

Interventions by the Province aimed at preventing and combating fraud and corruption relating to the awarding of public sector contracts and tenders.

A paper presented at the launch of the KwaZulu-Natal Association of Public Sector Lawyers (08 October 2010). Mr LS Magagula HoD: Department of Finance, KZN

Introduction

Ladies and Gentlemen, let me start by conveying my MEC'S apology for not attending this very important launch in the history of KwaZulu-Natal's public service. This launch unfortunately coincided with her official trip to Washington DC with the Minister of Finance to attend a series of workshops with international financing institutions such as the World Bank and the International Monetary Fund. Given the significance of these workshops in shaping the economic future of the world, you will all agree with me that she had no choice but to accept this invitation.

Let me also acknowledge the presence of my fellow speakers, Dr Khoza (chairperson of SCOPA in KZN), Mr Vavi (Sec. Gen. of COSATU) and Prof Govender (Law professor at UKZN). You will agree with me that these speakers will arouse your interest in the subject at hand and provoke interesting debates.

As you aware, the theme of this colloquium is conflict of interest in the public service. The question is – Should public servants and public office bearers be allowed to have business interest in companies that do business with the State? This question has been around for while not just in South Africa, but the world over. Unfortunately the answer has not been forthcoming. The reason being is this is not a straightforward issue – as you will hear from my fellow speakers.

Defining conflict of interest

But what exactly is this beast called conflict of interest? The Organization for economic Co-operation and Development (OECD) defines a conflict of interest as “a situation in which a person, such as a public official, an employee, or a professional, has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties”. Webster Dictionary defines it even more sharply when it says it is “a conflict between one’s obligation to the public good and one’s self-interest, as in the case of a public officeholder who owns stock in a company seeking government contracts”.

The context

But why is this subject so topical? It is because there is a very thin line between pursuing private interest and the obligation to the public good for a civil servant or public office bearer. There are many examples where public servants have benefited financially from doing business with government. What makes it even more worrisome is that a large number of these officials do not even declare their interest in companies that benefit from government contracts. This is in clear contravention of the Code of Conduct which stipulates that public servants will “serve the public in an unbiased and impartial manner in order to create confidence in the public service, and that a public servant will recuse herself or himself from any official action or decision-making process which may result in improper personal gain, and that this should be properly declared by the employee. I would however like to argue that simply declaring the personal interest does not eliminate the existence of conflict. But for now the legal parameters only require that interest be declared and that an official recuses him/herself in cases where

a conflict of interest exists. It will therefore be interesting to hear what the views of my fellow speakers are on this matter.

Without proclaiming myself to be an expert in law, ethics, morality and human psychology, I still contend that where conflict of interest exists, fraud and corruption prosper, and that fraud and corruption are criminal activities. But what exactly do we mean by fraud and corruption? Depending on the area of jurisdiction the definitions may vary. In the South African context fraud is defined as the unlawful and intentional making of a misrepresentation which caused actual and or potential prejudice to another. In its widest sense, the term is intended to include all aspects of economic crime and acts of dishonestly. In essence, fraud is one of the variables in the corruption equation. Corruption is any conduct or behaviour where a person accepts, agrees or offers any gratification for him / herself or for another person where the purpose is to act dishonestly or illegally. Such behaviour also includes the misuse of material or information, abusing a position of authority or a breach of trust or violation of duty. The following are dimensions of corruption; bribery; embezzlement; fraud; extortion; abuse of power; conflict of interest; abuse of privileged information; favouritism; and nepotism (Source: www.srac.gpg.gov.za). All these are criminal offences.

Criminology tells us that there are five key elements that need to be present when crime is committed. First, there must be a **target/victim**, and that the target must be vulnerable enough to ensure success. Second, there must be a **perpetrator** who is will and capable. Third, **the location / crime scene** must be conducive enough for successful commitment of crime. Forth, there must be no **deterrent** present (such a police), and lastly, the **rewards** must far outweigh the risks associated with being caught. For any given crime, the absence of one or more of these five elements makes committing it near impossible. If we therefore agree that fraud and corruption are criminal activities and that all these five elements have to be present when fraud and corruption are committed, we are also agreeing to the notion that if we

eliminate one of these elements from the equation, fraud and corruption can be eliminated. Let me then turn to the province's interventions aimed at preventing and combating fraud and corruption.

Interventions

1. Project *Unembeza*

In 2008/09, the province of KwaZulu-Natal introduced a project a project code-named *Unembeza* (conscience in English) as one vehicle to combat fraud and corruption. The project – which is still running has two elements to it. The first element involves an awareness campaign – it is an appeal to the conscience of all civil servants to abstain from fraudulent and corrupt activities. This component is premised on the idea that if you touch the conscience of a human being on how unethical and immoral it is to commit fraud and corruption you will go a long way towards eliminating these crimes. Of course we are assuming that there is a critical mass of civil servants who still have a conscience. For those who do not have a conscience anymore and are still hell bent on committing these crimes, *Unembeza* has a strong detective and investigative capabilities – which is a second element of this project. These capabilities were developed after the realization that there are civil servants and members of the public who were and still are defrauding the state of large sums of money utilizing the existing IT networks of government – the so called cyber fraud. Of course I cannot give out too much detail on how this element of *Uembeza* works, suffice to say that we are able to track down every suspicious transaction that occurs on government payment system in real time, we are also able to locate the computer(s) that is/are used to effect these suspicious transactions including their authorized user or users. In short, we are fortifying the location (crime scene) where crime occurs. We have been able to stop million of Rands from going to the wrong hands. So, to those civil servants who think they

are too smart and are able to hack into the government IT system and effect fraudulent transactions, here is the warning – Unembeza is watching you and you will be caught.

2. Forensic investigations

Over the years, the province has also developed a robust forensic investigation capability to investigate allegation of fraud and corruption. The internal audit unit has no less 10 investigators regularly deployed across the province to investigate fraud and corruption allegations both in provincial departments and in municipalities. This capability is further strengthened by the relationship we have established with the law enforcement agencies. The MEC for Finance regularly interacts with these agencies as some of the cases of fraud are referred to them for further investigations and prosecution.

3. SCM Review

One of the areas that are highly susceptible to fraud and corruption in government is the supply chain management (SCM) or procurement. This kind of fraud or corruption takes many forms. The first element of corruption and fraud in SCM occurs when a department or entity departs from competitive tendering and asks for quotations from service providers. There is a provision in the Treasury Regulations of the Public Finance Act (TR 16A.6.4) which stipulates that “If in a specific case it is impractical to invite competitive bids, the Accounting Officer or Accounting Authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids are recorded and approved by the accounting officer or accounting authority”. We have taken notice of how this provision is being abused. The main thrust of this provision was to enable rapid procurement of goods and services in cases of natural disaster for example. You will agree with me that if there has been

storm damage to property and loss of life, it will be impractical to call for competitive tenders to provide relief to the affected. But what we have seen lately is that everything that government has to procure is now labelled as an emergency. This is how civil servants engage in fraudulent practices. They do what we call cover quoting, that is, they call their friends, husbands, wives, daughters, sons and so on to submit quotations. They indicate to them how much they should quote, and then they add other fictitious quotes from non-existent companies to make it look authentic and competitive. The result – the tender goes to their friends or relatives. We have discussed this loophole with the custodians of the PFMA – the National Treasury, and very soon the provision to deviate will define the conditions under which deviation may occur rather than leaving to the Accounting Officers or Authorities to decide. Of course it will require an amendment to the PFMA, and this amendment will be made. Watch this space.

The second element of corruption in SCM involves the inflation of prices by the bidders in collusion with the officials in SCM. This occurs precisely because nobody watches the market clearing prices of what government procures. It is common knowledge that government pays far more than it should for goods and services. It is a cash cow. In one instance government paid R6000 for a garbage bin and in another for R20 for a 500ml bottles water per unit. To deal with this practice, we will be developing a price-list of all goods and services that government procures to ensure that we do not pay more than we should. And this price list will be live and will be updated daily. Any official who procures above these prices will have to account. We all know at any given time what are the going prices of gold; a barrel of brent crude oil; platinum; white maize, the share price of Nedcor are for example. Why can't we know what the competitive prices of a pair of surgical gloves; a packet of panado; an A4 rim of printing paper; a laptop; a school building are? There is no reason. The information is there. All we need to do is

access and make it available. This we will do as part of SCM review. The reason why government pays more than it should of course is because some officials have to get a cut and the service provider still needs to make a decent margin. This is untenable as it robs the poor of what they rightfully deserve from the government *fiscus*.

4. Contract management

Another area of concern that we have indemnified is contract management in government. Generally, nobody manages contracts that government has entered into with a variety of service providers. Our preliminary investigation revealed the following shortcomings:

- There are no proper and documented contract management processes in departments;
- There are no contract registers;
- Inadequate understanding of contract management as a function;
- No monitoring and reporting on supplier performance; and
- No review of contract prices to ensure that they are still market related.

The project begins with compiling a simple inventory of all existing contracts across departments. The second step is what we call contract diagnosis, that is, a clause by clause analysis of the contract and lastly a thorough review of these contracts.

This review should indicate the following:

- Business risks per contract
- Value for money analysis
- Market conditions
- Compliance
- Governance arrangements

- Appropriateness
- A contract improvement action plan, and,
- Identification of cost savings.

With the assistance of public sector legal experts gathered here today, we believe that we will be able to roll-out this project and ensure that all contracts that we enter into are above board, compliant with the laws of the land and result in value for money for government.

5. Expanding the declaration requirements

As you aware, the current Public Service Act, requires that only SMS members in the public service need to declare their business interests annually. Through the Office of the Premier, the province plans to expand this requirement to also include civil servants in lower levels especially those on SCM. We hope that this will deter all civil servants from engaging in compromising activities when it comes to awarding of tenders.

Ladies and gentlemen, these are just some of the initiatives that the province is implementing to deal with fraud and corruption. Of course we are fully aware that measures alone may not totally eliminate fraud and corruption in the public service, but they nonetheless demonstrate our commitment towards ensuring clean governance and to restore trust in public institutions.

As stated in a paper by the Institute of Security Studies (2009) *“If citizens believe that their elected officials (and civil servants – own addition) do not act for the public good, or that they misuse their office to benefit themselves or others close to them, then the public trust, vital to the well-being of democratic institutions, is eroded. When public trust in democratic institutions is lowered an indirect threat can be posed to the legitimacy of the entire democratic system”*.

Thank you