STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
				B-BBEE certificate. Failure to submit a valid B-BBEE certificate will be regarded as a deviation from section 10 (1) requirements. In terms of section 10 (2) of the Act it is only the Minister of Trade and Industry who may grant an exemption or deviation to this obligation To date, only the Department of Mineral Resource has been granted a twelve (12) months exemption which expire in October 2016. Therefore to safeguard the Constitutional mandate on economic transformation, B-BBEE must be implemented as a pre-qualification. This means that a tenderer must first be B-BBEE compliant prior to its proposal being evaluated on functionality and price. That will further mean that	

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				failure to submit a B-BBEE certificate should result in the tenderer being disqualified, not merely losing the points. This approach will safeguard the objectives of section 9 (2) and 217 (2) of the Constitution, and in our view still in line with the provisions of the PPPFA.	
		Regulation 7	This is limiting and contrary to section 217 (2) of the Constitution because the advancement of persons previously disadvantaged can only be considered post evaluation, where a tenderer did not score higher. Section 217 (2) allows for the implementation of a procurement policy providing preference to categories of persons in the allocation of contracts. This means that requirements to give effect to this section must be done prior to evaluation of proposals	Contracts of a certain value must only be opened to tenderers with a specific B-BBEE Status level for example SAPS uniform contract to the value of R100 million is only opened for tenderers with B-BBEE level 1 to 4 and adhering to priority elements as set out in the Codes. The above is a clear example of how preferential terms are set to advance those previously disadvantaged. The Regulations must also articulate what steps National Treasury can take or what	**Noted: We are not sure if S 217 suggests that contract must be given to tenderers before tendering process. The regulations provide for prequalification criteria that may be implemented to advance certain categories of persons based on an organ of state's empowerment objectives.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
				powers it can exercise after receiving reports in terms of Regulation 7(4), in addition to monitoring these awards.	
		Regulation 8	The mechanism for breaking a deadlock in this case goes against the normal prescripts of governance, and further undermines the structures recognised within the procurement process, such as the panels set up leading to final decision-making, such as evaluation and adjudication panels. There is no way of determining and proving that indeed the coin was tossed, or that slots were drawn, and this does not provide any level of governance better than what governance principles already provide for deadlocks.	The deadlock breaking mechanism should be the voting process instead of the tossing of the coin, or drawing of slots. Where the votes are equal, the chairperson of the panel must be given a casting vote, and all these be recorded in the minutes to reflect how the members voted, signed by the voting members.	**Noted: the suggestion will be considered in line with other suggestions it however makes sense to subject the tender to a vote where they are equal on BEE and Functionality.**
		Regulation 9	Designations must take into account B-BBEE to ensure that designated products or services do not entrench monopolies and continue to protect and benefit companies that are not B-BBEE compliant.	Provision should be made in the determination of the stages of the tender process that where a tenderer is not B-BBEE compliant, that specific conditions will be imposed to ensure the company is B-BBEE compliant, especially for	**Noted: there is a need to balance local procurement with BEE provisions however need to bear in mind the participation of black people in manufacturing.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
				contracts that are long term.	
		Regulation 10	If an organ of state intends to apply a pre-qualification criteria in the evaluation of the tender, such criteria must be stated in the tender documents and may not be limited to: □ A tenderers having a stipulated B-BBEE status level; □ Tenderer sub-contracting 30% of the value of the contract This is still an option, meaning that an organ of state may choose not to set B-BBEE as a pre-qualification	B-BBEE must be a pre-qualification to all government contracts. The stipulation of a certain B-BBEE status level may be linked to the value of the contract in certain instances as part of implementing the 30% set aside for small businesses. Sub-contracting should not be made the only way to implement a set aside of 30%.	**Noted: This will be on selected procurement as we are currently not sure whether the state can set such criteria for public procurement even 30% will be for selected procurement as not all procurement can be subjected to subcontracting.**
		Regulation 10	Section 10 (1) of the B-BBEE Act mandates every organ of state and public entity to apply any relevant Codes of Good Practice issued in terms of the B-BBEE Act in: a) Determining qualification criteria for the issuing of licenses, concessions or other authorisations in respect of economic activity in terms of any law; b) Developing and implementing a preferential procurement policy; c) Determining qualification criteria for the sale of state-owned enterprises;	Align this provision to the B-BBEE Act by stating that B-BBEE is a pre-qualification to participate as a bidder for the disposal or sale of assets	**Noted: however we are not sure if this can be prescribed for all public procurement tenders. In this instance it is meant to promote designated groups and what about international companies?**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			d) Developing criteria for entering into partnerships with the private sector; and Determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.		
		Regulation 10	We welcome the attempt to implement the 30% set aside for small businesses. However, it is not understood as to why this is done through sub-contracting only, and not setting aside certain contracts for small businesses based on value. Important to note that the majority of small businesses are black owned and operate in townships. In that regard certain contracts must be set aside for that category of tenderers as part of implementing section 9 (2) and accelerating township economy revitalisation which is part of the nine-point plan.	Contracts of a certain value must be reserved for small businesses. For example, the provisions that contracts to the value of RX and below are evaluated on price, must be changed to state that all R X and below contracts are set aside for EMEs and QSEs tenderers with a level 1 and 2 B-BBEE status level. Sub-contracting can be another avenue to advance access to contracts by small businesses for high value contracts, but must not be made the only way. Set asides are more effective in that they will give power directly to the small businesses instead of them	**Noted: all the attempts made to empower designated groups are made within the confines of the PPPFA.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
				only waiting to be sub-contracted	
		General	6. Conclusion Preferential Procurement is an effective tool to facilitate economic transformation and must be implemented within the context of the Constitution taking into account the B-BBEE Act. To the extent that other recommendations could be better achieved through the provision for exemptions under the PPPFA, it is recommended that these Draft Regulations provide for a clear procedure for entities to apply and obtain exemptions in a transparent manner. The process of exemptions has created confusion in the past, and providing direction in this regard is necessary. Again, we implore National Treasury to expedite the process for the review of the PPPFA so that the complete and full alignment is achieved. Making timelines available will therefore go a long way to allow us to work with National Treasury, and plan our contributions in time.		**Noted: National Treasury is in the process of drafting a Public Procurement Bill as such the PPPFA will be repealed through that legislation.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
62	**Rand Water: Thabisa Mange**	**Regulation 3**	3.(a) remove comma between 'determine' and 'stipulate'	'determine and stipulate in the tender documents, the applicable point system applicable to the tender; and'	**Accepted.**
		Regulation 4	4(4)(a) clarify what 'may not be generic' means?	Add flexibility for entities to evaluate the tenders on a criteria to assess the reasonableness of prices received from tenderers namely whether the tenderers are overpricing or under-pricing	**Noted: organs of state already have such a right and it need not be explained further in these regulations.**
		Regulation 5	Is the amount inclusive of taxes?	…Above R100 million inclusive of taxes	**Yes**
		Regulation 6	Is the amount inclusive of taxes?	…Above R100 million inclusive of taxes	**Yes**
		Regulation 7	➢ Combine 7 (3) (v) and (vi) ➢ Clarify how the following will be captured on a tender without divulging the sensitive information 7(3)(b), (c) and (d) o Add a provision to assess reasonableness of pricing from the tenderers ➢ Consequence of reporting, namely can NT challenge the objectivity of the criterion?	Add 7(3) (e) a criteria to assess the reasonableness of prices received from tenderers namely whether the tenderers are overpricing or under-pricing.	**Noted: organs of state already have such a right and it need not be explained further in these regulations.** **Where the regulations were not followed or complied with it may lead to irregular expenditure.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			➢ Can an opinion of NT on the above lead to an irregular expenditure for an organ of state?		
		Regulation 8		The organ of state must set an objective criterion for breaking deadlocks.	**Noted: However regulations must promote uniformity on application among organs of state.**
		Regulation 10	10.(3) How will an organ of state determine which document to evaluate if the tenderer has submitted both a Joint Venture and a separate tender. Should there be engagement with the tenderer as to which document to evaluate?	Suggestion – Disqualify the tenderer on both tenders	**Noted: The logic here is that the tender sent individually will be disqualified and only a Joint Venture tender will be considered.**
		Regulation 12	12.(1) the include instance where the tender automatically lapses for example where the validity period has expired. 12(2) should exclude prior approval where the tender has lapsed.		**Noted: although this falls within the realm of SCM regulations we are of the view that it warrants consideration.**
		Regulation 13	Consider an exemption in industries where no qualifying company is available for subcontracting. Further deal with verification of such non availability of a subcontractor.		**Accepted: subcontracting should not be a one size fits all organs of state must identify tenders where**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
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					subcontracting can benefit designated groups and structure their procurement to promote designated groups through subcontracting.
			1. CIDB requires tenders above R 200 000 to be advertised on CIDB website. This is in conflict with the current quotation process of up to R500 000. We recommend that National Treasury engages CIDB to align its requirement to National Treasury. 2. We recommend that quotation process be increased from R30 000 - R500 000 to R30 000 - R1 000 000. This is facilitate the turnaround is those tenders as quotations are quicker to turnaround. 3. Rand Water believes that the "preferential procurement" as it currently exist and as per the proposed draft is not addressing the real issues of economic transformation. This will not assist the		**Noted: however these are SCM regulation issues other than preferential procurement regulations.** **Noted: however the regulations cannot change what is prescribed in primary legislation, the PPPFA.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			country to achieve its aspirations of economical transformations such as creating black industrialists, empowering black women in business etc. We further believe that the rational for dividing bids on price classes (i.e. 80/20, 90/10 etc.) continues to advantage previously advantaged as they have the economies of scale and therefore no emerging business can compete with these companies on price. Putting a lot of emphasis on price will not change the status quo and will not drive any economic transformation. 4. If the 80/20 or 90/10 thresholds cannot be scrapped at this stage, the 90/10 thresholds should be removed. All tenders should be evaluated on an 80/20 basis.		
63	**Consulting Engineers South Africa: DS TEMPLE, Pr Eng., Pr. CPM Chairperson**	**General**	This comment is based on the draft regulations as published for comment. The CESA members after a recent meeting with SANRAL formally submit comment based on the implications of this draft. SANRAL will make their own submission. Our comments relate specifically to the procurement of **Professional Engineering**		

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			Service Providers and not to any other sector of our industry. In principle CESA members have no objection to the Preferential Procurement, per say, but wish to comment on the quantum of various thresholds and quantum of these regulations and our perception on how this will impact on the Consulting Engineering Profession as a whole.		
		Regulation 4	4 to 6 The concept of functionality and threshold to be reached to enable a tender to be acceptable is sound and is therefore supported.		
		Regulation 5 and 6	The threshold of R100 Million at which the 80/20 preference point system is evaluated is too high. At present the SIPDM (October 2015) defines this threshold at present a R1 Million. (14.5.2.3). We are of the opinion that the 100 fold increase of this amount is not realistic and recommend that this number be reduced to R10 Million for professional services providers after which the 90/10 threshold will take effect. The 90/10 threshold at R100 Million may be effective for Large Constructors and	We therefore recommend that the 90/10 threshold for professional service contracts is set at R10 Million Rand. The distribution of points is noted for both the 80/20 and 90/10 preference point systems.	

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			suppliers with large turnovers. It must be remembered that adopting a contract value of R100 Million the professional service contract will be in the order of 10 to 15 percent of the construction contract. The value of professional services contracts with SANRAL which is the largest Roads Authority in SA awards Contracts to professionals from between R5 Million to R200 Million with an average of R23,5 Million. The implication of this regulation is that effectively 100% of all professional service contracts will be awarded on the 80/20 preference point system. The concept of a single threshold of the supply of Goods and Services is too simplistic and different categories of goods and services with different thresholds should be adopted for each sector and giving a list of such sectors would not be a difficult exercise.		
		Regulation 8	**Award of contracts to tenders not scoring highest points** The criteria for breaking a deadlock is very		

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			trite surely (3)(a) and (b) can be improved.		
		Regulation 9	**Local production and content** This is highly supported.		
		Regulation 10	The criteria that 30% of "the value of the contract" is too high and is in conflict with the PFMA where the maximum permissible subcontracting level is 25%. Having been involved with the SANRAL Board and management in setting up the concept of "New Entrants" i.e. EME's and QCE's being awarded 20% the "Design Work" on SANRAL contracts and we confirm that we have been able to work with this concept reasonable successfully. However, for the sake of the consulting industry we are of the opinion that the level of 30% is too high to achieve on a sustainable basis and should be reduced to the 20%. Our reasoning is a follows: On large contracts the 30% is high and will often immediately disqualify a small firm after one contract as their turnover now exceeds the minimum value.	We therefore propose that consideration be given to providing a Provisional Sum in contract for the provision of new entrants and that after the award of the contract quotations for this work are obtained from, say, a minimum of 3 small service providers (EME's & QCE's). These "Mini Tenders" can be managed under the guidance of the Main consultant and the client. We are also of the opinion that the Provisional sum concept for this new entrant work will tend to stabilise prices of the main contract in the context of fair competition. There should be a mark-up to cover the additional project management cost of the main services provider.	

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			As the market is currently highly competitive large discounts in fees are offered by the large established companies and the ability of small firms to carry out the work at these prices will be destructive for small firms. It is our opinion that there are not enough EME's or QEE's in field of Roads Design Engineering Consultants to do 30% of all SANRAL projects. SANRAL Design Contracts ±R4 Billion 30% of Design contract ±R1,2 Billion CESA will draft and submit comments in regard to capacity. In SANRAL Contracts a spread of expertise is required to meet the functionality requirements. Most if not all QSE's and certainly EME's generally only have limited expertise related to the spread of expertise required. Because EME's and QSE's are by virtue of the large amounts awarded to them mentioned in 3 above, they rapidly pass	"The tender to subcontract a minimum of 20% of the value of the contract before VAT less Provisions sums to one or more-" EME's and QSE's etc.	

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			through the system due to increased turnover. They now have to compete with the established players in the market and the very system set up to assist them is now "setting them up for failure". This is not productive for the country or for the development of technology and expertise in the field of consulting engineering. 5. Another major problem is the fact that in SANRAL tenders there are a number of Provisional Sums for provision of, for example, Laboratory, Surveys, Environmental, Geotechnical and Traffic Engineering Services. During the construction phase various other outsourced services are required related to Site staff, Accommodation travelling and Material Laboratories. On the basis of the above it is our opinion that the percentage of the contract to be allocated to new entrants should be the contract value before VAT minus all the provisional sums as the items are generally not in the scope of the new entrants or main contractor's fields of		

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			expertise. Our proposal based on the short experience of 2 Years of being exposed the new entrant system, and although not this is not long enough to make conclusions on how well it works, we recommend as follows:		
		Regulation 13		We propose that the wording is amended as follows: 13(1) "For contracts above R50 million the tender must subcontract a minimum value of 20% of the value of the contract before VAT less provisional sums to-"	
		General	The above comments are given is good faith on the principle of ensuring that there is a fair distribution of work to all sections of the demographic which makes up South Africa. We do not want to set up a system which is fails but one which is succeeds in providing		

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			work for as many citizens of our country as possible.		
64	**AIRPORTS COMPANY SOUTH AFRICA: PHUMZILE NJOKO**	**Regulation 1**	"black people" Kindly confirm if this definition shouldn't include "Chinese" people as decided by a court recently. "goods" and "services" Theses definitions seem incomplete.	*"goods"* *Includes goods as defined in the Consumer Protection Act 68 of 2008 including immovable property.* *"services"* *Includes services as defined in the Consumer Protection Act 68 of 2008 including construction or infrastructure related services.*	**Rejected: the constitutional court ruling referred to a group of Chinese who were here during apartheid years not all Chines. There is therefore no need to include them in the definition.**
		Regulation 4	Regulation 4(4)(c) This regulation is too subjective. We propose that it be removed or further parameters as to what is too high and what is too low be inserted.		**Rejected: in simple terms the regulations refer to a fair qualifying criterion.**
		Regulation 4 (6)	The cross referencing seems incorrect. Reference is made to regulations (5) or (6).		**Rejected: referencing is correct.**
		Regulation 5	5.1 We propose that in order to achieve the objective set out in the Media Statement, the threshold should be amended as seen in	"50/50 preference point system for acquisition of goods or services for Rand value up to	**Rejected: Regulations cannot introduce a new preference point system**

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			the next column. 5.2 Kindly advise whether the threshold is including or excluding VAT.	R30 million.	**contrary to one in primary legislation.**
		Regulation 6	6.1 We propose that in order to achieve the objective set out in the Media Statement, the threshold should be amended as seen in the next column. 6.2 Kindly advise whether the threshold is including or excluding VAT.	"70/30 preference point system for acquisition of goods or services for Rand value up above R30 million."	**Rejected: Refer to resolution on regulation 5 above.**
		Regulations 8(3)(a)	This regulation must be removed because it leaves room for misuse and manipulation.		**Rejected: it provides mechanism for resolving matters where tenderers score equal points.**
		Regulation 12	Kindly confirm if the cancellation of construction tenders must still take place in line with the Construction Industry Board Act and Regulations.		**The rules on cancellation provided here must be read with the rules provided by CIDB; treasury must be approached where there is conflict between the two rules.**
		Regulation 13(2)	This regulation should be removed because it contradicts the mandatory nature of regulation 13(1). Bidders may opt to be penalised rather than comply with regulation	Re-insertion from the Old Regulations 2011 Regulations 11(8), 11(9) and	**Accepted.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			13(1).	11(10) must be re-inserted to further the aims of B-BBEE and local production and content.	
65	**Black Elite Group: Ajay Lalu CA(SA) Director – Black lite consulting**		We at black lite consulting ("BLC") would like to thank you for affording us the opportunity to provide comments on the Revised Draft Preferential Procurement Regulations, 2016. Our mission is to Make a difference in the lives of ordinary South Africans. The services provided by BLC include advising clients on developing, implementing and improving their BEE strategies, Management consulting, and consulting on sustainable development strategies. Our key clients include MMI Limited, Kagiso Tiso Holdings, Anglo American, Department of Trade and Industry, SAB Miller, Tiger Brands and Sasol amongst others. We accept that an economically transparent and transformed public sector procurement system is critical to our continued growth as a country. We, however, believe that the		**Noted: unfortunately the regulations cannot prescribe a new preference point system other than following the one provided in primary legislation.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			public sector procurement System can do more to create an environment that Supports black owned and black women owned enterprises which will aid the overall growth, job creation and development objectives of South Africa. In our view The key matters that require urgent attention are as follows: 1. The draft regulations are not Going far Enough to support s 217 of the Constitution; 2. The 90/10 And 80/20 System does Not advance or Protect small Black owned companies. We propose A 50/50 preference Point system For acquisition of Goods or Services for Rand value Up to R100 Million and 70/30 preference Point system For acquisition of goods Or services With Rand value Above R100 million; The definition Of goods and Services as Per the Draft Regulations Relates only to		**Noted: the definition will be revisited.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			Infrastructure procurement and should be extended; and		
		Regulation 10	30% Of all Government tenders Should be Reserved for black owned and black women owned enterprise as opposed to making it compulsory to sub-contract a minimum of 30 per cent of the value of the contract for all contracts above R30 million.		
		General	Included below are our detailed comments On the Draft Preferential Procurement Regulations. This document Reflects our comments On the Draft Preferential Procurement Regulations. Please feel Free to contact us, as we would be willing to engage further to discuss the contents of the Draft Regulations.		**Noted.**
66	**KPMG Services (Pty) Ltd KPMG Inc: Edson Magondo**	**Regulation 3**	Uncertainty seems to exist on what scorecard will be used.	It is suggested that the specific scorecard also be referenced in the Preferential Procurement Regulations.	**Noted: Although it makes sense to state which score card will be used however it is not possible to mention a specific score card every time a bid is advertised also because public procurement is open to**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
					all and should not be seen as limiting other potential bidders from tendering.
		Regulation 5	A stepped approach is suggested	70/30 is suggested for tenders to the value of less than R50m, and then 80/20 up to R100m and 90/10 above R100m.	**Rejected: the Act does not allow for introducing another preference point system.**
		Regulation 8	A more refined set of deadlock breaking mechanisms suggested.	It is suggested that draft Regulation 8(3) be replaced by the following: (a) bidder with the highest black female ownership percentage, then if still equal (b) bidder with the highest black ownership percentage (c) bidder with the highest disability score	**Rejected: organs of state cannot introduce new criteria after closing date and time of tender to award a tender.**
		Regulation 10	Please see suggestions.	Draft Regulation 10(1)(a): Should this criteria not be capped – e.g. minimum Level 5 – especially since the qualifying criteria may disqualify all potential bidders Draft regulation 10(1)(b): It is	**Noted: the idea is that this will be based on a tender and sectors hence the discretion is left to organs of state.** **Suggestion noted and**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
				suggested that consideration be given to a sliding scale linked to the size of the contract	will be subject to deliberation further by the team.
		Regulation 12	A stepped approach is suggested (see recommendation column). We have some concern around the availability of EMEs. Very practically: the moment an EME is subcontracted, such EME does no longer qualify as an EME. In the long run the list of available EMEs are thus likely to be exhausted. QSEs are available, but a similar problem is envisaged.	1. It is suggested that a scale approach be followed, implying 10% on some tenders and up to 30% on others. The following is suggested: 10% to go to EMEs if the contract value is R50 million or more, 20% if more than R30 million but below R50 million, and say 30% if below R30 million 2. It is suggested that the categories of parties that can be contracted to, be extended to include medium-sized companies as well.	Suggestion noted and will be subject to deliberation further by the team.
		General	Please note that KPMG remains available to engage and interact on the Draft Preferential Procurement Regulations. We would like to thank you for taking this matter forward in a very practical manner.		Noted.

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	Mercedes-Benz South Africa: Arno van der Merwe CEO of Mercedes-Benz South Africa and Executive Director Manufacturing Mercedes-Benz South Africa Ltd	**General**	We refer to the Preferential Procurement Policy Framework Act 2000: Draft Preferential Procurement Regulations, 2016 Publication for Public Comment, published under Government Gazette No: 40067, on 14 June 2016 (herein after the "**Bill**"). 2. Mercedes-Benz South Africa Limited (herein after "**MBSA**") would like, at the outset, to thank the Department: National Treasury (herein after the "**Treasury**") and the Hon. Minister Pravin Gordhan, for the opportunity to provide comment on a very significant piece of legislation for the transformation of the social economic environment in South Africa. 3. As part of MBSA's ongoing drive towards development and transformation, MBSA continuously aims to find ways to support the people and businesses in the communities in which MBSA operates. 4. MBSA is committed to supporting small and medium-sized enterprises in the BBBEE		**Noted: a better way of subcontracting will be investigated so that it is not a one size fits all approach.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			category and this has been part of the overall objectives and long- term strategy of our business. MBSA not only contributes to the socio-economic landscape in financial terms, but we work hard to build partnerships that nurture start-ups and entrepreneurs in a sustainable manner which allows them to run as fully independent businesses. 6. As such, MBSA is proud to be part of transformation in the automotive industry and the South African market in general. We made various financial and non-financial contributions in 2015, which included, but was not limited to, financial contributions totalling R18 Million for supplier and enterprise development programmes. 7. We acknowledge the ongoing need and importance of Broad-Based Black Economic Empowerment in the automotive industry and South Africa at large. In light of the aforementioned, we support the proposed		

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			Bill fully, however we wish to provide some comments in relation to the practicality of the implementation thereof going forward.		
		Regulation 13(1)	Section 13 (1) – Requirement for 30 percent sub-contracting; 8.1. From the perusal of the proposed regulations in section 13, it is evident that the objective is to enhance the black-owned small and/or medium enterprises for the purpose of the development and skill transfer in order to participate in the broader economic environment.	In light of the aforementioned, MBSA would like to make certain submissions on how the concerns raised may be addressed. MBSA, therefore, proposes the following: 8.6.1. MBSA is of the view that the objectives of the proposed regulations can be achieved successfully, however, such	**Noted: a better way of subcontracting will be investigated so that it is not a one size fits all approach.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			The reality of the automotive industry is that the provision of products, goods and services requires high capital investment; is highly specialised; in some instances has low or inconsistent volumes with high risks; and low margins. Therefore, high capital expenditure and investments will be required to empower business to provide the necessary goods and services at the standards required within the industry. MBSA has made a lot of headway to address these aspects; however, such remains a concern for the implementation of the requirement in the Bill. Should an SMME be identified as a possible supplier, the volume and value of the work connected to the supply of a high-value product (such as a bus) will cause the SMME to no longer fall in the qualifying category of an EME or QSE, which inadvertently will have the undesired consequence that the SMME will no longer benefit from the proposed section 13. Due to the specialist nature of the goods and	cannot take place instantly due to the scarcity of such suppliers and thus a transitional period of no less than two (2) years is suggested to allow for the development of suppliers and enterprises. It is further possible to achieve the objective of EME and QSE development, and address the concerns identified in paragraph 8.3 and 8.5, by linking the percentage suggested, not to the overall contract value, but rather the total sub-contract value. This will enable businesses to develop sub-contractors without any impact on pricing and this will further ensure that QSEs and EMEs are developed in a sustainable manner and will continue to benefit from the proposed regulation in section	

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			services, the QSE or EME (SMME) will not be able to continue to render services in the future as it will be excluded from further participation in tenders, which will make the possible development of the SMME superfluous. Due to the specialist nature of the automotive industry and the demand for skilled service providers it comes as a challenge to adhere to the abovementioned section due to the scarcity of black-owned EMEs and QSEs. MBSA continuously attempts to address the aforementioned, however, the concerns identified in paragraph 8.2 remain barriers to achieve enterprise and supplier development in certain areas within the automotive industry. Thus the reality is that the 30% sub-contracting requirement would not be able to be achieved if such is implemented with immediate effect. There could be situations where only a small	13.	

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			percentage of the contract value is sub-contracted, which will automatically place the supplier in contravention as it would be impossible to sub-contract 30% of the total contract value for the goods or services to another third party. It is suggested that 30% of the sub-contracted value be used as an alternative.		
		General	MBSA fully supports the Bill and believes that the analysis and comments will assist in reaching the objective to create and promote added value for businesses through development, involvement and integration. MBSA is, and shall remain, committed to find tailored solutions to address the possible inequalities within the automotive industry. We therefore trust that the Treasury will find the aforementioned in order.		**Noted.**
66	**Construction Industry Development**	**Regulation 1**	1. Definition of "GOODS" cannot be "includes infrastructure"	Both definitions are aligned to the definitions prescribed in the previous regulations but	**Discuss with CIDB for clarity**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
	Board: Ms Hlengiwe Khumalo		Definition of "SERVICES" cannot be "includes any services to build or maintain infrastructure"	expanded to include infrastructure. The definitions must be stated in full in the final set of regulations.	
		Regulation 5	Net effect of raising the 80/20 preference point system to R100 million could result in a significant price premium on total infrastructure budget. See table under general comments on Page 8	Revision of the clause to a Rand value of up to R40 million for a more appropriate level of project cost for the application of the 80/20 rule	**Noted. No rationale provided for the R40million threshold. The thinking of NT in raising the threshold to R100 million was to allow for meaningful participation of previously disadvantaged groups.**
		Regulation 6		Revision of the clause applicable to a Rand value above R40 million for a more appropriate level of project cost for the application of the 90/10 rule.	**See comment above**
		Regulation 7	Section 7.3 (a) is confusing as an example as the minimum subcontracting requirement	**Recommendation:** Item (a) of Section 7.3 (a) is removed.	**Noted. This section will be revisited to consider**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			has already been used as an example in Section 10 for prequalification. The emphasis of Other Objective Criteria should be on "Risk Management" and Risk Mitigation" measures that will allow the client to use an objective measure to award to an alternative bidder other than the highest point scorer. The example in 7.3 (a) is misleading and could result in the misuse of the subcontracting requirements as prescribed. Items 7.3 (b) (c) and (d) are adequate but better guidance must be offered for the developed of further objective criteria. Note that the use of "tenderer sub-contracting a minimum of 30% of the value of the resulting contract to one or more: EMEs or QSEs owned by black people" provides for specifying a minimum of (say) 95% – which is not acceptable.		**the inclusion of parameters/thresholds within which to sub-contract.** **(Note for NT: Also look at the possibility of creating an exhaustive list of objective criteria)**
		Regulation 10	Section 10 (b) "the tenderer to subcontract at a minimum of 30% of the value of the contract…." what mechanisms are there to avoid 100% of the value of the contract being subcontracted as the regulation only	**Recommendation**: Section 10 (1) change proposed as follows: 10.(1) An organ of state must apply the following to pre-qualifying criteria in the	**Noted. The recommendation regarding sub-contracting a minimum % even for contracts**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			specifies the minimum? This could have the adverse effect of legitimising the selling of tenders / contracts where 100% is outsourced.	evaluation of a tender, but not limited to- the tenderer must have a stipulated minimum B-BBEE status level of contributor or B-BBEE status Level 1; for tenders up to R30 million, the tenderer to sub-contract a minimum percentage of the value of the contract to one or more- EMEs or QSEs owned by black people who are female; EMEs or QSEs owned by black people from the ages 14 to 35; EMEs or QSEs owned by black people; (vi) EMEs or QSEs owned by black people with disabilities. for tenders exceeding R30 million, the tenderer must sub-contract a minimum of 30 percent of the value of the contract to one or more- EMEs or QSEs owned by black	**below R30m will be considered.** **The issue regarding sub-contracting a minimum of 30% for contracts above 30m will be revisited in light of other comments received.**

PUBLIC COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016

NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
				people who are female; EMEs or QSEs owned by black people from the ages 14 to 35; EMEs or QSEs owned by black people; (vi) EMEs or QSEs owned by black people with disabilities. co-operatives conducting business in the municipal area or province where the goods or services are required; targeted local labor; enterprises conducting business in a township or rural area in the municipal area or the province where the goods or services are required;	
		Regulation 13(1)	Section 13 (1) requires revision to make it easier to monitor. As is currently stated, it is impractical to require the details of enterprises to be subcontracted to at tender stage and to monitor on projects involving a high volume of subcontracting arrangements. The cidb recommendation is therefore to	**Recommendation:** changes proposed as follows: 13.(2) If a successful tenderer does not meet the requirements of 13(1), the organ of state must penalise the tenderer 10% of the value of the contract, unless the tenderer submits a satisfactory	**Noted. This requirement will be revisited and aligned with the provisions of regulation 14.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			remove the words ""without disclosing it in the tender documents".	reason.	
		General	The draft regulations are supported in general and may yield significant improvements in supporting emerging business through government spend. However, those matters that have been highlighted for comment are pertinent to transformation in the construction sector and therefore require review in order to enhance the draft regulation. For this reason, the CIDB requests engagement with the team developing the PPPFA regulations to ensure that issues adversely impacting transformation in the construction sector are considered in the final set of regulations. It is noted that the draft PPPFA Regulations have deleted the need to report non performing service providers to the National Treasury Database of Restricted Suppliers. This should be made clear in your media statement supporting the final regulations. Note that non-performance of contractors on infrastructure projects remains a		Noted.

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			transgression to the cidb Code of Conduct and such reports through our Register of Projects will continue to be investigated. It is assumed that for the construction industry, the price premium to be absorbed by government in order to stimulate the development of small enterprises is as follows:		

EST CONSTRUCTION SPEND		TOTAL	GRADES 2-5	GRADE 6-9	PRICE PREMIUM			
GOVT	PUBLIC CORP		50%	50%	1%	5%	10%	12.5%
R64 B	R72 B	R136 B	R68 B	R68 B	R686 M	R3.4 B	R6.8 B	R8.5 B

			The importance of the price premium is that it concurrently reduces the amount of funding available for infrastructure. It is almost certain that the funding cuts will impact on the bottom-end projections which could result in a lesser spend for projects planned for the Grade 2- 8. The net effect of this is the shrinking of business opportunities to that level of contractors that need it the most. For this reason the cidb		**Noted. These regulations will be reviewed in the light of all other comments received as well on this matter.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			recommends that the 80/20 principle is applicable to projects below R40 million (see comment on Regulation 5). In addition to comment on the application of the 80/20 principle to R40 million, the cidb recommends that the band for Request for Quotations (RFQ) be raised to R1 million (this requires a change to the Supply Chain Management (SCM) Regulations) to further stimulate the development of small enterprises. It is also recommended that National Treasury monitors the percentage value of contracts subcontracted to evaluate whether, for example, subcontracting doesn't extent to the region of say 90%, which could support Fronting.		
67	**NASHUA: BHAVIK KHOOSAL**	**Regulation 1**	Uncertainty or ambiguity creates an environment in which abuse can be disguised errors or interpretational differences.	All terminology used in the Act, Regulations and Tender/Contract documents should be clearly explained.	**Noted: it would have been much better had those terms be identified so that one has an idea of the terms that are ambiguous**
		Regulation 5	The threshold has increased by 9900%. The	Using the 80/20 rule for tender	**Noted: however the**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			purpose of the PPPFA is to ensure government is not significantly overcharged when favouring BEE targets.	contracts up to R30 million would be more favourable in order to avoid government's willingness to support BEE being abused.	**suggestion is not supported by any reasoning compared to the proposed R 100 Million.**
		Regulation 6	Please note change from above R1m to above R100m	To be amended in line with above paragraph	**Refer to comment on regulation 5 above.**
		Regulation 7	Pre-Selection of suppliers becomes a likely probability by allowing contracts to be awarded when not scoring the highest number of points. Transparency of procurement sources must be a key focus are for the PPPFA	Insist that tender documents contain a predetermined point scoring mechanism for the objective criteria they require when creating the document.	**This criterion is applicable where the intention is to award to designated groups to meet empowerment targets and they are beaten on points.**
		Regulation 7(2)	After scoring the highest and complying to the minimum criteria they can theoretically still select lower scoring bidder but with higher criteria compliance.	Include a pre-approved scoring mechanism, which must be stated in the tender documentation for all objective criteria to be used.	**Noted: the regulation will be revisited to provide for more control when applying the regulation.**
		Regulation 7(3)		A mechanism may be required which ensure that the context requirement of this clause is adhered to. Pre-approval should be required prior to the use of objective	**The comment is not clear as to whose pre-approval is required. Reports however will be submitted to the relevant treasury to do an**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
				criteria.	analysis of how the regulation is implemented.
		Regulation 7(3)(a)	Various partnerships and consortiums may be created for every tender. While this may be the intention, the potential for creating business partners without operational capacity is great. It is also likely that fully compliant suppliers who have scored the most overall points may be overlooked in favour of the above partnerships and consortiums, stunting the actual growth of real entrepreneurs. Brand reputation is at risk if the project is not successfully completed.	A mechanism may be required which ensure that the context requirement of this clause is adhered to. Pre-approval should be required prior to the use of objective criteria. A site visit of subcontractor's premises will be required by procurement officials as part of the tender requirements.	Noted: the joint venture and partnership to advance designated groups will be revisited to ensure that it is linked with objective criteria, subcontracting, and Prequalification criteria. It is up to organs of state to perform due diligence on the ability of a supplier to perform according to contract.
		Regulation 7(3)(b)	Existing business may be difficult to locate and new businesses may be difficult to create when the delivery site and manufacturing site are not relatively close. Transfer of skills to these businesses also becomes impractical for a manufacturing concern.	Focus here should be on the imparting of skills and knowledge to the communities in these areas. Specifically related to the delivery of the goods and services, but not for general social support.	The regulations seek primarily to empower businesses of designated groups. Empowering through skills is left to the Small Enterprise Development Agency.

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
		Regulation 7(4)	The reporting of non-compliance after the fact does not provide transparency and comfort to the general public. Errors and abuses made can be covered up within 30 days after awarding.	Avoid this situation completely by using a point system to allocate the highest scorer on objective criteria.	**Noted: however this seeks to ensure that points alone do not determine who wins the tender as the constitution did not prescribe points and the PPPFA provides that objective criteria can be used in other instances.**
		Regulation 8(3)		Call for a presentation and a vote before applying a and b	**Rejected: this can be considered as second chance. However a more definitive method must be found.**
		Regulation 8(3)(a)		Perform a second independent evaluation after which a coin can be flipped by an independent third party with all tenderers present.	**We agree with a third party flipping a coin but not in the presence of tenderers.**
		Regulation 8(3)(b)		Perform a second independent evaluation after which lots can be drawn by an independent third party with all tenderers present.	**We agree with a third party drawing lots but not in the presence of tenderers because the tender is not yet awarded**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
					at this stage.
		Regulation 9	Importation of goods/services should be Strictly prohibited when local manufacturers are able to supply the required goods and services even if circumstances where the local manufacturers BEE compliance level is not at the required level. Importation where local supply is available creates South African unemployment while enriching other countries and their people.		**Noted.**
		Regulation 9(1)	This would be impractical to implement where the goods are not available locally.	There should be an exemption process to apply but only in valid, verifiable instances.	**Noted: however this is catered for in different Instructions issued for each sector/ product.**
		Regulation 10(1)(a)	This could result in businesses being excluded from tenders entirely based on B-BBEE status level, even if the business is one of very few or the only one actually capable of delivering under the tender.	It is imperative that functionality and operational capacity must be the first point of evaluation.	**Noted, however this can be used to force transformation in sectors that are not open to business transformation.**
		Regulation 10(1)(b)	Various partnerships and consortiums may be created for every tender. While this may be the intention, the potential for creating business partners without operational capacity is great. It is also likely that fully	A mechanism may be required which ensure that the context requirement of this clause is adhered to. Pre-approval should be required prior to the use of	**Noted: the joint venture and partnership to advance designated groups will be revisited to ensure that it is linked**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			compliant suppliers who have scored the most overall points may be overlooked in favour of the above partnerships and consortiums, stunting the actual growth of real entrepreneurs. Brand reputation is at risk if the project is not successfully completed	objective criteria. A site visit of subcontractor's premises will be required by procurement officials as part of the tender requirements. The act should be amended to exclude items of a classified nature that could have a negative impact on State Security Like:(i) the design and development of classified electronic hardware;(ii) the development of embedded software or application software;(iii) the manufacture of the classified electronic hardware, such as military communications equipment, encryption terminals, etc.	**with objective criteria, subcontracting, and Prequalification criteria.**
		Regulation 13(1)	In high tech industries with low volume production. Components cannot be sourced locally and to create a business for such low volumes does not make sense. We run multiyear technology development projects. We cannot determine what will be subcontracted prior to the final concepts and	A mechanism may be required which ensure that the context requirement of this clause is adhered to. Pre-approval should be required prior to the use of objective criteria. A site visit of subcontractor's premises will be	**Noted: it is accepted that subcontracting should not be a one size fits all approach but organs of state should identify tenders where subcontracting may be**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			designs which typically only happen in the 2nd year of the contract. This is not a standard product with a list of components. Sub-contracting clauses contained within tender documentation must be suitable in terms of the service/product required. For example purchasing equipment from the actual manufacturer, will not allow for subcontracting. Making a blanket statement to this effect may increase the likelihood of creating opportunistic intermediaries and increasing the cost at which government procures goods and services.Various partnerships and consortiums may be created for every tender. While this may be the intention, the potential for creating business partners without operational capacity is great. It is also likely that fully compliant suppliers who have scored the most overall points may be overlooked in favour of the above partnerships and consortiums, stunting the actual growth of real entrepreneurs.Brand reputation is at risk if the project is not successfully completed	required by procurement officials as part of the tender requirements. The act should be amended to exclude items of a classified nature that could have a negative impact on State Security Like:(i) the design and development of classified electronic hardware;(ii) the development of embedded software or application software;(iii) the manufacture of the classified electronic hardware, such as military communications equipment, encryption terminals, etc.	used to empower designated groups.
		Regulation 15(a)		Simultaneously inform business	Instructions and

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
				on matters pertaining to these Regulations	circulars are published on treasury OCPO website so that business and the public at large can be informed of policy developments.
		Regulation 15(b)		Simultaneously provide guidelines to business	Refer to resolution on regulation 15 above.
68	National Department of Public Works: Ms Adila Chowan	Regulation 1	Definition of a Tender to be included	Tender means a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals; The word tender and Bid are used interchangeably.	Accepted: the 2011 definition will be brought back.
		Regulation 5	Regulations 5(5) and 6(5) are silent on whether Unincorporated Consortia or Joint Ventures have to submit proof of consolidated B-BBEE status level contributor. Question: Are sworn affidavits acceptable for unincorporated entities (trust, consortium	A trust, consortium or joint venture will qualify for points for their B-BBEE status level as an unincorporated entity, provided that they entity submits their consolidated B-BBEE scorecard as if they were a group	Noted: regulation 11 of 2011 will be brought back as it provides clear regulations in this regard.

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			or joint venture)?	structure and that such a consolidated B-BBEE scorecard is prepared for every separate tender.	
		Regulation 11	This section is related to disposal and should not be included in the PPPFA as the act deals will procurement	Remove the section	**Noted, the regulation dealing will be revisited in line with other similar comments received.**
		Regulation 12	The draft PPPFA indicates that 30% of contracts over R30m must be sub contracted to designated groups There is no option of a discretion in terms of any limitations Construction contracts based on value and grading – this would impact subcontracting Does not define the process for subcontracting Does not define the process to address disputes between contractors and payments and who will be responsible Does this mean that the parties need to form a consortium or a joint venture when they tender		**Noted: it is accepted that subcontracting should not be a one size fits all approach but organs of state should identify tenders where subcontracting may be used to empower designated groups.**
69	**TRANSNET:**	**Regulation 1**	The Draft Regulations makes reference to		**Noted. We will revisit the**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
	DISEBO MOEPHULI		the expressions "sub-contract", "tender", "trust", "trustee" in different regulations of the Draft Regulations. It is further noted that these expressions were defined in the Preferential Procurement Regulations, 2011. In view of the fact that the expressions are still relevant in the Draft Regulations, Transnet recommends that the expressions be included in the definition section. The Draft Regulations defines "designated group". "Designated groups" means – (a) black people; (b) women; (c) people with disabilities; or (d) small enterprises, as defined in the National Small Enterprise Act, 2005 (Act 102 of 1996). Paragraphs (a)-(c) of the proposed definition may give rise to different interpretations i.e. whether non- South African would also be included in the proposed definition. If that is not the intention of the Minister to include non-South African, Transnet recommends that the definition be reconsidered.		**definition section to include relevant definitions.** **Noted. Definitions will as far as is practicable, be aligned with the B-BBEE legislation.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			Consideration may be given to adopting the definition provided for in the Employment Equity Act, 1998 (Act 55 of 1998). Consideration may be given for the definition to read as follows: "designated group" means – (a) designated groups as defined in the Employment Equity Act, 1998 (Act No. 55 of 1998); or (b) small enterprises, as defined in the National Small Enterprise Act, 1996 (Act No. 102 of 1996). (c) designated groups as defined in the B-BBEE Codes of Good Practice, under Part 2 on page 93 The Draft Regulations defines "goods". "Goods" includes infrastructure. Andrew Burger states that legislative drafters should avoid using the expression "includes" in a definition section as it is contradictory and may give the definition a wide interpretation.1 Transnet recommends that the Draft Regulations should explicitly provide an appropriate definition of "goods". Consideration may be given for the		**Noted. Definitions will be revisited taking into consideration all comments raised.** **Noted. See comment**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			definition to read as follows: goods" means – – "any physical object or objects which has value, whether raw or processed, movable or immovable". The Draft Regulations defines "non-firm price". "Non-firm price" means a price other than a price that is only subject to adjustments in accordance with the increase or decrease resulting from the amendment, imposition or abolition of any applicable tax which affects the price of the required goods or services. It is important to note that the definitions are meant to remove ambiguity and vagueness especially in legislation with a technical content. The Courts also find it difficult to interpret some of the definitions which are vague. In the case of Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another , Kotze JA, whilst ascertaining the meaning of the word in legislation stated that the legislation is addressed to the		**above.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			general public and not to a particular trade or section of the community. The legislature must ensure that the wording of the definition in legislation will be clearly understood by the general public. In Santam Insurance Ltd. V Taylor , Botha JA, whilst expressing the difficulty of ascertaining the intention of the legislature had the following to say: "In an attempt to escape from the prolixity which disgraces this piece of legislation I shall take a number of short cuts when referring to its provisions…In my opinion the man in the street would be at least as perplexed by the language used by the Legislature as is the man on the Bench who is writing this judgment". In view of the remarks made by the courts, Transnet recommends that the definition of "non-firm price" should be reconsidered taking into account that it is vague and unclear to an ordinary man on the street. Consideration may be given in the Draft Regulations to provide a definition of "firm price" and "non-firm price". The definitions		**Noted. See comment above.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			may read as follows: "firm price" means – –"a price that is only subject to adjustments in accordance with increases or decreases resulting from the amendment, imposition or abolition of any applicable tax which affects the price of the required goods or services". "non-firm price" means – –"all prices other than firm price". The Draft Regulations defines "services". "Services" include any services to build or maintain infrastructure. In view of the comments on "non-price", Transnet recommends that the definition of "services" be reviewed. Consideration may be given for the definition to read as follows: "services" means – "the provision of labour or work, including knowledge-based expertise, carried out by hand, or with the assistance of equipment and plant".		

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
		Regulation 4	Section 217 of the Constitution and section 51(1)(1)(iii) of the Public Finance Management Act, require organs of state to be transparent in the manner in which received tenders are to be evaluated. Regulation 3(c) of the 2011 regulations and paragraph 6.2 (c) of the Implementation Guide: Preferential Procurement Regulations, require organs of state to mention 'applicable values' on tender invitations, where functionality featured as part of the evaluation. The Implementation Guide provides the following example for applicable values: 1 (poor), 2(average), 3 (good), 4 (very good), 5 (excellent) Evaluators are expected to allocate points to tenderers using these applicable values. The stipulation of applicable values assists tenderers to understand the manner in which points are to be allocated. The 2016 regulations in 4(3)(b) refers to 'points for each criteria and sub-criteria'. It is not clear whether this regulation 4(3)(b) purports to		**Noted. It should be borne in mind that the issues of evaluation are general SCM issues, which should be dealt with in the SCM prescripts and not PPPFA regulations. Furthermore, this also forms the subject matter of training, to ensure that evaluation takes place objectively. Finally, further clarity on these matters will also be contained in an Implementation Guide.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			achieve the same object as in 3(c) of the 2011 regulations. There is a need for regulation 4(3)(b) of the 2016 regulations to be revised so that it will be strict and clear that it requires 'applicable values' to be stipulated on tender documents. Furthermore, the regulations have to provide guidance on how these 'applicable values' are to be incorporated into tender documents. This is critical as a mere statement that 1 represents a poor score, exposes the process to non- objective scoring. It also allows evaluators to subjectively determine whether a tender is responsive or not, without a clear guide of what needs to be contained on a submission to justify any point allocation.		
		Regulation 5 and 6	Regulation 5 proposes to increase the application of the 80/20 preference points system threshold from R1 million to R100 million for purpose of stimulating the development of small enterprises. Regulation 6 proposes a 90/10 preference system for acquisition of goods or services		**Noted. We will revisit the thresholds applicable to the preference points system, in line with all other comments received.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			for Rand value above R100 million. In view of the above comment, Transnet recommends that the 90/10 rule apply to tenders that are above R50 million. The Broad-Based Black Economic Empowerment Amended Code of Good Practice, 2013 ("the Amended Code") provides that a measured entity with an annual turnover of between R10 million and R50 million will be regarded as a "Qualifying Small Enterprise" ("QSE"). In view of the fact that the Draft Regulations proposes a change on the application of the 80/20 preference points system from R1 million to R100 million with the intention of stimulating small enterprises, Transnet recommends that the application of the 80/20 preference point system be reconsidered to ensure alignment with the Amended Code. Consideration may be given for the threshold of the 80/20 preference point system to be increased up to the Rand value of R50 million. In terms of regulation(s) 5(4) and 6(4) a		**Noted. These regs are about preference and the basis of preference. Non-contributors or those who do not have a certificate, score 0.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			tenderer that does not possess a B-BBEE certificate may not be disqualified and may only score 0 points for preference. Firstly, there is a need to compel suppliers that have an interest in contracting with organs of state, to contribute towards transformation or the advancement of B-BBEE. It is understood that foreign suppliers may not have any B-BBEE credentials. However, the regulations may stipulate the manner in which such foreign suppliers may be treated, i.e. they may commit to partner with targeted enterprises. This should be a requirement that is open to organs of state. Secondly, regulation 10 allows organs of state to use minimum B-BBEE thresholds. There is potential conflict between regulation 10 and 5(4) or 6(4). Regulation 10 allows organs of state to disregard or disqualify tenderers without any B-BBEE credentials where the tender invitation has stipulated as such. It is suggested that NT remove regulation(s) 5(4) and 6(4) to enable organs of state to determine instances where		**We will revisit the concept of foreign suppliers partnering or sub-contracting with local suppliers.** **Rejected. The pre-qualification criteria will not be applicable to all tenders.** **The definition of "Rand value" does indicate that**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			tenderers may or may not be considered for a failure to possess a B-BBEE certificate. A stipulation that imposes minimum B-BBEE thresholds, will be preceded by thorough market analysis and research to ensure that the use of such minimum B-BBEE thresholds is justifiable. Thirdly, It is not clear whether or not the value thresholds to be used when determining the applicable preference point system, include or exclude all applicable taxes. The regulations must specify whether or not applicable taxes are to be factored into the budget in order to determine the applicable preference point system. This will create a level of clarity for organs of state. Regulation 5(5) states that "A trust, consortium or joint venture qualifies for points for B-BBEE status level of contributor as if it is a legal entity, if it submits proof of its B-BBEE status level of contributor. Clarity is sought if a consolidated scorecard for a joint venture or consortium result in a status of a Qualifying		**all applicable taxes are included.** **Noted. Further clarity will be sought from the dti in respect of this and other issues. However, the principle that should be borne in mind is that consolidated proof of B-BBEE status level of contributor must be provided for this entity (i.e. Trust, etc.). The issue of incorporated and unincorporated entities will be revisited. (re-look at wording of Regulation 11(7))**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			small Enterprise or Exempted Micro Enterprises. The Preferential Procurement Regulations, 2011 dealt with the submission of B-BBEE certificates by trusts, consortia and joint ventures, as incorporated legal entities as well as unincorporated legal entities. However, the PPPFA Regulations regulation 6(5) only deals with the submission of B-BBEE certificates by "legal entities". It no longer deals specifically with the manner in which an unincorporated joint ventures is required to submit B-BBEE certificates. In practice, organs of state often receive bids from unincorporated joint ventures that are not "legal entities". It is recommended that the provision in regulation 11(7) of the 2011 regulations must be retained viz that unincorporated joint ventures must		**Rejected. The PPPFA does not allow for the introduction of another preference points system. However, to assist in the advancement of certain persons or categories of persons, regulation 7, 10 and 13 have been introduced.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			submit B-BBEE certificates as if they were a group structure and that a consolidated B-BBEE scorecard should be provided for every tender. Lastly, it is suggested that organs of state be given a discretion to stipulate on a case by case basis, preference point systems that are necessary to advance transformation. There are instances where due to the slow transformation within a particular industry. Transnet would like to allocate higher points than the 10 or 20 for preference. Alternatively, Transnet may want to evaluate all criteria using a 100% i.e. price (60) and preference (40) but the 40 allocation for preference will be scored based not only on the B-BBEE certificate but also other preference criteria e.g. black ownership. Transnet would like to have discretion to use a system that will serve to achieve better value depending on the circumstances of the matter and the current reading of regulation 5 or 6 does not allow this flexibility.		

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
		Regulation 7	Tenders must be awarded to those tenderers that scored the highest overall points for price and preference. Section 2(1)(f) of the Act and regulation 7 of the draft regulations, allow organs of state to award tenders to those tenderers that did not score the highest overall points, where there is objective criteria for doing so. The objective criteria to be used must be stipulated on tender invitations (regulation 7(2)). Regulation 7(3) requires objective criteria to be specific to the context of the goods or services. The challenge with this regulation is that an organ of state may require tenderers to commit on enterprise development which does not relate to the goods or services and would not be able to do so due to this regulation. For example if an organ of state issues a tender for stationery and then uses the extent to which tenderers have committed to enterprise development as objective criteria, where the targeted enterprise development beneficiaries are in the business that does not relate to stationery. The organ of state		**Rejected. The regulation will be revisited to consider various objective criteria and to ensure that it does not lead to abuse by being open-ended. To compel an enterprise to commit to enterprise development in an industry different to its own may not be fair and reasonable.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			may not use enterprise development as objective criteria. Organs of state must be afforded a discretion to make use of any objective criteria, subject to having stipulated such objective criteria on the tender invitations and that such objective criteria may be justified. Furthermore, it is suggested that the regulations provide clarity on whether or not objective criteria may be used to award tenders to designated groups, i.e. black people, black women and black youth, etcetera. The current draft of the PPPFA regulations make reference to sub-contracting requirements to black owned entities as one of the options available to be used as objective criteria. It is however, not clear whether organs of state may use objective criteria to award the whole contract to a designated group. Lastly, the regulations must specify that objective criteria must be a new criteria that was never considered prior to the award		**Noted. We will revisit the drafting of this provision to ensure that greater clarity is provided.** **We acknowledge and concur with the issue raised of double-dipping. Given that the intention of these regulations is to promote the advancement of designated groups, we will revisit the regulations to provide**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			stage. For example the use of financial distress as objective criteria, can only be allowed where the technical evaluation criteria did not include a consideration on the financial well-being of the tender respondents. Another example is when the delivery lead-times have been evaluated as part of the technical evaluation stage, the extent to which a bidder will deliver earlier than others, cannot be used as objective criteria. The regulations need to state categorically that, double counting should not be exercised. Regulation 7(3)(a)(iv) of the PPPFA Regulation does not clearly outline how disability will be established. It is recommended that a definition of "disability" be provided and what supporting documents will be required to substantiate disability.		**greater certainty with regards to the objective criteria.** **Noted. We will consider providing a clear definition of disability and how such disability can be substantiated.**
		Regulation 8	The draft regulations provide that, where bidders have scored equal overall points after the evaluation of price and preference, the successful bidder will be the one that scored higher points for preference. It is		**Rejected. The determination for breaking the deadlock as indicated in the regulations is objective.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			suggested that instead of considering the status of a bidder's B-BBEE level, that the following hierarchy be employed to identify a successful bidder: a) Percentage of ownership by black people in the bidder; b) Percentage of ownership by black youth in the bidder; c) Percentage of ownership by black women in the bidder; or d) Overall percentage owned by black people in the bidder. If the entities are equal on (a) above, then (b) may be used to determine the successful bidder, and so on. Where bidders are equal on all of the above, then the B-BBEE status may be the differentiating factor. It is further suggested that reference to the 'tossing of a coin' to determine the successful bidder be removed from the regulations.		**Furthermore, organs of state cannot add other criteria after the closing of the tender.** **The reference to "tossing of a coin" or "drawing of lots" is something that has been in the regulations since their inception.**
		Regulation 10	Sub-regulation 10(1)(b)(ii) of the Draft Regulations provides that if an organ of state intends to apply pre-qualifying criteria in the		**Noted. The age of youth-owned enterprises[1] will be revisited to be aligned**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			evaluation of a tender, the criteria in the tender documents may include but not limit the tenderer to sub-contract at a minimum of 30% of the value of the contract to one or more Exempted Micro Enterprises ("EMEs") or QSEs owned by black people from the age of 14 to 35. The office of the Chief Procurement Officer of the National Treasury ("the treasury") made it clear in a media statement that this criteria refers to one or more black youth-owned EMEs. Transnet has noted that in terms of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008), "youth" means persons between the ages of 14 and 35. It is trite law that certain persons require assistance of a legal guardian during the execution certain juristic acts, for example a person below the age of 18 does not have the legal standing to litigate or conclude a binding contract without the consent of the legal guardian. Section 17 of the Children's Act, 2005 (Act No. 38 of 2005) provides that a child, whether male or female, becomes a major upon reaching the		**with the intention of the legislature.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			age of 18 years. When interpreting the legislation it is important to ascertain the intention of the legislature. The purpose of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) ("the Act") is to regulate procurement related activities which are undertaken by organs of state as defined in the Act. Transnet is of the view that it is not the intention of the legislature to ensure that the procurement related activities be concluded with a person below the age of 18 because that person cannot conclude a binding contract without the consent of the legal guardian and still considered to be a minor. Therefore, Transnet recommends that the criteria referred to in sub regulation 10(1)(b)(ii) be reconsidered. Consideration may be given for sub-regulation to read as follows: "10(1)(ii) EMEs or QSEs owned by black people from the ages 18 to 35". It is hereby proposed that black ownership(black women, black youth,		**Noted. This issue would need to be further considered, taking into account that in terms of the B-BBEE codes, the issue of percentage ownership differs in certain circumstances.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			etcetera) be used as pre-qualification criteria and not B-BBEE status level. This will ensure that transformation is accelerated. Furthermore, it is proposed that the pre-qualification to be used must not only focus on preferential procurement, as there may be instances where successful bidders may be required to commit to supplier and enterprise development, and the extent to which such suppliers are to commit, may have to be used as pre-qualification. Regulation 10 to be written in a manner that will accommodate all possible pre-qualifications that promotes socio-economic objectives.		
		Regulation 11	The 2016 regulations provide that it is not peremptory for organs of state to use the 80/20 or 90/10 preference point systems, during the disposal, sale or letting of property or assets. In instances where an organ of state intends to dispose-off property it may make use of preference points systems listed under 11(3) which also refer to 80/20 and 90/10, but give more points to a tenderer that has submitted a higher offer.		**Noted. This regulation will be revisited to better express its intention and also subsequent to a discussion with Gys Cronje.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			The use of these preference point systems is not a problem. The concern, however, comes about when one considers that in paragraph 14.1.4 of the Standard for Infrastructure Procurement and Delivery Management that was issued by NT on 6 November 2015, it is mentioned that an 'assumption shall be made in the case of tenders for framework agreements that the 90/10 preference points system applies'. NT must clarify whether or not only the 90/10 preference point system may be applied for infrastructure related disposal processes where an organs of state intends to enter into framework agreements and which of the two regulatory documents (regulations or standard) take precedence. This regulation 11, does not allow organs of state to set minimum pre-qualification criteria for preference. It is suggested that National Treasury expressly state on the regulations that prequalification may also be imposed for disposal, sale or letting related processes.		**Noted. This will be revisited to ensure advancement of designated groups in these processes as well.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
		Regulation 12	In terms of Regulation 12(1)(a),(b) and (c) the grounds for cancellation are too limited. The three grounds for cancellation as listed are not only restrictive but are also peremptory. An organ of state has no discretion to cancel a tender for reasons other than those listed. Yet, in practice there may be legitimate reasons for wanting to cancel a tender for reasons other than those listed in the regulations. For example, if an incorrect specification has been issued, that cannot be corrected simply by issuing an addendum to the bid document because it introduces a material change to the scope of work. It is recommended that the grounds for cancellation therefore be broadened to cover these scenarios or alternatively the regulation should be written not to create a closed list of grounds for cancellation. The Draft Regulations provides that an organ of state may only with the approval of the treasury cancel a tender invitation for the second time. Transnet recommends that the Draft Regulations should explicitly provide		**Rejected. Reasons for the cancellation of a tender must be definitive. To leave them open-ended can lead to abuse of the system.** **Noted. The regulations will be revisited to consider a suitable timeframe for a response from Treasuries.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			the period within which the treasury will respond to an organ of state on the submission made in terms of sub-regulation (3). In view of the nature of the business operations and the urgency of some of the procurements events which are undertaken by organs of state, Transnet recommends that the treasury should provide a response within 5 days of receiving a request from an organ of state. Consideration may be given by way of the insertion of sub-regulation (4) which may read as follows: "12(4) An organ of state may assume that approval has been given if it receives no response from the treasury on a submission made in terms of sub-regulation (3) within 5 days of submitting the request." Transnet further proposes that the approval from the treasury should be limited to a tender of a Rand value above R10 million. Consideration may be given by way of the insertion of sub-regulation (5) which may read as follows:		**Noted. The regulations will be revisited to consider the inclusion of a threshold value for the implementation of the sub-regulation dealing with approvals of the cancellation. Perhaps for lower value tenders, the approval may remain with the Ao/AA or delegate.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			12(5) An approval referred to in sub-regulation (3) is only applicable to a tender invitation for a Rand value of more than R10 million".		
		Regulation 13	The Draft Regulations proposes that for a contract above R30 million, the tenderer must sub-contract a minimum of 30% of the value of the contract to one or more: (a) Of the categorise referred to in regulation 10(1)(b); (b) Exempted Micro Enterprises ("EMEs") or Qualifying Small Enterprises ("QSEs"); or (c) Small businesses, as defined in the National Small Business Act, 1996. Transnet has noted the above sub-regulation and fully supports the proposed initiatives. The question that may be asked is whether the treasury will be able to monitor compliance with the above sub-regulation. It is well-known that tenderers may form a shell company which may be used to sub-contract with the view of meeting the requirements of the above regulations. Will		**Noted. This regulation will be revisited to also consider reporting requirements.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			the treasury be able to fully enforce this sub-regulation? One may also ask a question on what will happen when the tender is for a specific services which requires specialised skills and the categories of enterprises who are targeted to get 30% of the value of the contract does not have such skills or expertise. For example, not all commodities or services can be sub-contracted, Transnet's locomotives which are currently imported from foreign countries and sub-contracting for such commodities will not add value but will add more cost to an organ of state. There is further no clarity on how the 30% was derived, currently an organ of state like Transnet is achieving transformation through Supplier and Enterprise Development initiatives which is developed for each procurement transaction. Consideration should also be given that sub-contracting should take place to an entity which does not have any ties to any relatives, friends etc, so as to prevent the main contractor from benefiting directly or		

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			indirectly by the sub-contracting. Consideration should also be given to penalise or blacklisting contractors from future tender related activity with an organ of state in the event of such sub-contracting to relatives, friends etc. In view of the above, Transnet recommends that an organ of state be allowed to decide on whether the tenderer should sub-contract 30% of the value of the tender where the contract value is above R30 million. The 2016 regulations provide that it is peremptory for organs of state to require tenderers to sub-contract at least 30 percent of the contract value, where the estimated contract value is in excess of R 30 million. Firstly, it is not clear whether the threshold is inclusive or exclusive of all applicable taxes. Secondly, there may be contracts for goods or services where there is no potential sub-contractor, organs of state will therefore not be in a position to enter into contracts with any of the tender respondents due to the		

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			requirement of regulation 11(1). It is suggested that NT merely allow organs of state to impose minimum sub-contracting requirements, without NT stipulating the value threshold as well as the minimum percentage of such a sub-contract. This will allow organs of state to determine on a 'case by case' basis whether or not to include sub-contracting or even joint venture requirements depending on circumstances. There are instances where a contract is awarded to an entity falling within the designated black group, the regulations to specify whether such an entity will also have to commit 30 percent of the contract to entities listed under regulation 13 (a-c). It is further suggested that the regulation require that sub-contracts be given to entities that are at least 51% black owned (including black youth, black women and black people living with disabilities, etc). The draft regulations do mention that sub-contracts are to be given to EMEs or QSEs owned by		

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			categories of black people. However, it does not prescribe a percentage threshold where ownership is concerned. The regulations must allow organs of state to identify suitable sub-contractors. Regulation 13(2) requires organs of state to penalize any tenderer that has failed to disclose that it will sub-contract a percentage of the contract. It is assumed that this requirement will also apply where the estimated contract value is a minimum of R 30 million. If the assumption is correct, this regulation 11(2) will adversely affect tenderers for an oversight committed by an organ of state. This renders the practical application of this regulation to be unfair on tenderers. This is because the responsibility to ascertain whether or not a tenderer has stipulated its sub-contractor lies with an organ of state during tender evaluations. Particularly, since organs of state are expected to understand that no tender with an estimated contract value of a minimum of R 30 million may be awarded to a tenderer		

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			that did not stipulate its sub-contractor.		
		Regulation 14	This regulation allows organs of state to restrict any entity from doing business with that organ of state, where such an entity has misrepresented its B-BBEE status. The problem with this regulation is that it only allows organs of state to restrict entities, where the entity has misrepresented its B-BBEE status and not for any other reason. Regulation 13 of the 2011 regulations allowed organs of state to restrict entities that have misrepresented their B-BBEE status, or have failed to meet a condition on the contract. It is suggested that regulation 14 of the 2016 regulations be amended to allow organs of state to restrict entities for the same reasons as in the 2011 regulations as well as in instances where a tenderer has committed an act of dishonesty such as fraud, corruption, anti-competitive practices, etcetera. The regulations must also be aligned with other pieces of legislation such as the B-BBEE Act which provides that a		**Noted. This section will be revisited to expand on the remedies provided, however, the remedies will be limited to matters relating to the preferential procurement regulations.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			misrepresentation of a B-BBEE status is a criminal offence, which must also be reported to the B-BBEE commission.		
		General	**Set-asides** The regulations are silent on whether organs of state may set-aside some of the tenders to a targeted group of enterprises. The use of set-asides is very critical in an effort to drive transformation. The use of set-asides accelerates transformation and allows local or targeted suppliers to advance their enterprises. National Treasury must state on the regulations that set-asides may be used.		**Noted. However, the provisions of these regulations must take into account the current legislative framework and should be cautious of being ultra vires the PPPFA.**
70.	AfriBusiness - Armand Greyling	**Evaluation of tenders on functionality**	Discretion on Functionality: Section 4 of the proposed regulations state the following: "4(1) An organ of state must indicate in the tender documents if the tender will be evaluated on functionality."2 This places a strange discretion at the disposal of any state organ to decide whether or not functionality should be a considering factor when determining preferential procurement. The easiest route in any event for an organ of state would simply be to ignore functionality and stay with the criteria of lowest price and BEE-status, effectively rendering section 4(1)		**Rejected. This provision does not seek to place a discretion on an organ of state as to whether to apply functionality or not when evaluating a tender. Functionality is always applicable when the procurement is for services, or for goods that have a service element attached to them. Because these regulations are about**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			redundant. In our opinion this is ultra vires the Constitution because organs of state, as creatures of statute, do not have the prerogative to choose whether they want to apply section 217 of the Constitution or not. Section 217 of the Constitution might be an obstacle to this discretion by stating the following: "217(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."3 When the abovementioned is considered in light of the discretion on functionality, it can be argued that there should in fact be no discretion as to functionality, instead it should be a compulsory consideration when considering any tender contract. It is argued that functionality falls within the ambit of 'competitive and cost effective' as set out in the Constitution. This is because functionality can be described as a competitive edge that one supplier has above its competitors, thus having it form part of what is to be considered when evaluating and calculating a preference point. It is trite that the regulations already acknowledge		**empowerment, they do not expand too much on the functionality component of the Supply Chanin Management process, suffice to say that the functionality threshold should be determined separately for each tender process so that the enterprises that pass the functionality threshold are indeed capable of delivering the service.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			the need for functionality to be considered, otherwise it would've been left out. The problem is with the discretion provided to a state organ to either consider functionality or not, without giving comprehensive criteria on how to apply this discretion. In other words, when is an organ of state within the ambit of the law correct in not recognising 'functionality' as a factor to be considered? The correct approach should be that functionality should always be considered, as a contributing calculation when considering the remaining criteria of price and BEE-status. Section 4 of the regulations should set out evaluation criteria which is compulsory to be considered, and should also allow state organs to extend further criteria should they deem same necessary. The requirements of section 4(4)(c)(i) and (ii) which states that the qualifying score my not be so low as to jeopardise the quality of the required goods or services, and not so high so as to be unreasonably restrictive, allow for too much room for subjective evaluation of the criteria. This contrasts with section 4(2) which states that the criteria for measuring functionality must be objective, and therefore the regulations should stipulate, at the very least, a minimum objective list of criteria which		

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			should be considered when determining functionality. It may then also allow for any further criteria to be added, but not less than what is placed on the list of criteria without written consent to that effect from the applicable government official who presides over that particular organ of state.		
		Regulation 5 and 6: Increase in thresholds	The increase of the threshold from R1 million to R100 million for the preference point of 80/20 amounts to a 9900% increase. Any state contract above R100 million will be subject to a preference point of 90/10. This contradicts what the Constitution envisions in section 217(1) of the Constitution in that this turn of events does not place equitability nor cost effectiveness at the center point of contract negotiations. Furthermore, it is argued that the increase of the threshold is so grossly exaggerated that it boils down to deliberate sabotage and manipulation of the procurement system, not to promote equitable and cost effective tender processes, but to benefit a handful of companies at the expense of diligent state tender procurement processes. The BEE-score can be abused to circumvent the		**Noted. Thes comments have been considered together with other comments as well as considerations of government's socio-economic objectives, as well as obtaining value for money. As such the increase in the threshold is deemed necessary, but the upper threshold has been reduced to align with the QSE upper threshold amount.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			lowest price score up to a certain percentage, eliminating perhaps other well established businesses who have the expertise and functionality to provide a given product cheaper, quicker and better but who will fall out of the run, due to a lower BEE-score. This can be illustrated on the hand of the following example: Company A is a well-established firm of engineers with over 30-years of experience in the specific field of civil-engineering with over 200 successful projects completed for both organs of state and private clients. SOE is a state owned enterprise which requires that a section of tarmac be re-engineered and tarred to allow for the uninterrupted flow of ship freights from and towards warehouses for shipment and storage. SOE is willing to contract for this project in the amount of R1 million and advertises a tender for the project. Company A is a level 7 BEE company, offering to do the work for R1 million and has a preference point which amounts to the following as per the current regulations: (Inserted equation here) Therefore, Company A scores a full 80 points for the lowest price and 4 points for its BEEscore with reference to the table provided for in the regulations, amounting to a grand total		

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			of 84 points as its procurement score. Company B, on the other hand also shows interest in the tender and submits its details to SOE. Company B is a newly formed level 1 BEE company consisting of a few new engineers who completed their studies with 3 years post graduate experience each. They have never worked on a large project like this before and are willing to do the work for the current project in the amount of R1.2 million. Their preference point is calculated as follows: (They inserted a formula here as well) Therefore, Company B scores 64 points for the lowest price and 20 points for its BEE-score with reference to the table provided for in the regulations, amounting into a grand total of 84 points as its procurement score. According to section 8(1) of the regulations, Company B must be awarded the contract regardless of experience to be able to deliver on the contract, and regardless of the fact that it was more expensive than Company A. This is because according to the relevant section in the regulations, the contract must be awarded to the company with the highest BEE score. Therefore, Company A scores a full 80 points for the lowest price and 4 points for its BEEscore with reference to the table provided		

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			for in the regulations, amounting to a grand total of 84 points as its procurement score. That is why it is argued that the correct approach would be to always consider functionality when awarding contracts. Section 8(2) almost falls within the ambit, by making functionality the deciding factor, but this is subject to both entities scoring the same for lowest price as well as BEE-status, and scoring equally in the general sense. The current model makes massive headway for misuse and exploitation of the process without duly making functionality a meaningful consideration. If Company B for instance was only able to finalise the project 6 months later than expected due to capacity issues, then such a contract would cost more than tendered for, resulting in a breach of section 217(1) of the Constitution as the contract would not have been cost effective. If functionality is the determining factor, then organs of state would better be able to adhere to the Constitution. Merit should be given to a company being able to deliver on goods and services, and not because of a politically motivated system dressed under the vail of discrimination and being previously disadvantaged. Of course merit should be given to such individuals to be able to		

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			enter the market, but it honestly can't be considered the deciding factor when keeping in mind the Constitutional requirements of section 217(1). When it comes to delivering on state promises of infrastructure etc. the main focus should be on how to utilise tax funds diligently and responsibility to provide the maximum success for the most equitable and cost effective measures. This standpoint regarding functionality was confirmed in the case of Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others4 where it was held that: "[T]o 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."5 This standing of the court is of paramount importance because it sets the bar that when tender contracts are to be awarded for instance as in the example above, that functionality should be the deciding factor as to whom the tender contract should be awarded to. The court further held that: "[T]he point is simply that functionality should not be ignored in the final adjudication between competing tenders, and should be taken into		

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			account within the parameters of the Procurement Act. I therefore agree…that functionality or capacity is a relevant consideration and an objective criterion for the purposes of section 2(1)(f) of the Procurement Act. It therefore falls to be taken into account in deciding whether or not a tender should be awarded to a tenderer other than the one with the highest score for price and preference."6		
		Objective criteria (regulation 7)	It is clear that there should also be some guidance given as to what qualifies as objective criteria for the purposes of functionality. In Simunye Developers CC v Lovedale Public FET College and Another7 it was held that: "If one considers the scheme provided for in the PPFA, it seems inevitable that these objective criteria would invariably relate to the ability of a tenderer to perform the work in accordance with the tender specifications. They would often relate to the track record of a prospective tenderer in other related projects, its infrastructure and available financial resources and equipment. It goes without saying that when		**Comments have been considered, together with other submissions. Decision taken to remove these provisions from the final regulations but to include a subregulation that is "objective crtieria" are used, as provided for in the PPPFA, then the organ of state must ensure that such objective criteria**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
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			an organ of state considers the allocation of substantial public funds for such a project, it has a duty to ensure that the decision to appoint a particular tenderer will result in value for money. A decision to award a tender in the face of such objective criteria which put serious doubts on a tenderer's ability to complete the work satisfactorily and in accordance with the tender specification may well constitute wasteful expenditure. In this regard the organ of state will obviously have to consider the extent of the difference in the tender prices of the highest scoring tenderer and the tenderer which it is considering for the award. It goes without saying that the bigger the difference the more onerous it becomes for objective criteria to justify a decision not to award to the highest scoring tenderer."8 This emphasises the duty organs of state have in ensuring that when awarding a tender contract, they need to ensure that the decision to appoint a particular tenderer will result in value for money. If there is doubt on a tenderer's ability to perform the work required, then that will constitute wasteful expenditure.		**are stated upfront in the bid document to ensure transparency as well.**

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		General Comments	It is our submission that functionality should form an intricate part of the preferential procurement process, and that the regulations should outline specific objective criteria for organs of state to utilise in light of section 217(1) of the Constitution. Government should be wary of the possibility that the current model and calculation of points for preferential procurement could be abused in order to inflate prices if companies know they are stronger than their competitors in the BEE-segment. Where to companies score the same score, regardless of BEE-status, our submission is that the determining factor of who should be awarded the contracts, is the entity with the highest functionality score. This must be done whilst having regard to section 9 and 36 of the Constitution, but we submit that any regulation of law which undermines the aims of the Constitution should be declared invalid		**Noted. The comments are summarising what was said under the functionality submission.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
71	South African Medical Device Industry Association (SAMED) - Tanya Vogt	1. Definitions	It is not possible to just designate sectors or sub-sectors, specific tenders or goods must be designated	Designated sector means a sector, sub-sector, product(s) or tender …taking into account – (a) national development and industrial policies for local production and content; and (b) competition and other economic factors, and (c) feasibility- and other studies in relation to the envisaged designation and to which a stipulated minimum threshold applies	**Noted: A directive on application of Regulation 9.3 of the 2011 Regulation which will be brought back in these regulation will be issued after promulgation of the regulations.**
	South African Medical Device Industry Association (SAMED) - Tanya Vogt	1. Definitions	The stipulated minimum thresholds must be realistic. In a SAMED snap survey respondents, even those who manufacture locally, indicated that the bulk of their inputs or components are imported, and that for certain types of devices, no or limited local content would be possible.	"stipulated minimum threshold" means that portion of local production and content as determined by the National Treasury after consultation with the Department of Trade and Industry and which have been shown to be realistic, possible and feasible within the specific market or sub-market.	**The Instructions stipulate minimum threshold for local production and content. Industry can approach the dti if there are issues with minimum threshold are not feasible for local industries.**
	South African Medical Device Industry	4. Evaluation of tenders on functionality	"Functionality" is perhaps THE most important part of the tender process, and also of monitoring of a tender. Lack of properly crafted	Add to the regulation: Functionality must be determined with reference to the –	**There should be clear distinction between conditions of tender and**

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	Association (SAMED) - Tanya Vogt		tender specifications lead to the procurement of inappropriate, incomplete, in the long term costly, unused and/or ineffective medical devices.	(a) specific organ of state issuing the tender; (b) specific outcomes, short- and long-term, which are to be achieved by the tender; (c) short- and longer terms obligations placed on successful bidders, including services associated with goods; (d) infrastructure, human resources and associated goods required by the organ of state to implement or give effect to the tender; (e) persons who or entities which stand to benefit from, use or be affected by the tender.	**specification or functionality. The proposal is more on conditions/ outcomes of tender than functionality.**
	South African Medical Device Industry Association (SAMED) - Tanya Vogt	7. Award of contracts to tenderers not scoring highest points	The one category for which the point system can be negated, and also which features in relation to mandatory subcontracting (reg 13) and pre-qualification, are the small business, EME and QSE categories, which has to be, so SAMED assumes, 100% black-owned. SAMED's own membership (a total of 160+ companies), which includes most of the total universe of medical device suppliers (i.e. white- and some part-black-owned, a minority being 100% black-owned) and distributors, and from	Proposed amendment: 7.(1) Subject to the availability of qualified, licenced potential suppliers, able to fulfill the requirements of the specific tender and any post-tender obligations, a contract may be awarded to a tenderer that did not score the highest points only in accordance with section 2(1)(f) of the Act.	**Agreed objective criteria should not be used to appoint incompetent or unsuitable suppliers. Suppliers will have to pass the mandatory requirements, specification and functionality criteria where applicable before being considered for objective criteria.**

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			amongst which larger suppliers would have to contract, or from which the reg 7 provisions could be applied, show the following: Turnover up to R10m (i.e. EME's of all races): 40 Turnover R10m to R50m (i.e. QSE's of all races): 29 This means that there is a potential total (if white or partially-black-owned entities would have counted) of only 69 businesses in existence currently from whom a significant number of tenders, mostly from provinces, have to be subcontracted or appointed under reg 7. It appears that there are simply not sufficient numbers of black-owned medical device businesses, across the range of products required by the state, for any of these regulations to be effectively implemented. In a SAMED snap survey, the companies' portion of turnover that related to state business ranged from 0% to 75%, indicating that a significant number of SAMED's members will be impacted by these draft regulations.		
	South African Medical Device Industry Association	9. Local production and content	The Medical Device industry is indentified in the Industrial Policy Action Plan as an industry for development. However, as the replies to our snap survey show, very little progress appears to	New sub-regulations: Prior to the designation of a sector, subsector, tender, product or product group as envisaged in these	A framework for designating sectors, although under review caters for consultation of

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	(SAMED) - Tanya Vogt		have been made in growing smaller enterprises which are 100% or significantly black-owned, and even local manufacturers battle with local content requirements. The process of designation should be done in conjunction with trade associations in the field, and involve the relevant organs of state (Provincial, National Departments of Health, the NHLS, etc). It is also important that intended designations be published for comment to allow the industry to provide input as to the feasibility of proposed designations, prior to its finalisation.	regulations, the Natuonal Treasury shall – (a) consult with the Department of Trade and Industry; (b) consult with the affected organ or organs of state; (c) publish its intention to designate in the government gazette and invite all stakeholders and roleplayers to comment on the intended designation; (d) consider all input received; (e) publish the designation in a circular that is publicly available in terms of regulation 15.	all relevant stakeholders including industry role players.
	South African Medical Device Industry Association (SAMED) - Tanya Vogt	10. Pre-qualification criteria for preferential procurement	See comment on draft regulation 5. If a BEE level is set at level 3, for example, it will by definiton exclude all multinational suppliers. This could open the state entity up for legal challenges, including on competiton law grounds. Also see comment on draft regulations 7 and 13 on the EME's and small businesses.	Add sub-regulation: Prequalification criteria should be set such as to ensure that bidders are able to fulfil functionality criteria, and that there are adequate numbers of bidders so as to ensure a competitive process.	Noted: this will be applicable to identified tenders where organ of state wants to emphasize transformation or encourage industry players to transform. South Africa comes first.
	South African Medical Device Industry Association	12. Cancellation of tender	It is not only cancellations, but the non-issuing, and resultant extension of an existing tender that is problematic, and which would hamper effective implementation of these regulations.	(2) The decision to cancel a tender invitation in terms of sub-regulation (1) must be published in the same manner in which the original tender	National Treasury to assess if reasons for cancellation should be provided in the notice and whether this is

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	(SAMED) - Tanya Vogt		This could effectively lock out other competitors and increase the cost of products as there might be a cheaper product available or a better product with better outcomes and savings down the line. SAMED's snap survey shows the following in relation to tenders being cancelled, extended and/or not issued, the impact of which on the successful bidders, and other competitors who wish to enter, being apparent (as well as the future impact on sub-contractors under reg 13 if finalised): · Wound care tenders in three provinces being cancelled over the past three years, and the existing encumbents benefitting from extension in perpetuity. One of the reasons given related to local content, but no designation was officially published as is required by the current regulations. · Gauteng we have one that is crippling continuity with supply/prescription Which is GT21 for Bandages and dressings. The DTI Textile requirements not adhered to in the bid. · Extensions beyond the tender period also appear to be prevalent in orthopaedic tenders, with members mostly reporting that the reason for this is unknown. There is also an example of a national sutures tender that has been extended	invitation was advertised and must include: (a) the reasons for the cancellation (b) the prospects of re-advertisement of the tender (c) the status of the existing tender and any extentions thereto. New sub-regulation: Where a tender which has run its contractual course, and is extended, such extension, and the reasons therefore, must be published, with the duration of such extension, or alternatively, the manner and process in which goods or services will be procured until the allocation of the new tender to successful bidders, should be disclosed.	in line with PAJA requirements.

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			from 2014 into 2015 and then until end July 2016, but no new tender documents have been released. In some cases the reasons for the extensions relate to capacity constraints to evaluate bids, in particular if it is a large tender. · Various 2015 tenders are also still in the process of being evaluated or adjudicated, more than a year after the closing dates of the tenders. · There were also a few reports of cancellations with no reasons provided whatsoever. · Some tenders appear to be delayed as a result of corruption allegations. · Cancellation of a 2013 tender, awarded in 2016. was due to politics and lack of funds · Tender was "refloated" without reasons · Textile (bandages) tender was cancelled and there were extension on the previous tender that had now expired, and there is now a very long procurement process, with a risk to patient care as stock cannot be replenished fast enough. · A two-year contract had now been extended twice, another for a year, then 8 months and then another 8 months · Medical consumable tender cancelled · An NHLS tender extended 4 times · Cardiovascular, ICU and various other tenders were also extended, with members mostly not knowing the reasons		

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			· Rehabilitation and orthotic tenders extended 6 times · RT14 Tender has been extended, reason not known by ourselves · North West province multiple tenders cancelled lack of funds. All our tenders 80% of them call for extensions · The Western Cape Orthopaedic tender has been extended twice by three month periods. Current tender was supposed to expire in April 2016. WCDOH67-2016. The reason for the delay is the size of the tender and the shortage of staff in dealing with the administration of thereof. Of concern is that many cancellations appear to not be accompanied by reasons, and not by the reasons listed in draft regulation 12.		
	South African Medical Device Industry Association (SAMED) - Tanya Vogt	13. Sub-contracting	See comment on regulation 7. In addition, SAMED asked its members in a snap survey whether it would be able to subcontract its tenders over the value of R30m to an EME / QSE, and whether they are aware of potential candidates in their fields to whom they would be able to subcontract. Their responses included the following: · For expensive capex, one could at most	SAMED proposes that the mandatory sub-contracting regulation be reconsidered, and that research be undertaken as to what alternatives could exist to ensure an adequate number of EME /QSE suppliers in various medical device fields over the coming years.	**Subcontracting will be revisited so that it is not a one size fits all. It will also place discretion on organs of state to determine subcontracting based on sector and value of contract. The subcontracting value and**

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			subcontract 5 to 10% of the value · We would not be prepared to do this as we are already in effect our own Social Enterprise – we would much rather create additional jobs for previously disadvantaged SA citizens & that would include those who are struggling to make their own business a success. Not everyone is cut out to run their own Business by a very long stretch & doing so here in SA is far from easy, especially for small businesses. · We are a local manufacturer and we do source some materials from EME's and QSE's, but cannot do so for a large proportion of technically complex and highly specialised components that must be imported. It is an unrealistic requirement. We will never make 30% subcontracting. · These regulations will add additional pressure to companies who are already adhering (struggling to adhere) to the Codes under the Board Based Black Economic Empowerment Act.This additional financial burden will have a hugely detrimental effect on companies, some of which may even have to close down. · We are concerned as we know of no EMEs or QSE's in our field. · 30% is not realistic		**threshold will be revisited so that it is not too restrictive even where it could be applied to tenders below below R 30 Million. This regulation must be aligned with the provisions to form joint ventures and consortiums.**
			None (x 27)		

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			· Three to four · Five, depending on the type of product · Not aware of any / don't know · We will be prepared to help upskill such suppliers, if there were any · We are not aware of suppliers who would be able to take part of our products and deliver the product and services to the public sector · Due to the size of the tenders involved, if we subcontract, that entity who gets the subcontract will no longer be an EME or a QSE (x2) · We are an entity that is black-owned and could potentially benefit from this · 2 to 3, which would require significant investment in training, capacity and infrastructure to subcontractors, which we would not be able to afford · None, but most of our preferred suppliers are QSE's and EMEs · There are some issues with entities not being well-established or credible · Four · All our products are imported as finished goods · We have a partnership with a black-owned company that qualifies, we think, as a QSE · Financial backing of these entities is problematic., without credit they cannot buy and		

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			supply, or survive when accounts are paid late, which is often the case in the public sector. Some might close down. · We are a level 2 QSE – please tell the others · EME's and QSE's include white ownership as well, and not only 100% black-owned · We have BEE distributors who are awarded the tenders, none are above R30m · We have over 50 HDI (Historically Disadvantaged Individuals) distributors who have accounts with us, We do NOT however subcontract but are able to be their supplier of all our products. · We could only subcontract building works for certain tenders. Know of 1 company only. All of our components are imported. Most respondents knew of none, and some did not believe that the NT could set criteria for EMEs or QSE's that differ from that of DTI which allows for white ownership. A number of members said they know of about 2 potential subcontractors in their field. Even where there are 3 to 4 possible entities to subcontract to, if there are 10 or 12 bidders, they would have to "share" in the bidding process, which would also raise competition law concerns.		
72.	South African	5. 80/20 preference	5.(2) 20-Point table to calculate B-BBEE	5.(2) Proposed alternative 20-Point	National Treasury met with

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	Forum of Civil Engineering Contractors (SAFCEC)	point system for acquisition of goods or services for Rand value of up to R 100 Million	score (80/20) The table indicated in the Regulations affords a recognition level out of 20 points based on the BBBEE Status Level of the tenderer. This table's purpose is therefore the same as the table in paragraph 8.2, Statement 000 of the B-BBEE Codes which does the exact same thing for purposes of business to business procurement. The problem with the proposed table is that it does not afford the same proportionate recognition to the B-BBEE Status levels as the table in the B-BBEE Codes. As such it is misaligned and gives an even bigger competitive advantage based solely on black ownership to the detriment of the other elements of the scorecard when it comes to government procurement, than that which is provided for in business to business procurement in Statement 000 of the B-BBEE regulations. A business without majority black ownership at best (in highly unlikely circumstances) will be a level	table to calculate B-BBEE score (80/20) **The proposed table below aligns the 20 points to the recognition levels in Statement 000 of B-BBEE Codes. Even though this may be believed to be unfair, and therefore unconstitutional as per the reasons above, at least it is not arbitrary.** **B-BBEE Level No. Points** **Level 1 20** **Level 2 19** **Level 3 17** **Level 4 15** **Level 5 12** **Level 6 9** **Level 7 8** **Level 8 2** **Non-Compliant 0**	**the dti and agreed to revise allocation of points per B-BBEE status level. The new points will be contained in the final draft**

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			4 but more realistically a level 5 or below. This provides an 8 to a 12 points advantage to a black owned business, just based on this table. This is without considering the other advantages B-BBEE Status automatically affords such as the set-asides already provided for in other mechanisms of the Regulations.		
73	Bigen Africa Services (Pty) Ltd	1. Definitions	"designated group" Inclusion of small enterprises as defined in the National Small Enterprise Act - this is providing a preference for a 'different type of group' (small enterprises independent of race, gender and disability) as opposed to the aforegoing 3 groups who were previously disadvantaged.	Refer to comment(s) and amend the regulation accordingly.	**The definition will be aligned with the B-BBEE Act as amended.**
	Bigen Africa Services (Pty) Ltd	1. Definitions	"infrastructure" 'or' - should be 'and / or' to include both immovable as well as movable assets associated with service delivery	Refer to comment(s) and amend the regulation accordingly.	**Noted: will revise accordingly.**
	Bigen Africa	1. Definitions	"local production and content" (b) costs abroad	Clearly define 'costs abroad'	**Accepted: the definitions in**

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	Services (Pty) Ltd		– clarification of this term will be required. What qualifies as costs abroad? (c) "…taxes payable at the South African port of entry;" - We are unclear as to why excise duties are not seen as 'local'? Import duty tax contributes to the South African economy	Refer to comment(s) and amend the regulation accordingly.	**the 2011 Regulations will be retained.**
	Bigen Africa Services (Pty) Ltd	1. Definitions	"non-firm price" It is not clear how contract price adjustment due to price escalation relate to a non-firm price.	Refer to comment(s) and amend the regulation accordingly.	**Noted: will revisit the definition in line with the intention of the Regulations.**
	Bigen Africa Services (Pty) Ltd	1. Definitions	"rural area" (a) this is not clearly defined. To give an example: a mining community might also be seen as a "rural area". Was this the intention of the legislator? This might lead to potential disputes. An objective criteria or declaration is also required to classify areas that, due to development, become no longer predominantly rural.	Use a different definition to define 'rural area' to give effect to the intention of the legislator. An objective criteria or declaration is also required to classify areas that, due to development, become no longer predominantly rural.	**Noted: however the comment does not specify what is wrong or confusing with the definition.**
	Bigen Africa Services (Pty) Ltd	1. Definitions	"township"	In order to follow the intention of the legislator it is suggested that the	**Noted: the definition will be amended to align with the**

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			This definition might lead to confusion. In terms of town planning law, a township is a term used to describe a legal entity that comes into being by virtue of a process in terms of a specific ordinance or the DFA, resulting in transferrable stands or erven to third parties. By definition, a township must consist of two or more erven. Ordinance 15 of 1986 defines a township as being: "any land laid out or divided into or developed as sites for residential, business or industrial purposes or similar purposes where such sites are arranged in such a manner as to be intersected or connected by or to abut on any street." In order to follow the intention of the legislator it is suggested that the definition be more explanatory e.g. "black township". This will prevent future confusion.	definition be more explanatory e.g. "black township". This will prevent future confusion.	**intention of the Regulations.**
	Bigen Africa Services (Pty) Ltd	2. Application	None	None	**Noted**
	Bigen Africa Services (Pty) Ltd	3. Identification of preference point system	None	None	**Noted**
	Bigen Africa Services (Pty) Ltd	4. Evaluation of tenders on functionality	Regulation 4(6): The preference point system referred to in this regulation does not score functionality (or		**Noted: however it does not mean that when a minimum qualifying score for functionality is used**

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			quality) as part of the 'objective criteria'. There is only a minimum qualifying score for functionality. By not including functionality/quality as 'objective criteria', cost-effectiveness [as one of the pillars stipulated in Section 217 of the Constitution of RSA to which the framework needs to adhere to] will most likely not be achieved. Please see the Cape High Court ruling under item 1.2 (General Comments) below in this regard.	Refer to comment(s) and amend the regulation accordingly.	quality and cost effectiveness will be compromised.
	Bigen Africa Services (Pty) Ltd	5. 80/20 preference point system for acquisition of goods or services for Rand value of up to R 100 Million	General comments on Regulation 5: 1. The 2016 regulations propose a hundredfold increase for the 80/20 preference system. It is submitted that this increase will be unaffordable to the RSA economy. 2. The same threshold is included for services (included in the definition of infrastructure services) and the construction of infrastructure. However, the cost of infrastructure services are typically one tenth of the costs of the associated construction. Separate thresholds for goods and services will be more appropriate.	Refer to comment(s) and amend the regulation accordingly.	Noted
	Bigen Africa Services (Pty) Ltd	5. 80/20 preference point system for acquisition of	Regulation 5(5): "A trust, consortium or joint venture qualifies	Recommended that it be made clear to tenderers that it will be a combined B-BBEE rating based on	The Regulation 11 of PPR 2011 will be retained.

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
		goods or services for Rand value of up to R 100 Million	for points for B-BBEE status level of contributor as if it is a legal entity, if it submits proof of its B-BBEE status level of contributor". Recommended that it be made clear to tenderers that it will be a combined B-BBEE rating based on the pro-rata participation in a contract of the JV or consortium members and as per their B-BBEE certificates issued by accredited B-BBEE verification agencies.	the pro-rata participation in a contract of the JV or consortium members and as per their B-BBEE certificates issued by accredited B-BBEE verification agencies.	
	Bigen Africa Services (Pty) Ltd	6. 90/10 preference point system for acquisition of goods or services with Rand value above R 100 Million	See comments for 5 above	See comments for 5 above	**Please refer to similar resolution in regulation 5.**
	Bigen Africa Services (Pty) Ltd	7. Award of contracts to tenderers not scoring highest points	Regulation 7(3)(a)(i-iv) 1. Sub-contracting to black-owned EME's or QSE's is included as one of the elements in the B-BBEE codes of good practice and is therefore already included as a preference. It should not be applied twice. 2. It is further submitted that sub-contracting to EME's or QSE's can be a functionality requirement, but cannot be inserted as objective criterion.	Refer to comment(s) and amend the regulation accordingly.	**Government is trying to come up with other empowerment schemes to uplift designated groups who loose tenders to established companies due to price. The regulations will further try to curb the premium to be paid between the first supplier and the supplier appointed**

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			3. The proposed drafting does not indicate how a selection will be made in the event of more than one such offer to sub-contract. 4. The percentage ownership by black persons is not specified. Regulation 7(3)(a)(vi) 'Enterprises conducting business in a township or rural area' needs to be more clearly defined as this can mean any enterprise that opens its doors within a rural area independent of ownership or size and this does not necessarily correlate with the intention of the legislator. Regulation 7(3)(b) Functionality has already been measured and this results in functionality being measured twice (See regulation 4(3)(c) in terms of minimum score for functionality)		**based on objective criteria. Bidders will still need to comply with with all mandatory requirements of the bid, specifications and functionality criteria. National Treasury to determine if functionality criteria should be added along the list of objective criteria selection, clarify the percentage ownership and restructure provisions for rural and township enterprises.**
	Bigen Africa Services (Pty) Ltd	7. Award of contracts to tenderers not scoring highest points	Regulation 7(3)(c) This should not specifically be a quantity surveyor; it can be any suitable registered built environment professional depending on the type of project and the skills required. Furthermore, this (once again) relates to functionality which is	Refer to comment(s) and amend the regulation accordingly.	**Noted a general and standard term will be used in the final regulations to avoid using a single profession. National Treasury to determine if functionality criteria should be added along the**

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			measured in regulation 4 and should not be measured twice. (See regulation 4(3)(c) in terms of minimum score for functionality) Regulation 7(3)(d) The anticipated lead-time should be a functionality criterion and should be specified. Lead-time should not be included under this regulation. (See Regulation 4(3)(c) in terms of minimum score for functionality)		**list of objective criteria selection, clarify the percentage ownership and restructure provisions for rural and township enterprises.**
	Bigen Africa Services (Pty) Ltd	8. Criteria for breaking deadlock in scoring	Regulation 8(1) The scoring of equal total number of points should specify that it is rounded off to the nearest two decimal places.	Refer to comment(s) and amend the regulation accordingly.	**Accepted: the rounding off of points will be retained from the PPR 2011.**
	Bigen Africa Services (Pty) Ltd	9. Local production and content	Regulation 9(1) This Regulation mentions that only locally produced goods or locally manufactured goods will be considered. Is the exclusion of locally produced services intentional [is the omission of the word 'services' to specifically allow for services acquired and procured from foreign countries?]	Refer to comment(s) and amend the regulation accordingly.	**Services are deliberately excluded; the dti has a good explanation on this.**
	Bigen Africa	10. Pre-	Regulation 10(1)(a)	This regulation should be omitted –	**Noted: this provides**