

ALIGNMENT OF PREFERENTIAL PROCUREMENT REGULATIONS, 2017 WITH B-BBEE ACT

BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION 15 March 2018



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

BACKGROUND

Government and social partners signed a Local Procurement Accord on 31 October 2011, as an outcome of social dialogue on the New Growth Path (NGP). Commitment one made by government was to leverage public procurement.

To give impetus to the NGP, the President made the following pronouncement in his State of the Nation Address in 2015:

President's pronouncement - SONA



GOVERNMENT WILL SET-ASIDE 30% OF APPROPRIATE CATEGORIES OF STATE PROCUREMENT FOR PURCHASING FROM SMMEs, CO-OPERATIVES, AS WELL AS TOWNSHIP AND RURAL ENTERPRISES

BACKGROUND

- After the pronouncement by the President, departments of Small Business Development, Economic Development, the Department of Trade and Industry and National Treasury convened.
- Firstly, to identify the relevant prescript within the empowerment legislation to implement the directive. The PPPFA, more specifically, the Preferential Procurement Regulations were identified as the most suitable prescript to implement the pronouncement.
- Secondly, to discuss content of the changes that would be required to effect the announcement in ensuring that Small Medium and Micro Enterprises benefit from public procurement.

BACKGROUND

POLICY OBJECTIVE OF THE REGULATIONS

- Government is committed to transformation and creation of a business environment conducive to all. The Preferential Procurement Regulations 2017 are premised on three interrelated government policy objectives:
 - ❖ **Socio-economic transformation,**
 - ❖ **promotion of small enterprises, cooperatives, rural and township enterprises and**
 - ❖ **promotion of local industrial development.**
- The Preferential Procurement Regulations, 2011 were focused on aligning the aims of PPPFA and B-BBEE. The Preferential Procurement Regulations, 2017 provide an added advantage to designated groups and Small Medium and Micro Enterprises (SMMEs) also classified as EMEs and QSEs in B-BBEE Act and the Codes of Good Practice.

CONSTITUTION

Section 217 – Procurement

- (1) When an organ of state... contracts for goods or services, it must ...fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organ of state or institution referred to in that subsection from implementing a procurement policy providing for –
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.

Therefore the Constitution provides for equality before the law, redressing the imbalances of the past and preferential treatment of historically disadvantaged persons when organs of state procure goods and services



PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT (PPPFA)

The PPPFA was enacted to give effect to section 217(2) of the Constitution

- However, the PPPFA introduced the 80/20 and 90/10 preference points system, in the Act, this limited the allocation of preference points and any amendments could only be effected by amending the Act itself.
- The PPPFA regulations of 2001 gave organs of state to whom the Act applied the discretion to prefer targeted groups but within the 80/20 or 90/10 preference systems.
- The PPPFA regulations of 2011 introduced the B-BBEE scorecard, which also inhibited the targeting of designated groups and instead focused on broad-based black economic empowerment approach.

AMENDMENTS IN THE PPF REGULATIONS, 2017

Key changes introduced by the revised Preferential Procurement Regulations:

1. Thresholds for application of preference points increased:
 - 80/20 preference points –increased to R50m (Regulation 6)
 - ✓ B-BBEE points for level 3 have been reduced from 16 to 14 to align with the amended codes
 - 90/10 preference points – Above R50m (Regulation 7)
 - ✓ B-BBEE points for level 3 have been reduced from 8 to 6 to align with the amended codes

Introduction of pre-qualification criteria

2. Introduction of pre-qualification criteria based on B-BBEE levels of contribution (Regulation 4)

- Prequalification criteria may be used in selected tenders to advance designated groups on the basis of the following:
 - B-BBEE Status Level of contributor,
 - EME or QSE
 - subcontracting with EMEs or QSEs that are 51% owned by either of the following: Blacks; Black Youth; Black Women; Black people with disabilities; Black people living in rural or underdeveloped areas or townships; cooperatives owned by Black people; Black people who are military veterans
- Therefore the introduction of prequalification criteria allows the advancement of these selected categories of persons by limiting competition only amongst themselves.
- Established companies will also be able to compete if they meet further requirements of subcontracting to these groups should they be successful.

Introduction of compulsory sub-contracting

3. The revised regulations require organs of state to identify tenders, where it is feasible, to sub-contract a minimum of 30% of the value of the contract for contracts above R30 million.
- The tenderer must sub-contract a minimum of 30% of the value of the contract to EMEs or QSEs or EMEs or QSEs which are 51% owned by either of the following: Blacks; Black Youth; Black Women; Black people with disabilities; Black people living in rural or underdeveloped areas or townships; cooperatives owned by Black people; Black people who are military veterans.
 - Acknowledging that in the main, the high value tender in the region of R30 million and above tend to be awarded to established companies due to economies of scale and affordability, leaving out categories of aspiring businesses, the revised regulations requires all those with ability to deliver the required service to demonstrate the element of subcontracting to the categorised groups at a tendering stage.

Specific Changes:

Changes to regulation 1: definitions

The following definitions are added to the list of definitions in regulation 1:

- 1) Co-operative
- 2) Proof of B-BBEE status
- 3) QSE
- 4) Rural area
- 5) Township
- 6) Youth

Changes to regulation 1: definitions

The following definitions have been deleted / modified to align with South African Bureau of Standards: Technical Specification on the Measurement and Verification of Local Content (SATS 1286:2011):

- 1) All applicable taxes (deleted)
- 2) Imported content (modified)

Regulation 2

- The regulations no longer provide a long list of the organs of state to which the PPR 2017 apply as opposed to the 2011 Regulations. A footnote is provided which provides a list of specific organs of state to which the 2017 regulations apply.

Regulation 3

The following provisions have been added to regulation 3:

- a) Determining whether pre-qualification criteria are applicable to the tender; and
- b) Determining whether compulsory sub-contracting is applicable to the tender
- c) Determining whether objective criteria are applicable to the tender as envisaged in regulation 11.
- d) If there is uncertainty regarding the estimated price and which preference point system will be applicable, then the tender documents should state that either the 80/20 or the 90/10 preference point system will apply and that the lowest acceptable tender will be used to determine the applicable preference point system.

Regulation 4: Prequalification criteria (new)

This regulation is used to advance designated groups through:

- (a) Prequalifying tenderers in terms of B-BBEE Status level
- (b) Prequalification in terms of being an EME or QSE
- (c) Sub-contracting with the following designated groups:
 - i. An EME or QSE which is at least 51% Black Owned
 - ii. An EME or QSE which is at least 51% owned by black youth
 - iii. An EME or QSE which is at least 51% Black Women Owned
 - iv. An EME or QSE which is at least 51% owned by black people with disabilities
 - v. An EME or QSE which is 51% owned by black people living in rural or underdeveloped areas and / or townships
 - vi. A Cooperative which is at least 51% owned by black people.
 - vii. An EME or QSE which is at least 51% owned by black people who are military veterans

Regulation 5: Tenders to be evaluated on functionality

- Regulation 4 in PPR 2011
- The changes to this regulation include expansion of sub-regulation 4 to include the following provision:
 - The minimum qualifying score for functionality for a tender to be considered further-
 - (a) must be determined separately for each tender; and
 - (b) may not be so-
 - (i) low that it may jeopardise the quality of the required goods or services; or
 - (ii) high that it is unreasonably restrictive.
- The inclusion of a provision that points scored for functionality must be rounded off to the nearest two decimal places.

Regulation 6: 80/20 preference point system

- Regulation 5 in PPR 2011
- The maximum threshold for application of the 80/20 preference point system has been increased to R 50 Million
- B-BBEE points for level 3 have been reduced from 16 to 14 to align with the amended codes.
- Sub-regulations related to B-BBEE status level included, these were previously stated in regulation 11 on conditions.
- A sub-regulation empowering organs of state to negotiate with preferred tenderers a fair market price has been added.

Regulation 7: 90/10 preference point system

- Regulation 6 in PPR 2011
- The minimum threshold for application of the 90/10 preference point system has been increased to R 50 Million
- B-BBEE points for level 3 have been reduced from 8 to 6 to align with the amended codes.
- Sub-regulations related to B-BBEE status level, included those regulations which were previously stated in regulation 11 on conditions.
- A sub-regulation empowering organs of state to negotiate with preferred tenderers a fair market price has been added.

Regulation 8: Local production and content

- Regulation 9 in PPR 2011
- National Treasury will issue circulars to inform organs of state about designations made by the dti.
- Sub-regulation (3) has been changed to indicate that the standards to be issued (in the case where there is no designated sector) will be issued by the dti, in consultation with National Treasury, and not the other way around, as was previously the case (now sub-regulation 4).

Regulation 9: compulsory subcontracting

- New Regulation aimed at empowering designated groups especially in sectors where there is a lack of transformation.
- An organ of state must, in the case of selected tenders where it is feasible to sub-contract, apply compulsory sub-contracting to advance designated groups in contracts above R30 million.
- That organ of state must advertise such tender with a specific tendering condition that the successful tenderer must sub-contract a minimum of 30% of the value of the contract to-
 - (a) An EME or QSE;
 - (i) An EME or QSE which is at least 51% Black Owned
 - (ii) An EME or QSE which is at least 51% owned by black youth
 - (iii) An EME or QSE which is at least 51% Black Women Owned
 - (iv) An EME or QSE which is at least 51% owned by black people with disabilities

Regulation 9: compulsory subcontracting continued

- (v) An EME or QSE which is 51% owned by black people living in rural or underdeveloped areas and / or townships
 - (vi) A Cooperative which is at least 51% owned by black people.
 - (vii) An EME or QSE which is at least 51% owned by black people who are military veterans
- The list of designated groups mentioned in sub-regulation (2)(i) – (vii) must be made available by the organ of state selected from amongst suppliers registered on the Central Supplier Database of the National Treasury.

Regulation 11: Award of contracts to tenderers not scoring highest points.

- Regulation 7 in PPR 2011
- An additional sub-regulation has been added states that if an organ of state intends to use objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.

Regulation 12: Subcontracting after award of tender.

- The regulation provides that subcontracting after award of the contract must be subject to approval from the organ of state.
- The regulation includes provisions which were provided for in Regulation 11 of the 2011 regulations related to 25% subcontracting and local production and content.

Regulation 13: cancellation of tender

- Regulation 8 in PPR 2011
- Provisions related to re-invitation of tender have been removed.
- Addition of sub-regulation related to cancellation of tender due to material irregularities.
- Also addition of a provision that an organ of state may cancel a tender for the second time, only with the approval of the relevant treasury.

Regulation 14: Remedies

The regulation has been enhanced to include sub-regulations related to:

- 1) Giving tenderer an opportunity to make submission.
- 2) Informing the relevant treasury in writing of any actions taken against the tenderer.
- 3) The responsibilities of the treasury after receiving documents from the organ of state concerned.

IMPLEMENTATION OF PPR, 2017

- Regulations became effective in April 2017.
- National Treasury issued implementation guidelines- living document
- Auditor-General will audit implementation thereof, starting in 2018.
- National Treasury is enhancing guidelines to monitor outcomes- needs support from all organ of state.

CHALLENGES AND SHORTCOMINGS

- Ownership and B-BBEE status level, companies can obtain level 1 or 2 without meaningful black ownership. This is one area that needs urgent attention as it will unlock opportunities for black economic empowerment.
- The 80/20 and 90/10 preference systems in the PPR, 2017. This is being addressed through the Public Procurement Bill which will be gazetted soon for public comments.
- Inconsistency in interpretation and application of PPR, 2017. A lot of training is needed.
- Anti-competitive practices and monopolies. Addressing competition issues, monopolies, barriers to entry and market dominance will unlock opportunities for black owned companies and SMMEs.

CHALLENGES AND SHORTCOMINGS

- The challenge of evergreen contracts, unjustifiable extension of contracts creates serious barriers to entry.
- Non-payment of suppliers for legitimate invoices is devastating for SMMEs and black owned companies and it is a violation of the PFMA and MFMA.
- Access to finance and markets.

THANK YOU



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