



# Approaches to dealing with “functionality” and “quality” in the evaluation of tender offers

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*The Standard for Infrastructure*

*Procurement and Delivery*

*Management makes no reference to “functionality”. It does make reference to “quality” which may be used in the evaluation of tenders as other objective criteria and provides detailed procedures for doing so. This enables contracts to be awarded not only on the basis of lowest price adjusted for a preference, but also on the most economically advantageous or cost-effective offer that is submitted.*

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## INTRODUCTION

Section 217(1) of the Constitution of the Republic of South Africa (Act 108 of 1996) requires that the public procurement system be fair, equitable, transparent, competitive and cost-effective. Section 217(2) permits organs of state to implement a procurement policy which provides for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Section 217(3), however, requires such policy to be implemented through a framework provided in national legislation.

The Preferential Procurement Policy Framework Act (PPPFA) was promulgated to give effect to Section 217(3) of the Constitution by providing a framework for the implementation of

the procurement policy contemplated in Section 217(2) of the Constitution. The Preferential Procurement Regulations 2001 were issued to enable the Act to be implemented. These regulations dealt not only with a price preference mechanism which was contemplated in Section 217(2) of the Constitution, but also with the evaluation of other factors (functionality) and other objective criteria in addition to price and preference in the awarding of contracts.

International best practice suggests that tenders be awarded to tenderers who are considered to be fully capable of undertaking the contract and whose tender offer is the most competitive in terms of one of the following two criteria:

- a) the **lowest price**; or
- b) the **most economically advanta-**

**geous** from the point of view of the purchaser, which is usually identified through the application of a points-scoring system which requires that specific evaluation criteria linked to the subject matter of the contract in question, associated relative weightings, if any, and prompts for judgement or qualitative indicators are all set out in the tender documents, and the tender is awarded to the tenderer scoring the highest number of points.

The Preferential Procurement Regulations of 2001, issued in terms of the PPPFA, in line with international best practice, enabled tenderers who are considered capable of executing the contract to be evaluated on a points-scoring system. A maximum of 10 or 20 points are awarded for specific goals relating to a preferential procurement policy, depending upon the value of the transaction, while 80 or 90 points respectively are awarded for price only

or for price and other factors (functionality). These regulations split price into price and functionality, and then added points for preference.

During 2009 some of the Regulations relating to functionality were successfully challenged in the KwaZulu-Natal High Court in Pietermaritzburg. The court found that **“the word price does not include functionality ... they are entirely distinctive concepts”**. The court consequently ruled that some of the regulations relating to functionality were inconsistent with the Act and therefore declared them to be invalid. The court did not, however, rule out the evaluation of functionality in the evaluation of tenders.

## APPROACHES TO DEALING WITH THE EVALUATION QUALITY IN TENDERS

Two schools of thought have emerged in the wake of this judgement regarding the manner in which functionality may be evaluated in tenders.

The first is that no points other than those provided for in the PPPFA for price and preference may be included in the evaluation of tenders. If this is the case, functionality/quality criteria may only be applied as pre-qualification criteria, meaning that such criteria are scored to establish whether or not the functionality/quality offered satisfies a minimum threshold, and only those tenderers who score above the threshold are evaluated on the basis of price and preference in order to establish which is the most advantageous tender. Thus functionality/quality is scored and all tenderers who fail to achieve a minimum score are eliminated from further consideration, and the remaining tenders are evaluated as follows:

Tender evaluation points = (points for price) + (points for preference)

This method evaluates functionality/quality on a balanced scorecard basis in terms of which tenderers have to achieve a minimum score in order for their tender to be evaluated in terms of price and preference. This approach cannot be used to establish the most economically advantageous offer, as it does not allow comparisons to be made between offers that satisfy an absolute minimum level of functionality. It also cannot be used to evaluate a single aspect as a score above a threshold is the same as simply specifying an absolute minimum value.

The second school of thought is that the PPPFA is a framework (a skeleton or set of principles) which is intended to give effect to a procurement policy embedded in the Constitution and therefore has narrow application. The PPPFA accordingly recognises that there are objective criteria in addition to price and preference which can be taken into account when a tender is awarded. Furthermore, the Act does not limit the points awarded to 100. Neither does it say that additional points cannot be added to the points for price and preference. If this is the case, the points system for evaluating tenders can be extended beyond the combining of points for price and preference in the quantum provided for in the PPPFA (i.e. 100) to the points for functionality in order to establish the most advantageous tender, i.e.

Tender evaluation points = (points for price) + (points for preference) + (points for functionality/quality)

This method recognises that there is a relationship between the outcome of the procurement and the tendered price, and the quality offered by the tenderer. It quantifies this to enable comparisons to be made between tenderers. It identifies the highest scoring tenderer as offering best value for money in a given context, whilst including equity considerations.

The Preferential Procurement Regulations were revised during 2011 to take account of this court judgement, as well as of recent developments regarding Broad-Based Black Economic Empowerment. These regulations came into effect on 7 December 2011.

## QUALITY VERSUS FUNCTIONALITY

It is important to understand what is meant by “functionality” in the Preferential Procurement Regulations 2011, and “quality”.

The Preferential Procurement Regulations define functionality as the “measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, amongst other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer”. This definition assesses what a tenderer has to offer measured against predetermined norms which may include a number of factors which can relate to the characteristics of what is offered and the technical capacity and ability of a tenderer. Such norms can include quality, a term which is not defined. The Oxford dictionary definition of quality is “the standard of something as measured against other things of a similar kind or the degree of excellence of something”. This definition of quality is in line with the thinking expressed in the definition for functionality.

Regulation 4 of the Preferential Procurement Regulations permits the evaluation of functionality in the evaluation of tender offers, provided that the functionality criteria are objective and such criteria are stated in the tender documents along with the values and weighting applicable to such criteria and a minimum qualifying score for quality. Tenderers who fail to achieve the minimum score are eliminated from further consideration. This regulation appears merely to give direction regarding the requirement in the PPPFA for only scoring acceptable tenders, which the Act defines as “any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”.

The approach to functionality provided in Regulation 4 of the Preferential Procurement Regulations 2011 is a form of prequalification and does not change the outcome of the preference points system. It influences it as it excludes tenderers who fail to satisfy stated requirements from consideration. It also does not measure best economic value or the potential cost-effectiveness of the transaction.

The commonly used ISO definition for quality is “the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs”. Quality criteria used in the evaluation of tender offers (see 6.2.11.2 of SANS 10845-1) should form an integral part of the tender offer and hence the outcome of the procurement. Such criteria should:

- relate directly to the goods, services or engineering and construction works that are being procured, and to matters that cannot directly be expressed in monetary terms;
- be justifiable in terms of projected procurement outcomes;
- enable the most economically advantageous offer to be established; and
- be practicable, objective and quantifiable to enable tenders to be compared and assessed objectively.

The evaluation of quality in the evaluation of tender offers alongside price adjusted for a preference, expands the preference points scoring system included in the Preferential Procurement Policy Framework Act to include points for quality as objective criteria, which are added after points for price and preference have been scored. This enables best economic value to be determined or the cost-effectiveness of the transaction to be considered in the awarding of contracts.

## VIEWS OF VARIOUS COURTS ON THE EVALUATION OF QUALITY ALONGSIDE PRICE AND PREFERENCE

The courts have, in terms of a number of cases, had reason to look at aspects of the evaluation of quality in tender offers in addition to price adjusted for a preference. Their comments which shed some interesting insights into this approach are as follows:

- Eastern Cape High Court, Grahamstown, in Case No 230/09: “... there is in my judgement nothing offensive either in using quality or functional assessments as an initial threshold requirement, as well as then using them again as part of the second assessment amongst those who passed the threshold. The repetition is not unfair (the same scores are used); it does not affect equity requirements (those are met in the B-BBEE points allocation); the process remains competitive (not only in relation to price); and effectiveness is enhanced (price and functionality count).”

- Western Cape High Court, Cape Town, in reportable case No 21158/2012: “Functionality as it is defined in the Tender Documents concerns the ability of the tenderer to deliver what is required, to meet the needs of the tender, to deliver a service or commodity which is fit for purpose. It is based on the objectively measureable criteria of experience and standing, capability and resources. As such it has a bearing on the question of whether the tender is cost-effective, i.e. whether it yields best possible value for money. To my mind it is self-evident that it is not cost-effective to award a tender to a party who ticks the right boxes as regards price and preference, but is unable to get the job done properly – whether through lack of experience, adequate personnel or financial resources.

“I consider that the constitutional imperative that the procurement system be cost-effective, means that functionality must necessarily be taken into account in the adjudication of competing tenders and should not be relegated to a mere qualifying criterion ... The point is simply that functionality should not be ignored in the final adjudication between competing tenders, and should be taken into account within the parameters of the Procurement Act.

“As De Villiers J pointed out in the Grinaker case, Section 2(1)(f) of the Procurement Act, which is cast in peremptory terms, posits a two-stage enquiry: the first step being to determine who scored the highest points in terms of the 90/10 points system; the next stage is to determine whether objective criteria exist in addition to or over and above those referred to in Sections 2(d) and (e), which justify the award of the tender to the lowest scoring tenderer.”

## THE EVALUATION OF QUALITY IN THE EVALUATION OF TENDER OFFERS

The PPPFA establishes a framework (a set of principles or rules) which is intended to give effect to a procurement policy embedded in the Constitution. It establishes a broad framework which requires that a preference points system be followed which, depending on the value of the procurement, allocates a

maximum of 80 or 90 points to price and 20 or 10 points to specific goals which are clearly specified in the invitation to submit a tender and which are measureable, quantifiable and monitored for compliance.

The PPPFA was not intended to deal with procurement procedures relating to the evaluation of tender offers outside of the preference points scoring system, which merely adjusts price for preference. The Act was also not designed to provide a points scoring system aimed at determining best value for money within the South African context. The Act nevertheless recognises in Section 2(1)(f) that the tenderer who scores the highest number of points for price and preference can be overlooked for the award should there be other objective criteria apart from the preference points system that justify the award to another tenderer. The Act also does not cap any points-scoring system at 100 points, it merely establishes the quantum of the adjustment to price to take account of a preference.

Matters that are not addressed in the PPPFA and that merely fall under the provision of “acceptable tender” and “other objective criteria”, include the following:

- the criteria that have to be satisfied in order for a tender to be evaluated (i.e. eligibility criteria);
- reasons for overlooking a tenderer on the basis of unacceptable commercial risk, restriction precluding participation in contracts, the required capacity and capabilities, legal capacity to enter into a contract, financial capacity, compliance with legal requirements, conflicts of interest, etc; and
- the determination of which tender yields best value for money.

The SIPDM defines quality as “the totality of features and characteristics of a product or a service that bears on the ability of the product or service to satisfy stated or implied needs”. This standard permits quality to be evaluated in tender submissions as other objective criteria, as provided for in the PPPFA in accordance with the provisions of SANS 10845-1.

Such evaluation needs to be undertaken by at least three persons who are professionally registered in certain categories of registration with a built environment council falling under the umbrella of the Council for the Built Environment. ●