements, as defined in Chapter 3 of the Housing Code.

4.2.6 **Individual Subsidies**

The requirement should not apply as the individual will select his/her site of own accord in the open market.

4.2.7 **People's Housing Process (PHP)**

The intention of this process is that the people themselves should be actively engaged in the process. There are many different ways in which such a project is conceptualised. The procurement mechanism of outsourced services will depend on the contracting strategy applied to the project (turnkey, traditional pre-planned, etc). Where the municipality is the support organisation, it is required to procure services in accordance with section 217 of the Constitution. This is considered to be in the best interest of the people to ensure compliance with the procurement regime. This will apply to all types of support organisations as state funds are being used. This will ensure competitive prices. In some cases, however, there may be

a strong desire from the community towards local preferences. The Preferential Procurement Act provides for these issues. Communities should not be precluded from opting for invitation tenders, provided a transparent, competitive, equitable, and cost effective process is followed.

4.2.8 Phased Projects

Where project approvals have been phased, an undertaking may have been given for subsequent work. This will only be applicable where the project has been approved on such basis, e.g. where a 1000 site development was approved in phases. This must have been indicated in the approval resolutions by the former Housing Boards, because this will only apply to historic cases, provided proof of such approvals can be provided.

4.3 **Procurement of professional services**

4.3.1 The Department will have to decide whether it wants to apply the exemption clause in the Preferential Procurement Policy. 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 inter-governmental 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.

4.3.2 The housing policy will have to guide municipalities in exercising its rights to this option. The national policy has been designed to allow for flexibility in this regard. To avoid complications, it may be more practical to request an explanation as to the procurement of these services. The municipality will have to confirm that the services of its outsourced professionals and/or implementation agents have been done in accordance with tender regulations. It may be argued that monitoring of compliance with local government legislation is the responsibility of the Department of Local Government and Traditional Affairs. However, in view of Housing funds being applied in the delivery of houses, the Department of Housing has a responsibility

5 **GENERAL**

The general principles to be applied in both the procurement of land and professionals (including implementation agents and contractors) are that the procuring entity must be able to demonstrate that, where possible a fair, transparent, equitable, accountable, competitive and cost effective process has been followed. The developer is to confirm that it has complied with these requirements. Where none of the abovementioned principles have been applied, a tender process will have to be re-initiated, unless adequately motivated to the satisfaction of the MEC of housing.

6 **LEGAL IMPLICATIONS**

The interim guideline for the procurement of land and professional services for low income housing will ensure that the compliance with the requirements of section 217 of the Constitution; sections

2(1)(c) (iv) and 2(1)(h)(ii and iii) of the Housing Act 1997, Act 107 of 1997; and Section 15(A) 13 of the KwaZulu-Natal Amendment Act 2000, Act 8 of 2000.

7 **RECOMMENDATION**

That the interim procurement guidelines as set out in paragraph 4, above, be approved

CHIEF DIRECTOR
STRATEGIC HOUSING SUPPORT

DATE

RECOMMENDATION SUPPORTED/NOT SUPPORTED

MR C E NTSELE
CHAIRPERSON KZNHAC

DATE

APPROVED/APPROVED AS AMENDED/NOT APPROVED

REV W NGCOBO
MINISTER OF HOUSING

DATE

