



CAPE WINELANDS DISTRICT
MUNICIPALITY • MUNISIPALITEIT • UMASIPALA

COMBATING ABUSE OF SUPPLY CHAIN MANAGEMENT SYSTEM POLICY

FEBRUARY 2015

**Adopted by Council:
Implemented:**

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1. DEFINITIONS

In this Policy, unless the context indicates otherwise: -

“Abuse of the Supply Chain Management System” means any act or omission made by an affected person, which constitutes a basis upon which the Accounting Officer may take steps against such person to combat the abuse in terms of paragraph 3.2 hereunder, and includes, *inter alia*, the following acts:-

- (a) **“Fronting”, also referred to as “tokenism” or “window dressing”**, which refers to the practice of fraudulently manipulating the supply chain management process in order to secure a preference for the purpose of being awarded a contract. This is achieved through the fraudulent misrepresentation of a business's B-BBEE or Historically Disadvantaged Individual (“HDI”) status by, without limiting the generality of the afore-going:
 - (i) Appointing HDI's as fictitious shareholders or members in essentially "white" businesses, where such HDI's are token appointees who are excluded from active and meaningful participation in the management, decision-making and/or financial oversight of the business; or
 - (ii) Through the establishment of a front Black Economic Empowerment (“BEE”) company which fulfils the same role a sister "white-owned", or white majority-owned, company, save that all work is channelled through the BEE vehicle and is still done by the non-BEE sister company which, in turn, takes most (or all) of the profits;
- (b) **“Collusive Tendering”**, which refers to the practice by which tenderers come to an unlawful arrangement amongst themselves in order to secure the award of a contract at the highest possible price by eliminating the competition. This is achieved where, for example, one tenderer submits a bid at an agreed maximum price, while the other tenderers who are party to the fraudulent arrangement, submit "cover bids" at higher prices in order to create an impression of competition, thereby ensuring that the winning contractor is pre-determined. The resulting monopoly profit is then shared amongst the tenderers who are party to the scheme in accordance with their prior arrangement; and
- (c) **“Influencing the Tender Process”**, which refers to an act or omission on the part of a tenderer, which has the result of

manipulating, whether directly or indirectly, the supply chain management process, by *inter alia*:

- (i) Influencing the award of a contract;
- (ii) Inciting a breach of ethics by a municipal employee or councillor through, *inter alia*, bribery and/or an encouragement to breach confidentiality;
- (iii) Causing over- or under-invoicing;
- (iv) Influencing the choice of procurement process;
- (v) Influencing the choice of technical standards; or
- (vi) Generally doing anything in order to influence a municipal official, employee or councillor, whether directly or indirectly, in order to secure an unfair advantage during any stage of the procurement process, whether pre- or post-award.

"Accounting Officer" means the Municipal Manager of Cape Winelands District Municipality, appointed in terms of section 54A, read with section 55(2) of the Systems Act, who, by virtue of section 60 of the MFMA, is responsible for exercising the powers and functions assigned to him/her under the MFMA, including the responsibility of combating any abuse of the Supply Chain Management System, and his/her nominee;

"Affected Person" means any natural or juristic person found to be in breach of this Policy by virtue of an act of abuse of the Supply Chain Management System, and, where applicable includes any representative of such person;

"Bid" includes, *inter alia*, a quotation (whether verbal or written), a tender, an expression of interest, a proposal and any other proposition to do business with Cape Winelands District Municipality, whether solicited or not, and whether pursuant to a competitive procurement process or not, and includes a written offer in the prescribed form in response to an invitation to bid by Cape Winelands District Municipality for the provision of goods and/or services, and the verb "to bid" (or "to tender") and the noun "bidder" (or "tenderer") have corresponding meanings;

"Blacklisting" has the meaning contemplated under regulation 13(2)(d) of the PPPFA Regulations, namely, the restriction of a tenderer or contractor, its shareholders and directors, or solely its shareholders and directors, who acted on a fraudulent basis, from obtaining business from any organ of state

for a period not exceeding 10 years, after the *audi alteram partem* (hear the other side) rule has been applied;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"Contract" means a lawful and binding written agreement between a successful tenderer and Cape Winelands District Municipality which contract is awarded pursuant to a procurement process, whether competitive or not, and which creates rights and obligations between the parties *inter se*;

"Cape Winelands District Municipality Register of Tender Defaulters" means the blacklist compiled by Cape Winelands District Municipality for purposes of, *inter alia*, combating abuse of the Supply Chain Management stem in terms of which the affected persons reflected on the list are, after the application of the *audi alteram partem* principle, prohibited from obtaining any business from Cape Winelands District Municipality and/or any other organ of state, for a period up to a maximum of 10 years;

"MFMA" means the Local Government: Municipal Finance Management Act, 56 of 2003;

"PAIA" means the Promotion of Access to Information Act, 2 of 2000;

"PPPFA" means the Preferential Procurement Policy Framework Act, 5 of 2000;

"PPPFA Regulations" mean the Regulations made under the PPPFA in Government Notice 502 of 8 June 2011, *Government Gazette* No. 34350;

"Representative" means any person, whether authorized or not, who represents or purports to represent an affected person in relation to a bid, including, *inter alia*, any directors, members, employees, agents and legal representatives of an affected person;

"SCM Policy" means Cape Winelands District Municipality's Supply Chain Management Policy;

"SCM Regulations" means the Municipal Supply Chain Management Regulations, 2005, published in Government Notice 868 of 30 May 2005 in *Government Gazette* 27636; and

"Systems Act" means the Local Government: Municipal Systems Act, 32 of 2000;

2. OBJECT AND LEGAL FRAMEWORK

- 2.1 Section 217 of the Constitution makes it obligatory for every organ of state, whether in the national, provincial, or local sphere of government, to contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective ("**the Procurement Principles**").
- 2.2 The PPPFA owes its existence to section 217 of the Constitution and the PPPFA sets the parameters within which an organ of state may contract for goods and services in a way which gives effect to procurement principles.
- 2.3 These legislative measures provide a mechanism through which the constitutional imperative of empowering HDI's is sought to be realized. This must be done by, *inter alia*, rooting out any fraudulent scheme which is designed to divert economic benefits primarily reserved for HDI's to historically empowered individuals through some form of abuse of the Supply Chain Management System.
- 2.4 Regulation 13 of the PPPFA Regulations empowers organs of state to take steps to address abuse of the Supply Chain Management System. In terms of regulation 13:-

"(1) An organ of state must, upon detecting that -

- (a) the B-BBEE status level of contribution has been claimed or obtained on a fraudulent basis; or*
- (b) any of the conditions of the contract have not been fulfilled, act against the tenderer or person awarded the contract.*

(2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulation (1) -

- (a) disqualify the person from the tendering process;*
- (b) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;*
- (c) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;*

- (d) *restrict the tenderer or contractor, its shareholders and directors, or only the shareholders and directors who acted on a fraudulent basis, from obtaining business from any organ of state for a period not exceeding 10 years, after the audi alteram partem (hear the other side) rule has been applied; and*
- (e) *forward the matter for criminal prosecution."*

- 2.5 Regulation 13 of the PPPFA Regulations mandates organs of state, in the face of fraudulent preferment, to take active steps to combat such abuse of the Supply Chain Management System, including blacklisting the affected person in question.
- 2.6 Regulation 38(1)(a) of the SCM Regulations further empowers the Accounting Officer of a municipality to take all reasonable steps to prevent any abuse of the Supply Chain Management System.
- 2.7 The implementation of this Policy is aimed at fulfilling the object of giving effect to the legislative mandate to prevent abuse of the Supply Chain Management System and in order to uphold the constitutional imperative of ensuring that all procurement takes place in accordance with the Procurement Principles.
- 2.8 Cape Winelands District Municipality undertakes to implement this Policy in accordance with the prescripts of the legislative framework governing procurement, and further, in accordance with the provisions of the SCM Policy.
- 2.9 Any form of abuse of the Supply Chain Management System in breach of this Policy and/or the legislative framework, will be duly addressed and penalized by the Accounting Officer in accordance with the provisions set out in this Policy.

3. COMBATING ABUSE OF THE SUPPLY CHAIN MANAGEMENT POLICY

3.1 Duty to act against an affected person upon detecting fraudulent preferment

- 3.1.1 Where the abuse of the Supply Chain Management System is a result, whether direct or indirect, of fronting or any other form of fraud on the part of an affected person or its representative/s, the Accounting Officer is mandated, in terms of Regulation 13(1) of the PPPFA Regulations, upon detecting that a preference was awarded as a result of such fraud, to

take active steps against the affected person.

3.1.2 The Accounting Officer has a wide discretion as to which remedial and/or punitive steps he/she may choose to take to address such fraud, including, *inter alia*, those remedies set out in sub-regulation 13(2) of the PPPFA Regulations, specified at paragraph 2.4 above. In addition, the Accounting Officer may take any of the steps set out at paragraph 3.2.3 below.

3.2 General power to take all reasonable steps to prevent and address all forms of abuse of the Supply Chain Management System

3.2.1 The Accounting Officer has a wide discretionary power to take all reasonable steps, and generally to do anything necessary, to prevent and address abuse of the Supply Chain Management System by affected persons.

3.2.2 In addition, the Accounting Officer is empowered to act against any employee and/or councillor of Cape Winelands District Municipality on the basis of a reasonable suspicion of fraud, corruption, favouritism and/or any other unfair, irregular or unlawful practice(s), including, *inter alia*, a failure to comply with the SCM Policy, (collectively, "**Irregular Conduct**") on the part of such municipal employee or councillor in relation to supply chain management.

3.3 Steps that may be taken by the Accounting Officer pursuant to a reasonable suspicion of irregular conduct by an official, employee or councillor of Cape Winelands District Municipality in relation to Supply Chain Management

3.3.1 The Accounting Officer has a general discretionary power to take all reasonable steps to address irregular conduct by an employee or councillor of Cape Winelands District Municipality.

3.3.2 In particular, the Accounting Officer may, *inter alia*: -

- (a) Initiate an investigation, of any form, pursuant to any allegations of irregular conduct, and take appropriate action against the employee or councillor concerned in light of the outcome of such investigation;

- (b) Inform the chairperson of the municipal council (i.e. the Speaker) of any allegations of irregular conduct on the part of a councillor; and
- (c) Report any irregular conduct of a criminal nature to the South African Police Service for the purposes of criminal prosecution.

3.3.3 In relation to any recommendations or decisions made in relation to a bid tainted by irregular conduct on the part of an employee or councillor of Cape Winelands District Municipality, the Accounting Officer may, subject to any rights which may have accrued to third parties, *mero moto* and provided the municipality is not *functus officio, inter alia*, reject, withdraw or invalidate any such recommendations or decisions that were unlawfully or improperly made or influenced by: -

- (a) Councillors in contravention of items 5, 6 or 9 of the Code of Conduct for Councillors contained in Schedule 1 to the Systems Act; and/or
- (b) Municipal employees in contravention of items 4, 5 or 8 of the Code of Conduct for Municipal Staff Members contained in Schedule 2 to the Systems Act .

3.3.4 The Accounting Officer may cancel any contract awarded to an affected person if an employee or councillor of Cape Winelands District Municipality committed a corrupt or fraudulent act, or was guilty of another form of irregular conduct, during the bidding process or the execution of the contract, which act or conduct benefited, whether directly or indirectly, the employee or councillor concerned.

3.4 Steps that may be taken by the Accounting Officer to address and prevent abuse of the Supply Chain Management System by affected persons

3.4.1 In addition to the general discretionary power to take steps and implement measures to combat and prevent abuse of the Supply Chain Management System, the Accounting Officer may, *inter alia*: -

- (a) Initiate an investigation, whether internal or external, of a suitable_nature, pursuant to any allegations

and/or indications of abuse of the Supply Chain Management System by an affected person, and take appropriate action following the outcome of such investigation, including, *inter alia*, reporting any alleged criminal conduct to the South African Police Service for the purposes of criminal prosecution.

- (b) Reject a recommendation for the award of a contract if the recommended bidder (namely the affected person) or its representative/s, has committed a corrupt or fraudulent act, which *prima facie* amounts to abuse of the Supply Chain Management System, in competing for the contract.
- (c) Reject a Bid from an Affected Person, with due notice and on *prima facie* evidence of the following -
 - (i) Municipal rates, taxes or municipal service charges owed by that affected person or its representative/s to Cape Winelands District Municipality, or to any other municipality, have been in arrears for more than three months as at the date of submission of the bid;
 - (ii) The affected person, or its representative/s has, in the past 5 (five) years as at the date of the invitation to bid, failed to perform satisfactorily on a previous contract with Cape Winelands District Municipality, or any other organ of state, notwithstanding the fact that written notice was given to that bidder indicating that performance was unsatisfactory;
 - (iii) The affected person, or its representative/s has, in the past 5 (five) years as at the date of the invitation to bid, committed an act of abuse of the Supply Chain Management System of Cape Winelands District Municipality, or has committed any improper, irregular or unlawful conduct in relation to the supply chain management system; or
 - (iv) The affected person, or its representative/s has, in the past 5 (five) years as at the date of the invitation to bid, wilfully neglected, reneged

on or failed to comply with any government, municipal or other public sector contract.

- (d) Reject the bid of an affected person on receipt of written verification that that person or any of its representatives has, in the past 5 (five) years: -
 - (i) That has been convicted of fraud or corruption; or
 - (ii) That has been blacklisted on: -
 - (a) The Register for Tender Defaulters in terms of section 29 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004;
 - (b) The National Treasury's Database as a person prohibited from doing business with the public sector; or
 - (c) The Cape Winelands District Municipality Register of Tender Defaulters.
- (e) Cancel a Contract awarded to an affected person if: -
 - (i) The affected person, or its representative/s, committed a corrupt or fraudulent act amounting to abuse of the Supply Chain Management System, during the bidding process or in the execution of the contract; or
 - (ii) The affected person, or its representative/s, incited a corrupt or fraudulent act amounting to irregular conduct, on the part of an official, employee or councillor of Cape Winelands District Municipality, which act, directly or indirectly, resulted in the award of the contract to the affected person.

4. CAPE WINELANDS DISTRICT MUNICIPALITY'S REGISTER OF TENDER DEFAULTERS

4.1 The Accounting Officer may, after the application of the *audi alteram partem* (hear the other side) rule, list the name of an affected person and/or any of its representative/s (if so applicable) on the Cape

Winelands District Municipality Register of Tender Defaulters for a period not exceeding 10 (ten) years: -

- (a) On evidence of any abuse of the Supply Chain Management System as contemplated in this Policy; and/or
 - (b) Upon detecting that the BBBEE status level of contribution has been claimed or obtained on a fraudulent basis, or any of the conditions of the contract have not been fulfilled, within the meaning of the PPPFA Regulations.
- 4.2 Any such listing in terms of paragraph 4.1 above shall, at the discretion of the Accounting Officer, further extend to any other natural or juristic person who exercises, or may exercise, some form of control, whether directly or indirectly, over the business of the affected person, and who is, or was, in the opinion of the Accounting Officer, actively associated with the affected person.
- 4.3 An affected person who is convicted of any of the offences referred to in paragraph 3.4.1(e) above shall be blacklisted on the Cape Winelands District Municipality Register of Tender Defaulters.
- 4.4 An affected person who has been blacklisted on the Cape Winelands District Municipality Register of Tender Defaulters shall not be entitled to be awarded a contract, or generally obtain any business from Cape Winelands District Municipality, and possibly also any other organ of state, for the duration of the period and as per the terms reflected on such register.
- 4.5 The Accounting Officer may at any time and on good cause shown: -
- (a) Remove the name of an affected person from the Cape Winelands District Municipality Register of Tender Defaulters; or
 - (b) Reduce the period for which the affected person is prohibited from obtaining any business from Cape Winelands District Municipality and, if applicable, any other organ of state.
- 4.6 The Accounting Officer shall appoint an official who shall be tasked with the responsibility of ensuring the timely and diligent management of the Cape Winelands District Municipality Register of Tender Defaulters in order to ensure that such register is always up-to-date and accurate.

5. ADEQUATE NOTICE OF MANNER OF ABUSE OF SUPPLY CHAIN MANAGEMENT SYSTEM

- 5.1 On obtaining *prima facie* evidence, whether pursuant to an investigation or otherwise, of an instance of abuse of the Supply Chain Management System by an affected person and/or its representative/s, Cape Winelands District Municipality shall, prior to taking any steps to combat such abuse, and in accordance with the prescripts of the *audi alteram partem* principle, give the affected person adequate written notice of the manner in which it is alleged that the Supply Chain Management System was abused ("**Adequate Notice**").
- 5.2 For the purposes of constituting adequate notice of the manner in which it is alleged that an affected person abused the Supply Chain Management System, the notice shall: -
- (a) Specify, with sufficient particularity, the grounds on which it is alleged that the affected person committed an act of abuse of the Supply Chain Management System, and indicate the nature of such alleged abuse in order to enable the affected person to respond properly to the allegations stipulated in the notice;
 - (b) Refer to the applicable provisions of this Policy in terms of which the Accounting Officer may proceed to take steps against the affected person on finding that such person committed an act of abuse of the Supply Chain Management System;
 - (c) Stipulate that the affected person is, in accordance with *audi alteram partem*, invited to make written representations in response to the notice within 14 (fourteen) calendar days from the date on which the notice was served on the affected person;
 - (d) Indicate that any such written representations received by Cape Winelands District Municipality after the due date for submission as per paragraph 5.2(c) above, shall be disregarded, save where the affected person can show good cause for the consideration of such written representations by way of a request for condonation for the late lodgement of such representations and provided that such request shall not result in unreasonable delays or otherwise prejudice the public interest;

(e) Include the following particulars of the relevant municipal official to whom written representations, and/or any other correspondence required in terms of this Policy, must be sent: -

- (i) Full name;
- (ii) Official title;
- (iii) Postal address;
- (iv) Street address;
- (v) Telephone number;
- (vi) Fax number; and
- (vii) E-mail address.

6. RIGHT TO ACCESS TO INFORMATION

6.1 On furnishing the affected person with the notice referred to in paragraph 5 above, Cape Winelands District Municipality may, in addition, grant such person access to all documents upon which Cape Winelands District Municipality intends to rely in respect of the allegations of abuse of the Supply Chain Management System by the affected person.

6.2 Affected persons are entitled to request any additional information from Cape Winelands District Municipality in accordance with the provisions of PAIA for the purposes of furnishing written representations as contemplated at paragraph 5.2 above. Where such additional information is requested, Cape Winelands District Municipality may, at its sole discretion and upon a written request to do so, extend the time period contemplated at paragraph 5.2(c) above in order to give the affected person adequate time to consider such additional information.

7. ADJUDICATION OF MATTERS PERTAINING TO ABUSE OF THE SUPPLY CHAIN MANAGEMENT SYSTEM

7.1 In accordance with the requirements of procedural fairness, and in particular, the right to be heard (*audi alteram partem*), affected persons shall, in terms of the procedures set out in this Policy, be afforded a proper opportunity to be heard prior to the taking of any steps by Cape Winelands District Municipality against such persons as contemplated in paragraph 3 above.

7.2 In order to give effect to *audi alteram partem*, Cape Winelands District Municipality must give proper consideration to the written representations of affected persons in determining whether there has indeed been abuse of the Supply Chain Management System as

contemplated herein, and if so, what punitive steps Cape Winelands District Municipality ought to take.

7.3 The adjudication of written representations pertaining to instances of abuse of the Supply Chain Management System by an affected person shall be conducted by a panel ("**the Panel**") which shall consist of: -

- (a) The Accounting Officer (or its delegate), who shall be the Presiding Officer for purposes of the adjudication; and
- (b) At least two other persons selected at the discretion of the Accounting Officer.

7.4 The panel shall adjudicate on the matter in order to reach an appropriate finding based upon an assessment of, *inter alia*: -

- (a) The notice delineating the grounds of alleged abuse of the Supply Chain Management System;
- (b) The affected person's written representations (if such representations have been duly submitted to Cape Winelands District Municipality); and
- (c) Any other relevant documentation and/or considerations placed before the panel for purposes of the adjudication.

7.5 If, on the papers before it, the panel is able to make an informed decision, it shall duly inform the affected person (and any other interested and/or affected persons, if so applicable) of such decision within a reasonable time, but at least **14 calendar** days from the date on which the finding of the panel was made.

7.6 In the event that the panel is unable to reach a proper finding on the papers before it, where for example, additional information is required to make a decision, the panel shall refer the matter for determination by an oral hearing.

8. ORAL HEARINGS

8.1 An affected person does not have an automatic right to an oral hearing. Matters shall proceed by way of oral submissions in the event that: -

- (a) The panel is unable to reach a finding on the papers as contemplated in paragraph 7.6 above; and/or
 - (b) An affected person requests an oral hearing and the panel, at its discretion, is satisfied that such person has shown good cause for the presentation of oral submissions.
- 8.2 For the purposes of showing "good cause" for an oral hearing, an affected person shall, by way of written representations, present all relevant factors in order to aid the panel in making a rational and well-informed decision as to whether or not to grant an oral hearing.
- 8.3 In the event that the panel, having considered such written representations, decides to grant the affected person a right to an oral hearing, the Presiding Officer, or his/her duly authorised representative, shall proceed to notify the affected person of such decision in writing, within 7 (seven) days of the receipt of the written representations. The notice of the decision to proceed by way of an oral hearing shall set out, *inter alia*, the following: -
 - (a) The date, time and venue of the oral hearing; and
 - (b) A statement to the effect that the affected person has the right to legal representation for the purposes of the oral hearing.
- 8.4 The procedure to be followed at an oral hearing shall be determined by the Presiding Officer, who shall, in all cases, ensure that due effect is given to the tenets of natural justice.
 - (a) In complex matters, the Presiding Officer shall allow the affected person and, where relevant, Cape Winelands District Municipality, to call witnesses who shall testify under oath;
 - (b) An affected person, or, where applicable, the legal representative thereof, shall be entitled to present his/her/its case and to cross-examine any witness or witnesses that Cape Winelands District Municipality elects to call; and
 - (c) Similarly, Cape Winelands District Municipality, and any other interested and/or affected party, may cross-examine any witnesses called by an affected person.
- 8.5 In the adjudication of all matters pertaining to alleged abuse of the Supply Chain Management System, Cape Winelands District Municipality bears the onus of proving such abuse on a balance of

probabilities prior to taking any steps to combat the abuse as contemplated at paragraph 3 above.

- 8.6 On reaching a finding that an affected person is guilty of abusing the Supply Chain Management System within the purview of paragraph 3 of this Policy, the Presiding Officer, or his/her duly authorised representative, shall in writing and within 7 (seven) days of reaching such finding, inform the affected person thereof. The Presiding Officer shall furthermore inform the affected person of the right to request reasons for such finding from Cape Winelands District Municipality in terms of section 5 of PAJA.

9. CRIMINAL PROCEEDINGS

- 9.1 If the form of abuse of the Supply Chain Management System constitutes a criminal offence under South African law, including, *inter alia*, fraud or corruption, the Accounting Officer may institute criminal proceedings against the affected person, in the normal course.
- 9.2 In such instances, the Accounting Officer is mandated to inform the National Treasury and the Western Cape Provincial Treasury, in writing, of any actions taken pursuant to such alleged criminal conduct, in terms of Regulation 38(2) of the SCM Regulations.

10. SHORT TITLE

- 10.1 This policy is the Combating Abuse of Supply Chain Management System Policy of Cape Winelands District Municipality.