

PROCUREMENT IRREGULARITIES WITH A FOCUS ON FALSE DECLARATIONS OF INTEREST - IS ENOUGH BEING DONE?

Category: Administrative and Procurement Law
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Introduction

South African courts have been plagued with numerous cases dealing with procurement irregularities. Notwithstanding, the various mechanisms in place to placate the issue, there is no decline. In this article, I discuss issues or pertaining to false declarations of interest, and what the ramifications of false disclosures are.

A recent matter that has been in the media is that of the Office of the Chief Justice, having awarded an IT contract to multinational media and technology company Thomson Reuters. Thomson Reuters was required to provide a South African local subcontractor for the Professional Services portion of the larger contract, in order to comply with BEE procurement regulations. Former officials of the Office of the Chief Justice have been alleged to have benefited from R225 million IT contract, given the conflict-of-interest issues related to the award of the tender. Investigations are ongoing relating to the alleged wrongdoing and we will keep a close eye on these.

Procurement Laws

Section 217(1) of the Constitution addresses procurement. It states that:

"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."

The Public Finance Management Act^[1] ("PFMA") prescribes the use of fair and transparent procurement procedures. The PFMA further prescribes methods dealing with the implementation of Supply Chain Management Systems.

Supply Chain Management Regulations (“**the SCM Regulations**”) further detail provisions specific to the establishment and implementation of supply chain management practices. The following sections dealing with compulsory disclosures of conflict of interest matters are provided:

(3) *A supply chain management official or other role player –*

(a) *must recognise and disclose any conflict of interest that may arise;*

(b) *must treat all suppliers and potential suppliers equitably;*

(c) *may not use their position for private gain or to improperly benefit another person;*

(d) *must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act;*

(e) *must be scrupulous in their use of public property; and*

(f) *must assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system...*

(4) *If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –*

(a) *disclose that interest; and*

(b) *withdraw from participating in any manner whatsoever in the process relating to that contract...*

These practices and codes of ethical standards for officials and other role players in the supply chain management system are in place to promote mutual trust and respect; and an environment where business can be conducted with integrity and in a fair and reasonable manner.

Case Law

[Tshopo v The State](#)^[2]

The case related to fraud in respect to failure to disclose in tender declaration that the person connected with the tenderer was employed by the Free State Province. In giving meaning to the word “connection” in the declaration, the Supreme Court of Appeals states that:

The meaning that should be given to the use of the word ‘connection’ in the declaration is that which the ordinary reader would attach to it. In this case appellants did not tell the court that they possessed an understanding that differs from that of the ordinary reader. In the context of the explanation in the preamble to the Declaration the ordinary reader would have interpreted ‘connected with the tenderer’ as including any person who stood to derive financial benefits from the performance of the contract by reason of his or her interest in the tenderer and / or one who directed its affairs.

[Lefetlho Trading \(Pty\) Ltd v MEC for Health Northwest Province](#)^[3]

In this case, the court found that the misrepresentation by the Plaintiff resulting from failure to

disclose that the father of the Plaintiff's director was a Deputy Director in the Defendant's (MEC for Health Northwest Province) amounted to a material misrepresentation. In reaching the decision the court stated that:

Evidence given by the director responsible for the supply chain in the Department of Health confirmed that the misrepresentation was material. This is because the witness testified that the father of Plaintiff's director occupied an important position in the defendant, as Assistant Director: Internal Control which is the financial branch responsible for audit. As audit manager he was responsible for corruption and prevention strategies. His unit checked the SBD compliance. As the lead in the inspections, he was responsible to see that the SBD forms were completed.

According to P Bolton, where there is a conflict of interest between an official's interests and that of an organ of state, the interests of the organ of state may be compromised. The existence of a conflict of interest negatively impacts on the attainment of value for money by the organ of state. Conflict of interest disclosures further promote transparency, and the principles of equity and fairness. Principles of procedural fairness are equally further enhanced as a result of this requirement.

Conclusion

Given the increase in these cases, it is clear that more intervention needs to be done in order to enforce and regulate the procurement processes. These may be reaffirmed in the form of prosecutions, blacklisting of entities and/or directors, role-players etc., to ensure accountability for wrongdoing.

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[1] 1 of 1999.

[2] (29/12) [2012] ZASCA 193.

[3] (403/2016) [2017] ZANWHC.