



TRANSNET PROCUREMENT OMBUDSMAN

Terms of Reference

Effective date: 01 April 2010

TERMS OF REFERENCE OF THE TRANSNET PROCURMENT OMBUDSMAN

INTRODUCTION

The Transnet Procurement Ombudsman (the Ombudsman) is appointed to provide bidders as well as Transnet with a fair, expeditious, and effective dispute resolution process. The Ombudsman acts independently and objectively in resolving disputes and is not influenced by anybody in making his or her decisions.

The Terms of Reference (Part 1) define the powers and the duties of the Ombudsman. The Operational Procedures (Part 2) define the manner in which those powers and duties are to be exercised.

PART 1

TERMS OF REFERENCE

1. The role of the Procurement Ombudsman

- 1.1 The role of the Ombudsman is to enhance the integrity and fairness of Transnet's procurement processes by providing an independent and objective assessment of complaints which are lodged by unsuccessful bidders regarding any aspect of Transnet's bid process.
- 1.2 As a general rule, the Ombudsman will only consider complaints pertaining to bids valued at R5 million and above.

2. Powers of the Ombudsman

- 2.1 The Ombudsman has the power to conduct a full investigation of a complaint and to make appropriate recommendations to the Chief Procurement Officer and the Chief Executive Officer of the relevant Operating Division of Transnet regarding the appropriate remedial measures to be undertaken.
- 2.2 Such measures may include, but are not limited to, the following:
 - (a) cancelling a bid if there is a material irregularity;
 - (b) referring a bid back for re-evaluation;
 - (c) amending a bid decision;

- (d) recommending that letters of censure be sent to any Transnet official; and/or
 - (e) the institution of disciplinary, civil or criminal proceedings where appropriate.
- 2.3 The Ombudsman may also on his own initiative launch a review of any bid award, regardless of whether a formal complaint was received or not.
- 2.4 An investigation by the Ombudsman of any bid award may also be initiated by an internal referral.
- 2.5 In most instances the Ombudsman will conduct the investigation without the need for a formal, oral hearing. However, in highly exceptional circumstances, the Ombudsman may in his sole discretion conduct an oral hearing if it would assist with the resolution of the matter.

3. Eligible complainants

- 3.1 Only a person with a material interest in the bid may lodge a complaint. As a general rule, only persons who participated in the bid process are allowed to lodge complaints.
- 3.2 Complaints will not be considered from members of the public who did not participate in the bid, subcontractors or persons who merely collected a bid document but who did not submit a bid.
- 3.3 However, complaints will be considered from persons who believe that they were unfairly prevented from participating in the bidding process e.g. exclusion from a confinement process.

4. Limits on the Ombudsman's jurisdiction

- 4.1 The Ombudsman will not consider a complaint where the value of the bid is less than R5 million.
- 4.2 Complaints involving bids below R5 million should be sent to the Chief Procurement Officer of the relevant Operating Division of Transnet for review.
- 4.3 If a complaint is lodged outside the prescribed period, the ombudsman will not consider the complaint thereafter, unless there are compelling reasons to do so.

- 4.4 The Ombudsman shall not consider any complaint pending before other statutory bodies such as the National Ports Regulator, the National Energy Regulator of South Africa (NERSA) or the Competition Commission.

5. Grounds for complaint

- 5.1 There are no limitations on the nature or number of complaints which an aggrieved bidder may lodge with the Ombudsman. For example, complaints may relate to any of the following:

- (a) the bid advertisement;
- (b) the bid specifications;
- (c) the receipt and opening of bids;
- (d) the acceptance of late bids;
- (e) unfair advantage being given to the successful bidder;
- (f) incorrect evaluation; or
- (g) bias.

6. Criteria used to resolve disputes

- 6.1 In deciding upon which remedy to recommend, the Ombudsman will take all relevant factors into consideration, including the following:

- (a) whether there had been an irregularity in the bid process;
- (b) the seriousness of the irregularity;
- (c) the prejudice suffered by the complainant; and
- (d) whether there was bad faith on the part of any party.

7. The obligations of Transnet's Operating Divisions

- 7.1 Transnet's Operating Divisions shall:

- (a) immediately refer any complaints received over the threshold referred to in 1.2 above to the Ombudsman;
- (b) act within these Terms of Reference;
- (c) expeditiously comply with requests made by the Ombudsman in terms of the Terms of Reference and Operational Procedures;
- (d) provide the Ombudsman with unrestricted access to relevant information, documentation or persons in relation to an investigation; and
- (e) abide by the decision of the Chief Procurement Officer and the Chief Executive Officer of the relevant Operating Division of Transnet regarding the implementation of the Ombudsman's recommendation.

7.2 Transnet's Operating Divisions shall not:

- (a) prevent a bidder from making use of the services of the Ombudsman; or
- (b) provide the Ombudsman with any misleading information.

8. Indemnity and Confidentiality

8.1 Transnet as well as the Ombudsman are indemnified against any claims arising out of the exercise of the Ombudsman's duties in good faith.

8.2 Save that the Ombudsman shall provide the complainant with a précis of his/her findings, the report of the Ombudsman shall be confidential.

8.3 The Ombudsman shall not be a compellable witness in court proceedings regarding a dispute which was considered by him/her.

PART 2

OPERATIONAL PROCEDURES

STEP 1

9. Lodging of complaint

- 9.1 The time frames for the lodging and resolution of complaints are designed to achieve an expeditious process. All parties must endeavour to adhere strictly to such time frames.
- 9.2 Transnet should inform all bidders of the outcome of the bid process within **48 hours** of the approval of the contract.
- 9.3 A bidder has **7 days** from receipt of the notice mentioned in 9.2 above within which to lodge a complaint. The complainant must lodge his/her complaint by completing the attached Complaint Form.
- 9.4 The Ombudsman will not consider a complaint lodged outside of the 7 day time period unless there are compelling reasons for doing so.

STEP 2

10. Complaint received by Ombudsman

- 10.1 When a complaint is received, the Ombudsman shall ensure that:
 - (a) the Complaint Form has been correctly completed; and
 - (b) the complaint falls within the Terms of Reference.
- 10.2 The Ombudsman shall conduct an initial assessment of the merits of the complaint and immediately provide the Operating Division concerned with a copy of the complaint.
- 10.3 The Operating Division must be informed that it shall have 48 hours within which to provide the Ombudsman with a full set of the bid documents. The Operating Division shall also be informed that it shall have **7 days** within which to respond to the Ombudsman regarding the complaint in writing.

STEP 3

12. Investigation

- 12.1 The Ombudsman may require the parties to clarify any issues raised by the complainant or to provide such information in their possession to the extent that the Ombudsman deems necessary in order to arrive at a conclusion.

STEP 4

13. Recommendation

- 13.1 The Ombudsman will endeavour to prepare written recommendations within **30 days** of the receipt of Transnet's written response to the complaint.
- 13.2 The Ombudsman shall make recommendations to the Chief Procurement Officer and the Chief Executive Officer of the relevant Operating Division of Transnet whose decision shall be final.

14. Interpretation

- 14.1 In these Terms of Reference the following definitions apply:
- (a) "Bid" means a written offer in a prescribed or stipulated form in response to an invitation by Transnet for the provision of services, works or goods, through price quotations, advertised open tenders or proposals;
 - (b) "Complainant" means any bidder who participated in a particular bid, making a complaint to the Ombudsman in respect of that bid;
 - (c) "Ombudsman" means the Transnet Procurement Ombudsman appointed from time to time to exercise the powers and duties of that office; and
 - (d) "Operating Division" means any Transnet Operating Division, Specialist Unit, as well as Group Functions and Transnet Businesses within the entire Transnet Group.