

## GROUNDS FOR DISPENSING WITH PUBLIC TENDER PROCEDURES IN GOVERNMENT CONTRACTING\*

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### Summary

The *Constitution of the Republic of South Africa*<sup>1</sup> provides that organs of state must comply with five principles when procuring goods or services: procurement procedures must be fair, equitable, transparent, competitive and cost-effective. In short, this means that organs of state should make use of competition when procuring goods or services. They should shop around and attract the maximum number of contractors who will participate in such competition. The aim should be the attainment of value for money, meaning, public money should be spent in an effective and efficient manner. Those who participate in competitions should also be treated fairly and without bias. In principle, no preferences should be afforded to different contractors; all contracting parties should have equal access to competition; some contractors should not be afforded more time for the preparation and submission of quotes or tenders than others; and the same information should be made available to all contracting parties. Government procurement procedures should further be transparent, meaning public or open. Thus, organs of state should not contract behind closed doors – government contracts should, as a rule, be advertised.

Depending on the nature and value of a particular contract, the use of a public call for tenders is generally the best way to ensure compliance with the

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1 *Constitution of the Republic of South Africa* 1996. Hereinafter 'the Constitution'.

principles in the Constitution. By nature, a public call for tenders is open, it assists in the prevention of fraud and favouritism, and it ensures that the maximum number of contractors is approached to compete for a contract. Organs of state can also compare prices and quality and can contract with whoever offers the best deal. Most legislation therefore proceeds on the basis that procurement takes place by way of tendering. Generally, contracts above R200 000 are subject to public tender procedures.

In certain instances, however, a public call for tenders may be inappropriate regardless of the high value of the contract. For this reason, exceptions are provided for in legislation. Since tendering, however, is generally the best way to ensure compliance with all the principles in the Constitution, it is important for there to be sufficient guidance on the non-use of tender procedures. Proper guidance will, to a large extent, ensure uniformity and transparency in government procurement procedures which will, in turn, assist in the combating of corruption. In this article, attention is given to the legislation that provides for exceptions to the use of tendering at all three levels of government. Recommendations are then made as to how some of the legislative provisions should be interpreted in order to align them with the principles in the Constitution. In doing so, reference is made to a number of international instruments dealing with government procurement and specifically, the non-use of tender procedures.