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Mr L. Fuzile
Director General
National Treasury
40 Church Square
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Date : 03 July 2013
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Our ref: Leg/Exempt
Enquiries : Adv. Vuyisa Ramphele

Dear Mr Fuzile

APPLICATION TO THE NATIONAL TREASURY FOR EXEMPTION FROM THE PROVISIONS OF THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT NO. 5 OF 2000 (PPPFA) AND THE REGULATIONS

1. INTRODUCTION

1.1 The purpose of this application is to request the National Treasury for its consideration to exempt Armscor from the provisions of the abovementioned pieces of legislation.

1.2 Accordingly, Armscor requests the Minister of Finance to grant an exemption from the Act and the new Regulations in their entirety. This exemption is sought in terms of section 3 of the Act read together with regulation 2(2) of the new Regulations. Section 3 of the Act provides that the Minister may, on request, exempt an organ of state from any or all the provisions of the Act if:

"(a) it is in the interest of national security;

(b) the likely tenderers are international suppliers; or

(c) it is in the public interest."

1.3 Regulation 2(2) provides that "an organ of state contemplated in sub regulation (1) must, unless the Minister of Finance has directed otherwise, only apply a preferential procurement system which is in accordance with the Act and these regulations".

2. BACKGROUND

2.1 The Department of Defence, is the primary client of Armscor, and the source of bulk of the funding that is channelled to the Defence Industry. Armscor plays a critical role in enabling the SANDF to achieve its military strategies, whose objectives are amongst others, the following:

- To enhance and maintain comprehensive defence capabilities
- To promote peace, security and stability in the region and on the continent
- To support people of South Africa in situations of disaster, emergency and humanitarian need

2.2 Armscor, as the procurement arm of the Department of Defence and Military Veterans (DOD), has a responsibility and a duty to support Government's Broad-Base Black Economic Empowerment strategies.

2.3 The centralized procurement practice of DOD as implemented by Armscor is efficient in terms of costs and controls, but is not sensitive to the other developmental objectives of the Government such as equitable distribution of employment opportunities.

2.4 Armscor, in its capacity as an organ of state, relies on national legislation and policies to make the much needed contribution on transformation agenda of the National Government. The Defence Industry lags behind with regards to transformation and still does not have a transformation charter that has been agreed upon and accepted by all stakeholders in the industry.

2.5 Local industry support is weak because very few relevant products to the Defence Industry have been designated. This therefore leaves Armscor with only a single measure to factor transformation in our procurement policy which is through the preference weighting point criteria as prescribed by the PPPFA, namely, 90/10 and 80/20. The bulk of acquisition of the defence materiel projects which is Armscor's

main source for transformation of the Defence Industry are large and beyond R1m in rand value. This therefore places Armscor's acquisition projects within the ambit of 90/10 weighting criteria. 10 points is not adequate for Armscor to make the necessary transformation inroads. An added factor is that the Implementation Guide issued by the National Treasury states that bidders who did not submit the B-BBEE Verification Certificate must still be considered.

2.6 The absence of the defence industry charter tends to indicate that there is somewhat unwillingness on the part of the local defence industry to voluntarily transform itself. In the absence of such charter it could be argued that there requires a certain level of measure that will enable the local defence industry to transform. Prior to the promulgation of the current Regulations, Armscor had imposed certain measures that had aided in accelerating the transformative objectives of government. However since the coming into effect of the promulgated Regulations, Armscor is now disabled from continuing with such strategic and progressive measures.

2.7 The local defence sector cannot sustain high level of growth in the absence of deliberate measures by Armscor to ensure meaningful participation of black people in the local defence industry. As indicated previously, if the local defence industry is left on its own it is unable to transform itself to ensure that black participation becomes a reality. Armscor through the use of its acquisition power should be in a position to operate in a responsive manner and lead the economic participation of all South African citizens in the ownership of companies in the local defence industry.

3. PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT AND THE REGULATIONS

3.1 On 8 June 2011, the Minister issued new Regulations in terms of the Act which came into effect on 7 December 2011. On 8 June 2011, the Minister also issued a notice in terms of section 1(ii) (f) of the Act, stipulating that with effect from 7 December 2011,

the new Regulations would apply to public entities listed in schedules 2 and 3 of the Public Finance Management Act No. 1 of 1999.

3.2 Prior to the issuing of this notice, the Act and its Regulations did not apply to schedule 2 and 3 public entities, including Armscor. The reason for this exclusion was due to the fact that at the time, Government recognised the need to afford public entities a greater degree of flexibility with regard to the application of preference. The current Regulations will have the effect of completely removing the flexibility that public entities had in advancing transformation. This change has adverse effects in so far as the transformation of the local industry is concerned.

3.3 In order to assist organs of state with the implementation of the new Regulations, National Treasury has passed Implementation Guidelines. In terms of the Guidelines bidders cannot be automatically disqualified by virtue of their failure to submit BBBEE level certificate.

"A bid must not be disqualified from the bidding process if the bidder does not submit a certificate substantiating the B-BBEE status level of contribution or is a non-compliant contributor. Such a bidder will score zero (0) out of a maximum of 10 or 20 points respectively for B-BBEE."

3.4 However, in terms of Regulation 10(2), tenderers other than Exempted Micro Enterprises "EME's" must submit their original and valid BBBEE status level verification certificate or a copy thereof substantiating their BEE rating.

3.5 In light of the aforegoing, it is clear that there is an inconsistency regarding the peremptory provision in the regulation and the guidelines which in Armscor's view makes a mockery of the transformation agenda of government in that even companies that do not have any empowerment credentials will be allowed to tender but will however be awarded zero points and not be disqualified from the bidding process, according to the guidelines.

4. MOTIVATION

4.1 Armscor, as an organ of state, is obliged to implement National Government's policies, transformation being one of the key policies. Armscor further has a duty to minimise the country's dependence and exposure to foreign sources for security reasons. To achieve this it is imperative that Armscor should be enabled to facilitate growth of the local defence industry through building necessary capabilities locally and also focusing on the growth and inclusion of black empowered companies within the local defence industry. This is regarded to be in the national interest and that is the spirit in which this application is made.

4.2 Preferential procurement is one of the key strategic interventions to be exploited to bring about transformation. In the defence industry the distribution of tenders is still skewed due to the inherent circumstances (e.g. political) that prevailed in the armaments industry. Armscor has an enormous task of facilitating inclusion and development categories of persons who were excluded from participation within this specialised industry. This is regarded to be in the public interest and that is the spirit that we are submitting this application.

4.3 It is Armscor's view that the Act and the Regulations are inadequate as an instrument to achieve government objectives in that it places excessive reliance on the threshold i.e. 90/10 or 80/20. Armscor deems this threshold as insufficient to ensure that the local defence industry is meaningfully transformed. It is therefore Armscor's position that the 90/10 and or 80/20 is unable and ineffective to deal sufficiently with the complexities involved in the deracialisation of ownership in the local defence industry.

4.4 Armscor is further of the view that the Act in its present form will not substantively or Qualitatively change the empowerment landscape in South Africa. Although Armscor

complies with the 90/10 and 80/20 formula, it is necessary that Armscor be afforded more flexibility in determining an appropriate weighting for preference.

4.5 In order to accelerate transformation of the local defence industry, and to protect the national security, Armscor proposes that the National Treasury considers and recommends to the Minister the granting of exemption from application of the PPPFA to Armscor as far as the following is concerned:

- The weighting point criteria
- The consideration of bidders who did not submit valid B-BBEE verification certificates
- The inclusion in Armscor's procurement policy of a qualifying clause for all bidders that will objectively and responsibly address and respond to the unique defence industry circumstances.

5. APPROVAL SOUGHT

Armscor requests the Minister of Finance to grant an exemption from the Preferential Procurement Policy Framework Act and the Regulations. This exemption is sought in terms of section 3 of the Act read together with regulation 2(2) of the Regulations.

Yours faithfully

JS MKWANAZI
ACTING CHIEF EXECUTIVE OFFICER:
ARMSCOR

MINISTER OF FINANCE
27 SEP 2011
FILE No: M 4/1/Ke
MINISTER OF FINANCE
2819-11

PetroSA

The Petroleum
Oil and Gas Corporation
Of South Africa (SOC) Ltd
Reg. No. 1970/008130/07

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Our Ref: PPPFA Regulations

Date: 27 September 2011

Minister Pravin Gordhan
Minister of Finance
National Treasury
Private Bag X115
PRETORIA
0001

Dear Honourable Minister

REQUEST FOR EXEMPTION IN TERMS OF SECTION 3 OF THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, ACT NO 5 OF 2000

The purpose of this letter is to request the Minister to consider exempting PetroSA from all the provisions of the Preferential Procurement Act, in terms of section 3 (a), read with Notice, No R.501 dated 08 June 2011, issued by the Minister in terms of section 1(iii)(f) of the Preferential Procurement Policy Framework Act, Act No. 5 of 2000 ("Preferential Procurement Act"), with effective date 07 December 2011.

We hereby submit that the Preferential Procurement Act and Regulations in its current form could have, inter alia, the following adverse implications on PetroSA:

- PetroSA would be exposed to a projected cost of approximately R660 million per annum for price premiums on hydrocarbons if the 90/10 point scoring system is used as elaborated elsewhere in this document;
- PetroSA would effectively forfeit over R132 million per annum (based on historical data), if it is prohibited from negotiating with suppliers in the manner it has been doing;
- PetroSA loses its ability to operate on commercial principles and to respond

AD

- Competitors could now possibly use the Regulations to stifle our business; and
- The Company's BBBEE objectives, as outlined in the Liquids Fuel Charter would not be realised without contravening the Regulations.

1. INTRODUCTION

PetroSA's procurement philosophy is aligned and derived from section 217 of the Constitution and section 51(a) (iii) of the PFMA. All policies, procedures and systems are designed to comply with the provisions of the aforementioned constitutional provision, whilst ensuring that the company remains commercially competitive.

2. OVERVIEW OF PROCUREMENT ENVIRONMENT

2.1 Procurement Expenditure

During the last financial year, PetroSA's procurement expenditure (spend) exceeded R7,3 billion, broken down as follows:

DESCRIPTION	VALUE	PERCENTAGE (%)
Foreign Suppliers & Original Equipment Manufacturer (OEM) Expenditure	R 4,0 billion	55%
Government & State Owned Enterprises	R 0,8 billion	11%
South African Spend (including local agents)	R 2,5 billion	34%
TOTAL	R7,3 billion	100%

2.2 Statistical data

DESCRIPTION	VALUE (PERCENTAGE OR NUMBER)
Average number of purchase requisitions processed per annum	30 000 per annum
Percentage of contracts awarded to supplier with highest points or sole source.	82%

Directors:
Dr AMB Mokaba – Chairman,
Mr N G Nika (Executive), Mr M B Dameane, Mr D R Zihlangu, Mr V Tanga, Dr Z R Rantsejane,
Adv. L Makalini, Ms N Mashapa, Mr Z Mavuso, Ms GN Jgana, Mr MM Zwane, Mr ACG Molosi, Ms E Lebepe,
Ms P S V Ngaba (Company Secretary)

DESCRIPTION	VALUE (PERCENTAGE OR NUMBER)
Percentage of contracts not awarded to supplier with highest points or sole source	18%
Advertised tenders – percentage of bids where 3 (three) or less suppliers tendered	69%
Number of suppliers registered on PetroSA's database	12 000
Countries of operation	USA, The Netherlands, Equatorial Guinea, Egypt, Namibia, South Africa, Nigeria
Commodities or services procured	Anything from stationery to the most sophisticated deep sea rig and related services

The above high level snapshot data, paints a complex and challenging procurement environment picture. The Company procures goods and services for at least 7 (seven) of its international operating offices and operations. At least 30 000 (thirty thousand) purchase requisitions are processed per annum from a variety of Suppliers across the world, with over 55% of the procurement expenditure from foreign entities and original equipment manufacturers (OEMs). This scenario presents challenges, including the often limited options that PetroSA has when it procures goods and services.

The Company uses the 80/20 point scoring system, in respect of certain tenders, mostly goods procured in South Africa. However, in respect of complex services where functionality, technology and technical considerations are critical, a weighted point scoring system is also used.

This mix of evaluation options allows PetroSA to procure goods and services in a manner which not only allows compliance with section 217 of the Constitution and section 51(a) (iii) of the PFMA, but also ensures that the Company fulfils its objectives of operating on commercial principles. It is

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Ms P B V Ngaba (Company Secretary)

PetroSA's submission that indeed the Company uses the principles of the Preferential Procurement Policy Framework Act, and has been doing so for the past 7 years.

The 80/20 and 90/10 points scoring system prescribes that price and BBBEE are the only criteria for adjudicating bids and tenders, once those bids or tenders meet minimum requirements.

3. COMMERCIAL IMPACT

3.1 Profitability and business continuity

PetroSA procures and trades in hydrocarbons (oil, condensate, etc.) and finished products (petrol, diesel, etc.) in terms of normal oil industry trading practices. In order to execute this sourcing and marketing of the product, PetroSA needs to trade within the International Petroleum trading environment. The Regulations prescribe that the 90/10 or 80/20 point scoring system must be used when goods and services are procured. If PetroSA uses the point scoring system as currently contained in the Regulations, the products would be procured at a premium (or discount) of up to 25% in the case of the 80/20 point scoring system. In the case of the 90/10 point scoring system, a premium (or discount) of up to 11% would apply. For the 2011/12 financial year, PetroSA plans to procure R5,9 billion on hydrocarbons. This implies that the Company might have an exposure of up to R660 million in the most likely scenario where a level 1 BBBEE supplier competes with a foreign entity and where PetroSA uses the 90/10 point scoring system. It is further submitted that the rigidity of the Regulations, might have the unintended consequences whereby a window is opened for suppliers and customers to challenge PetroSA in court should PetroSA fail to implement the premium (or discounts). Trading in finished products is a margin business and PetroSA generates a maximum profit of 2% per cargo. Implementing this regulatory prescript would effectively put the company out of business, in that it would most likely be in a loss making position with every purchase. Regard being had to the numbers involved, there is a concern that suppliers and competitors may set up trading vehicles with BBBEE credentials to take advantage of the "windfall profits", which could not have been the intention of the National Treasury.

3.2 Negotiation

The requirement for point scoring dictates that the company appoints the highest scoring entity which in turn, weakens its position commercially because of the inability to negotiate. Given the size of the transactions within the oil industry, negotiation is at the heart of any entity that wishes to trade on commercial principles. The current procurement processes allows

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Ms P S V Ngaba (Company Secretary)

PetroSA to shortlist the top three highest scoring suppliers and negotiate with any or all of them. This keeps suppliers honest and allows PetroSA to conclude the deal on commercially sound principles. In the last financial year, the Company saved an additional R132 million through negotiations. The Regulations will in effect remove this flexibility, which in turn will drive up the company's cost of doing business and compromise on quality and safety standards.

4. OPERATIONAL IMPACT

4.1 International Procurement

Within PetroSA, more than 55% of all expenditure is procured from international companies. This will increase to over 80% in the next year due to the FO Development. In addition to this, the Company is represented in and operates in 7 countries. For international procurement, it would now be obliged to transact in countries such as the United States of America, Europe, Equatorial Guinea, Egypt, etc. In terms of these Regulations. According to the Company's current contractual obligations and the laws of those specific countries, PetroSA is required to procure locally in those countries. The Regulations currently prohibit this. Furthermore, in Europe for example, the South African BBBEE legislation is unlawful in terms of EU Law. By implication, the point scoring system in the Regulations would be illegal under EU Law. The nature of PetroSA's business is such that international procurement is integral to operations.

4.2. Export Credit Agency ("ECA") Funding Requirements

For PetroSA to remain self sustainable, it is sometimes required to approach commercial lenders for loans. Project Mthombo (i.e the new proposed 400 000 bpd Coega Refinery) would require ECA funding. ECA funding is a popular form of funding, and sometimes the only option for the company. The requirement for ECA funding has a major impact on the way the company procures. Therefore, in order to qualify for ECA funding, PetroSA will be required to "set aside" certain contracts for suppliers who come from countries who have Export Credit Agencies ("ECA"). However, in their current form the Regulations would be in conflict with this requirement.

4.3 Procurement between SOEs and/or inter-company

The Regulations prescribe that procurement through state entities should be done via the normal competitive bidding process.

The consequence of this provision creates an unnecessary restriction on the Company, in that it removes the commercial flexibility necessary to run a commercial entity. Sometimes contracting with another SOE without

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Ms P S V Ngake (Company Secretary)

tendering might be a strategic imperative aimed at ensuring that the Company remains competitive and commercially sustainable. A restriction in this area would certainly place competitors in a situation where they could potentially abuse the situation.

Furthermore, read literally, this provision would imply that PetroSA would need to follow an open tender process when contracting with its own subsidiaries (note that the subsidiaries of PetroSA are SOEs in their own right). It is submitted that the Regulator would not have enacted the provision in its current form if it had been aware of the unintended consequences of the proposed provision.

4.4 Tax clearance certificate

The strict requirement in terms of a Tax Clearance Certificate is unequivocally supported by PetroSA and a rule to that effect has been in place since 2002, with exceptions. However, the provision as written within the Regulation would place PetroSA in a non-compliant position as:

- Many of the company's suppliers are overseas based and do not operate in South Africa;
- Some of the critical suppliers are sole source suppliers, many of whom are larger enterprises than PetroSA. It is often neither in their interest nor does it justify the time and effort that they have to spend time to obtain a tax clearance certificate prior to contracting with PetroSA. Some of these suppliers are so strategic that it will not be possible to continue trading without their goods or services;
- The trading environment is such that a deal is requisitioned, traded and confirmed within 48 hours. It is therefore impractical to obtain a tax clearance certificate from SARS within that limited time frame; and
- Tax clearance certificates for low value items pose an administrative challenge, (e.g. Procurement of items on the Internet). PetroSA often procures geotechnical reports and other Internet based services at minimal costs. With Regulations in place, the company would find itself in violation through accessing these services.

4.5 Collaboration and strategic sourcing

The nature of the oil industry is such that collaboration and forming strategic partnerships is an integral part of remaining commercially competitive. Collaboration, in addition to being considered best practice in procurement, allows the organisation the flexibility to use its current procurement spend as leverage to remain commercially relevant. The Regulations have not covered this and once more places a burden on PetroSA which would affect its commercial viability. Furthermore, restriction in this area would open up an opportunity for competitors to possibly use these Regulations to frustrate the company's plans and business.

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Adv L Mokaba, Ms N Madupe, Mr Z Mavuso, Ms GH Jiyane, Mr MM Zuma, Mr ACG Motuli, Ms E Lethapo,
Ms P S V Ngibe (Company Secretary)

4.6 Tender cancellations

The requirement to cancel a tender because the evaluation criteria (i.e. 90/10 or 80/20) was not declared upfront is not viable nor practical to the extent that budgetary figures are based on historical figures and are not always exact or accurate. The supply and demand of oil prices are based on market conditions and suppliers in the oil industry often responds and track oil prices, which are unpredictable.

4.7 Other Legislation applicable to PetroSA

The point scoring system does not address the requirements of the Charter for the South African Petroleum and Liquids Fuel Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry ("Liquid Fuels Charter") which forms part of the Mineral and Petroleum Resources Development Act, Act 28 of 2002 ("MPRDA"). This is significant because PetroSA may be prohibited from trading if it fails to comply with the provisions of the MPRDA. In terms of the Liquid Fuels Charter PetroSA would be obliged to develop supportive procurement policies to facilitate and leverage the growth of Historically Disadvantaged South African Companies ("HSDA Companies") and such companies should be awarded preferred supplier status as far as possible.

One of the objects of the MPRDA is to "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources."

The Regulations specifically prohibit set asides yet it is required of PetroSA in terms of the Liquid Fuels Charter to facilitate targeted procurement from identified groups such as the youth, women or the disabled, etc.

Thus, it is important to appreciate the obligations imposed on PetroSA by the various Petroleum Industry initiatives as well as its existing regulatory environment. PetroSA would be placed in an untenable position if the Preferential Procurement Act and Regulations were to apply to its tailored procurement model, as the Preferential Procurement Act and PetroSA's current regulatory environment could be inconsistent specifically with reference to the Liquid Fuels Charter.

Directors:
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Adv. L Mahatlni, Ms N Madopo, Mr Z Mavuso, Ms GN Jones, Mr MM Zuma, Mr ACG Molsi, Ms E Lategan,
Ms P S V Ngoba (Company Secretary)

6. CONCLUSION

In conclusion it is submitted, that the Preferential Procurement Act and Regulations in its current form could have a significant impact on the ability of PetroSA to function optimally in a fiercely competitive commercial environment.

Kind regards

AMB Mokaba (PhD)
Chairman

cc: Ms B Mabuza: CEF Chairperson

Directors:
Dr AMB Mokaba – Chairman,
Mr N B Nkosi (Executive), Mr M B Dlamini, Ms D R Zilonga, Mr Y Tonta, Dr Z R Rastenjee,
Adv. L Makatini, Ms N Madupe, Mr Z Mavuso, Ms GN Ayers, Mr MM Zaaiman, Mr ADG Mokai, Ms E Lallapo,
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DEVELOPING MANAGERIAL LEADERSHIP

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JS
23 DEC 2015
MINISTRY OF FINANCE
2735/15

22 December 2015

Mr. Pravin Jamandas Gordhan
Minister of Finance
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40 Church Square
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Cindy.august@treasury.gov.za
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RE: Black Management Forum (BMF) Challenge of PPPF Act Practice Note

Dear Honorable Minister

The Black Management Forum ("the BMF") has taken a decision to seek a legal review of the Practice Note Number SCM 2 of 2006 ("the practice note"), which prohibits all National and Provincial Departments, and organs of state from reserving government contracts for previously disadvantaged persons.

Having considered a legal opinion we believe there is a viable case for reviewing the practice note. We have written this letter as a courtesy to your esteemed office to the Minister's predecessor, Nhlanhla Nene on the 30th of November, and also to assure you that the legal action is not intended to embarrass the government or to suggest that the BMF has taken cudgels with any interest groups inside or outside the country, political or otherwise. The BMF is committed to work with the government to help address socio-economic issues that affect the country.

It is our belief that Kruger, the then Deputy-Director General: Special Functions in Supply Chain Management at the National Treasury, issued this practice note prohibiting reserving government contracts for previously disadvantaged persons. The practice note is in conflict with the law of the Republic.

We believe this litigation will be a way of working with the government to achieve the objectives for the benefit of the majority of South Africans. The proposed litigation will not be acrimonious, and it is hoped will take the form of amiable co-operation. We welcome any co-operation between our offices in this regard going forward, and remain committed to our mutual friendship.

Sincerely,

Mr. Themba TC Dlamini
BMF: Managing Director
2015/12/22

BBCBE
BLACK BUSINESS COUNCIL IN THE GUILT-GOVERNMENT

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Johannesburg

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Tuesday, 01 March 2016

Mr. Kenneth Brown
Chief Procurement Officer
National Treasury
40 Church Square
Pretoria
0002

Email address: Kenneth.brown@treasury.gov.za

Re.: REQUEST TO NULLIFY PRACTICE NOTE NUMBER SCM 2 OF 2006

The abovementioned subject matter has reference.

The introduction of the abovementioned practice note (attached hereto for ease of reference) caused considerable harm to the efforts of various government departments and state owned enterprises (SOEs) efforts to set-aside projects specifically to empower previously disadvantaged individuals.

In light of current government programmes aimed at improving the participation of black businesses in the mainstream economy such as the Black Industrialists Programme (BIP) and the role expected to be played by government departments and SOEs we regard the sections of the abovementioned practice note, specifically dealing with the Prohibition of Set-Asides, as very restrictive.

Accordingly, we request that this section in particular be nullified in order to create an environment conducive for the said client bodies to set-aside tenders for the implementation of the BIP and empowerment of black businesses.

We trust you find the above in order and await your response.

Kind regards

Gregory Mofokeng
Secretary General

Office Bearers
President [illegible] Secretary General [illegible] Treasurer [illegible]

BBCBE
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Tuesday, 01 March 2016

Mr. Kenneth Brown
Chief Procurement Officer
National Treasury
40 Church Square
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Email address: Kenneth.brown@treasury.gov.za

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We trust you find the above in order and await your response.

Kind regards

Gregory Mofokeng
Secretary General

Office Bearers
President [illegible] Secretary General [illegible] Treasurer [illegible]

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF PROCUREMENT OFFICER (OCPO)

PPPFA REVIEW TASK TEAM

PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT REVIEW

NATIONAL TREASURY INTERNAL DISCUSSION PAPER

List of Abbreviations

BBC	Black Business Council
BEE	Black Economic Empowerment
CSDP	Competitive Supplier Development Programme
CPO	Chief Procurement Officer
HDI	Historical Disadvantaged Individuals
MBD	Municipal Bid Document
NDP	National Development Plan
NCOP	National Council of Provinces
LED	Local Economic Development
OCPO	Office of the Chief Procurement Officer
PFMA	Public Finance Management Act
PPPFA	Preferential Procurement Policy Framework Act
RDP	Reconstruction and Development Programme
SMME	Small Medium and Micro Enterprises
SOEs	State Owned Enterprises
SOCs	State Owned Companies
SALGA	South African Local Government Association

EXECUTIVE SUMMARY

This paper discusses the policy appraisal of the Preferential Procurement Policy Framework Act (PPPFA) as part of the Terms of Reference (ToR) in reviewing the PPPFA.

As a background, Cabinet mandated that the public sector preferential procurement system, as provided for through the Preferential Procurement Policy Framework Act (PPPFA) of 2000, be aligned with **the dti's** revised Broad-Based Black Economic Empowerment Act and its Codes of Good Practice as an interim measure, to meet the first phase objectives for public procurement reform as set out in the B-BBEE Act and the Codes of Good Practice and the IPAP 2.

This interim legislative measure now needs to be elevated into a permanent legislative framework, empowered by section 217 (3) of the constitution prescribing that national legislation, must provide for a framework within which preferential public sector procurement must be implemented.

In order to accomplish this task, the National Treasury, through the Office of the Chief Procurement Officer (**OCPO**), the Department of Trade and Industry (**the dti**) ,the Economic Development Department (**EDD**) and the Department of Public Enterprise (**DPE**) have agreed that it is necessary to convene a Preferential Procurement Review Task Team, consisting of senior representatives of the four departments, to undertake a review of the current Preferential Procurement Policy Framework Act of 2000 (PPPFA) and its associated Regulations to support Government's broader economic development policy initiatives through the constitutional provisions for preferential public sector procurement.

This discussion paper sets out a policy critique and recommendations, from the National Treasury's OCPO Task Team researchers, for the consideration of the PPPFA Task Team.

The paper's policy critique in summary includes that:

The Preferential Procurement Regulations, 2011 are not in compliance with the PPPFA to the extent that the Regulations attempt to restrict the framework for preferential procurement policies to BEE credentials to the exclusion of other goals contemplated in the PPPFA, causing the Preferential Procurement Regulations 2011 alignment to the BBBEEA's Scorecard to be unlawful;

The alignment of PPPFA's RDP goals with the B-BBEE's Scorecard narrows the broad socio-economic developmental objectives of the RDP to that of a narrow focus on developmental industrialization of the South African economy through public procurement;

The balance between value for money (price) & development empowerment (preferential criteria) is not equitable enough to contribute constructively to socio-economic transformation of the South African society, as required by the constitutional provisions for preferential public procurement;

Although aligned with the PPPFA, the 'Practice Note' (SCM 2 0f 2006) prohibiting set-asides for categories of contracts and categories of persons as a supplier development programme is identified as a hindrance and to the extent against constitutional provisions;

The PPPFA, through its preferential procurement points system does not proactively utilize the spending power of government on public procurement to contribute in achieving its objectives of local economic and enterprise development.

THE POLICY CONTEXT OF THE PPPFA

In the year 2000, The Preferential Procurement Policy Framework Act, gave effect to section 217(3) of the Constitution providing the required framework for the uniform implementation of a preferential procurement policy contemplated in section 217(2) of the Constitution of the Republic of South Africa, Act 108 of 1996, providing for:

(a) Categories of preference in the allocation of contracts; and

(b) The protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination (although to a lesser extent).

The preferential procurement policy framework prescribed to organs of state in the national, provincial or local sphere of government, or any other institution identified in national legislation when contemplating a preferential procurement policy to include an objective methodology in the evaluation and awarding of bids in the public sector through:

I. A preferential point system:

For bids below the threshold value of R500 000 a 80/20 point system would need to be followed with 80 points for best price evaluation and 20 points for RDP goals evaluation criteria, with a 25% maximum price premium the state is prepared to pay over and above the lowest best price if the preferred bidder is the highest scorer on RDP goals.

For bids above the threshold value of R500 000 a 90/10 point system would need to be followed with 90 points for best price evaluation & 10 points for RDP goals preferential criteria evaluation, with a 11.1% maximum price premium the state is prepared to pay over and above the lowest best price if the preferred bidder is the highest scorer on RDP goals.

The 2001 Preferential Procurement Regulations aimed at the promotion of RDP goals such as the Historically Disadvantaged Individuals (which was compulsory), women empowerment; promotion of South African owned companies, promotion of SMMEs; promotion of enterprises located in a certain province, regions, district or municipality.

In 2003, after conducting public hearings to assess the success of implementation of the PPPFA, the NCOP recommended the alignment of the PPPFA Regulations on RDP goals with the objectives of the B-BBEEA after it came to light from the hearings that there was inconsistency in the preferential policy application throughout government; the broad definition of HDI led to huge fronting; and that the policy objectives of the B-BBEEA and PPPFA were out of sync, with the PPPFA promoting the broad socio-economic development programme of the RDP and the B-BBEEA a more focussed developmental industrialization programme to transform private industries and promote black

economic empowerment in the South African economy; whilst retaining the 90 & 80 price evaluation criteria principle.

ii. PPPFA and B-BBEEA Regulatory Alignment

In 2011, the revised Procurement Regulations came into effect that sets the aligned new evaluation criteria method that is based on the B-BBEE status level of contribution where companies would claim 10 or 20 points (based on the 90/10 & 80/20 preference point system, where 90 or 80 is based on best price) based on their level of contribution to BEE codes of good practice providing for 7 elements of industrial empowerment: ownership, management control, employment equity, skills development, procurement, enterprise development and socio-economic development.

The aligned Preferential Procurement Regulations 2011 encourage industry transformation through change in ownership by importing BEE level of contribution and by promoting local production and content through designation of industrial sectors.

2. POLICY DEBATES ON THE PPPFA

Public procurement has been identified by government as a tool to leverage socio- economic redress & transformation, and as an instrument for efficient and effective service delivery. During the debate on PPPF Bill1 by the Finance Portfolio Committee and Finance Select Committee joint meeting, the National Treasury affirmed that the issue of the Bill's compliance with S217 of the constitution; *which requires 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*; requires a balance between two values; on the one hand society had to take into account historical redress, and on the other hand value for money was an important consideration, and that the National Treasury, through the PPPFA, finds this balance between empowerment and cost effectiveness. This has been the pillar of the National Treasury's values throughout the development and

implementation of the PPPFA and its associated regulations, and it's a consistent policy position adopted that the use of preferential procurement policy as a tool should not supersede other considerations such as fairness and competitiveness as prescribed by the constitution.

This balancing of priorities in public procurement through the PPPFA & its associated Regulations 2011 comes full circle within the policy context of the NDP, which laments the lack of economic opportunities in the country. It states that in particular, the country's development has not sufficiently broadened opportunities for black South Africans, especially women and youth. What it means is that- save for political rights, economic benefits for those with access to employment or empowerment programmes – the socioeconomic conditions that characterised the system of apartheid and colonialism largely still define our social reality (NDP: 04).

2.1 The 90/10 - 80/20 Preference Point System

As alluded earlier, the PPPFA system utilises a point system where 90 or 80 points are allocated for price and 10 or 20 points are allocated for BEE points based on the threshold as propagated in the regulations. The system is appreciated for utilising a scientific methodology in the evaluation and awarding of tenders, however companies of previously disadvantaged individuals have held a view that the system fails in practical terms to demonstrate how it empowers suppliers or contractors that were disadvantaged by the apartheid system. The argument is that a premium of 11.1% and 25 % for the 90/10 and 80/20 point system respectively is not sufficient to out- manoeuvre suppliers who are well established and were previously favoured by the apartheid system in public procurement bidding. Section 2(1) of the PPPFA serves to illustrate the importance attached to the attainment of value for money in the procurement process even though price is no longer the only criterion for the award of government contracts. The NDP proposes amongst others, support to small business, through better coordination of activities in small business agencies development finance institutions, and public and private incubators. It is submitted that socio-economic redress should be approached in a holistic manner.

2.2 Set-Asides and Competitive Supplier Development Programme

Section 217(2)(b) of the Constitution advocates that when implementing a procurement system an organ of state is not prevented from the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. It only insists that it must be done within a legislative framework.

The Procurement Regulations 2001 prescribed the specific goals that would be promoted as listed in the previous section 1 above. National Treasury issued an instruction note on prohibition of set asides and use of cost estimates as benchmark. The thrust of the practice note is that since the HDI factor has already been taken into account as a specific goal, it could not be regarded as objective criteria or threshold criteria in the awarding of a tender. It would mean that HDIs would compete against each other as a category of bidders with no need to award preferential points if there are no other categories of bidders (white bidders) for the same tender.

Some of the public procurement stakeholders, i.e. The Black Business Council (BBC) have regarded the instruction note as unconstitutional; it has argued that certain categories of contracts can be set aside for specific categories of persons such as black women etc. In the 2012 women's parliament a resolution was adopted that legislation biased towards the development of women businesses should be enacted for preferential procurement, to protect, facilitate and encourage women to participate in economic activities2. The statements demonstrate that sectors of the country's population still feel excluded in the economic transformation and empowerment initiatives and that the preference point system is of no assistance in this regard. More organisations see public procurement as a social responsibility.

2.3 Local Economic Development

The 2001 Preferential Procurement Regulations, over and above making the provision for preference, prescribed the specific RDP goals that institutions may promote. On economic development, the following goals could be promoted:

a) The promotion of SMMEs;

b) The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
c) The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region
d) The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
e) The promotion of enterprises located in rural areas.

The 2011 Preferential Procurement Regulations replaced the RDP preference goals with B-BBEE status level of contribution therefore state institutions' powers to determine specific RDP goals to promote in a specific bid were removed. In this regard some institutions have submitted that they can no longer promote local economic development with the new aligned preferential procurement regime.

The World Bank puts it clear that local economic development (LED) offers local government, the private and not-for-profit sectors, and local communities the opportunity to work together to improve the local economy. It focuses on enhancing competitiveness, increasing sustainable growth and ensuring that growth is inclusive. The practice of local economic development can be undertaken at different geographic scales. A local government pursues LED strategies for the benefit of its jurisdiction, and individual communities and areas within a local government's jurisdiction can also pursue LED strategies to improve their economic competitiveness. Such approaches are most successful if pursued in partnership with local government strategies. LED is thus about communities continually improving their investment climate and business enabling environment to enhance their competitiveness, retain jobs and improve incomes.

SALGA has expressed concerns that the 2011 Preferential Procurement Regulations do not support local economic development; municipalities can no longer use preferential procurement for local economic development within their municipalities due to the new aligned regulations. In relevant parts of their NCOP economic development submission, SALGA3 stated that it is agreed that spending across the three spheres of government can hugely impact on the economic development of small businesses. Therefore, preferential procurement is an important strategy for the government to extend

opportunities to the previously disadvantaged groups. Most municipal Supply Chain Management Policies (SCM) encourages procurement from within a local municipal environment. This is to ensure that the municipality itself supports companies and SMME's from their local community where possible. This imperative of promoting local small and enterprise development is constantly reinforced at local imbizos and IDP consultation processes. The new aligned preferential procurement regulations do not allow SCM policies to provide or set-aside for the targeting of local (geographical) suppliers including co-operatives, SMME's and Community Based Organizations(CBOs). While municipalities will have had to amend their policies, but it is the local businesses themselves who will potentially suffer the most.

2.4 The Case of the State Owned Enterprises

The 2001 Procurement Regulations specifically excluded the major State Owned Companies(SOCs) from the application of those regulations, as the National Treasury recognized the need to give SOCs a significant degree of flexibility in the conduct of their procurement activities due to their unique and divergent procurement environment that require the acquisition and import of highly specialized goods and services. And given that the SOC sector is shareholder driven, source their funding through multilateral and international commercial lenders, and procure from international markets brings it in conflict with the requirements of the Preferential Procurement Regulations. For this reason, the Minister of Finance exempted SOCs from the 2001 Preferential Procurement Regulations.

But in terms of the public procurement constitutional provision which sets out that national legislation must prescribe a framework within which the preferential procurement policy of an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation must be implemented, the SOC sector has been included in the new scope application of Preferential Procurement Regulations 2011 for reasons of constitutional compliance and standardization across organs of state.

The SOC sector is opposed to this inclusion because of their special business environment, as acknowledged by the Minister of Finance previously. In their

campaign to be exempted from the PPPFA Regulations they advocate for the PPPFA to be repealed to allow them to fulfil their constitutional objectives as State Owned Companies in determining their own preferential procurement regime that would suit their business operations. This is also to exercise their economic position in the South African market to give preference to more exclusively 'black' companies through supplier development programmes, as the majority of their procurement market is made-up of monopoly 'white' companies, and applying the preference point system will allow 'white' companies to win government contract solely on price alone, which is in contradiction to preferential strategies contributing to the economic empowerment of 'black' people and enterprises.

Constitutionally, government is bound to apply preferential procurement across all spheres of government and state institutions, as exemption from the preferential procurement framework may only be granted in the instances where it is in the interest of national security, or if the likely bidder is an international supplier or if it is in public interest. However, a public interest case can be made for the SOC sector based on their unique business model, but a total or permanent exemption from section 217 (3) of the constitution cannot be granted on grounds that it will defeat the whole purpose of having a national framework for implementing preferential procurement and will undermine the credibility of the preferential procurement framework and the Constitution from which it emanates.

3. STATISTICAL ANALYSIS OF THE PPPFA

In order to understand broadly if public preferential procurement is assisting in furthering the aims of government to redress the legacy of apartheid by applying the preferential procurement system of 90/10 and 80/20 and paying a premium of 11.1 per cent and 25 per cent respectively through BEE certificate level of contribution. The statics available on the National Treasury's 'Contract Registration Application' (CRA)4 was utilised. It has been explained in the preceding paragraphs that the Preferential Procurement Regulations 2011 introduced a BEE certificate level of contribution wherein BEE points are claimed for preference points in a bid based on the BEE certificate level of contribution.

Table 4.1 and 4.2 below compares the value of contracts awarded based on the BEE certificate level of contribution and the premium paid per level5. Table 4.3 and 4.4 compares the total value of contracts and the total premium paid.

Table 4.1: Public Entities and Constitutional Institutions

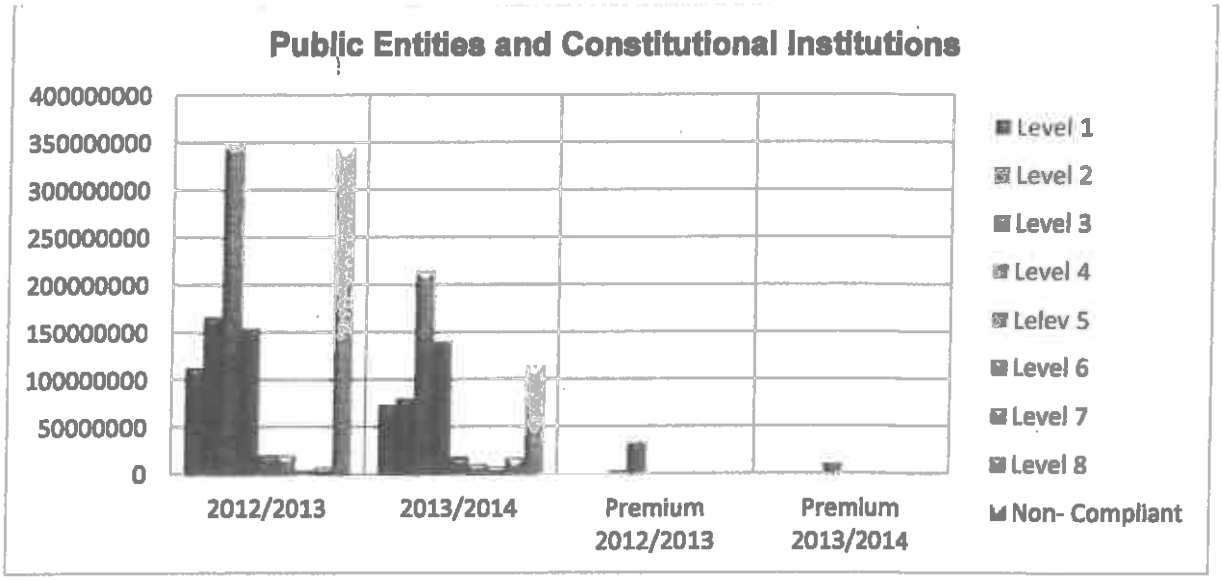
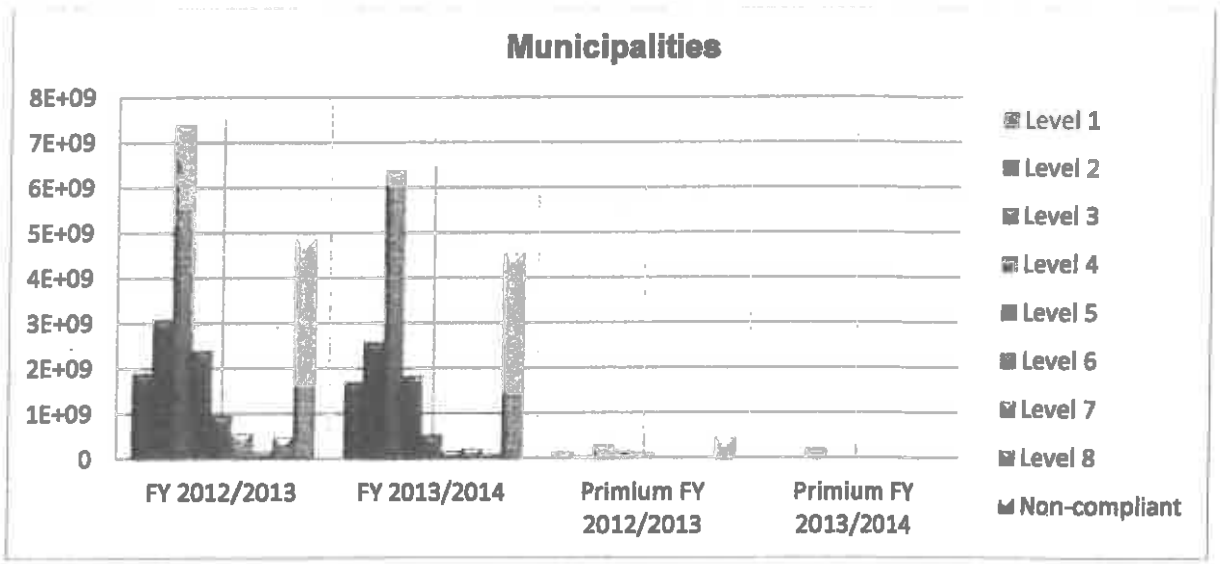


Table 4.2: Municipalities



A premium of 3.6 per cent and 1.6 per cent was paid in the 2012/2013 and 2013/2014 financial years respectively by public entities and constitutional institutions. In the same period municipalities paid a premium of 5.6 and 1.7 per cent. Level 3 suppliers in public entities and Constitutional Institutions were awarded contracts which accounted for 29.6 per cent and 30.7 per cent of the total value of contracts in the 2012/2013 and 2013/2014 financial years

respectively. In the same period the value of contracts awarded by municipalities was 33 and 35.2 per cent.

Suppliers at BEE Level 1and 3 were awarded contracts at value of 53 per cent and 52.8 per cent in 2012/2013 and 2013/2014 financial years respectively, whilst at municipalities 56.7 and 58.9 per cent was paid during the same period.

Non-compliant suppliers were awarded contracts with a total value equivalent of 29 per cent and 16.3 per cent in the 2012/2013 and 2013/2014 financial years respectively. In the same period municipalities awarded contracts valued 22.2 and 25 to non-compliant suppliers.

Table 4.3: Public Entities total value of contracts awarded compared with total premium paid

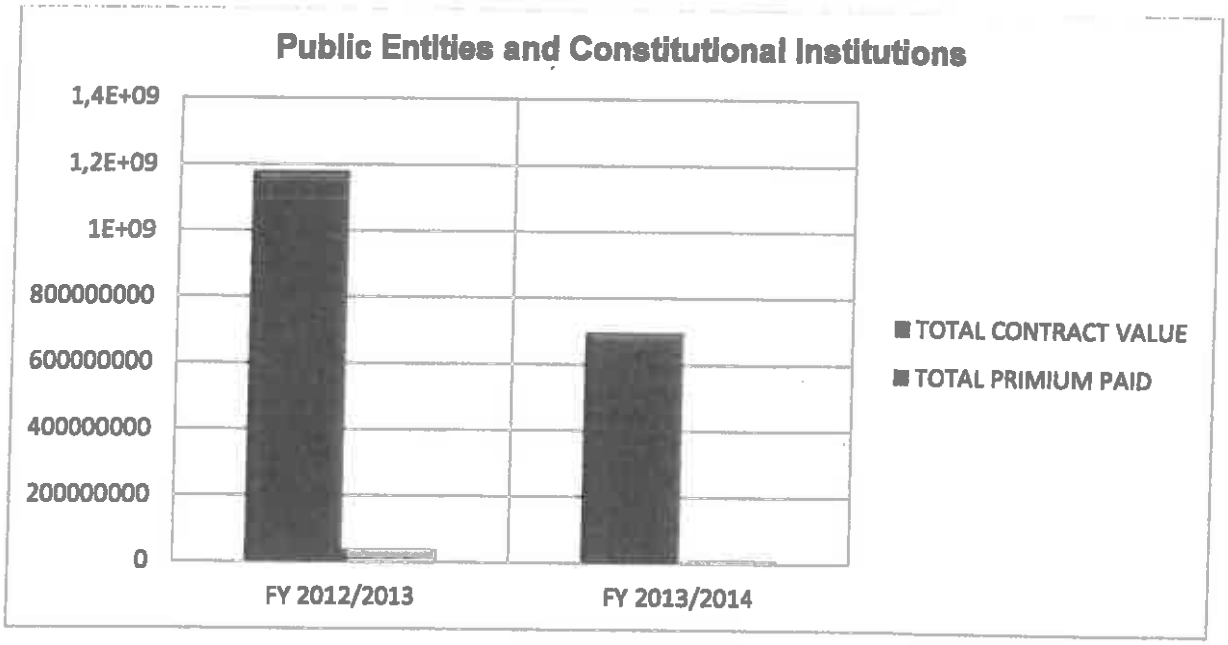
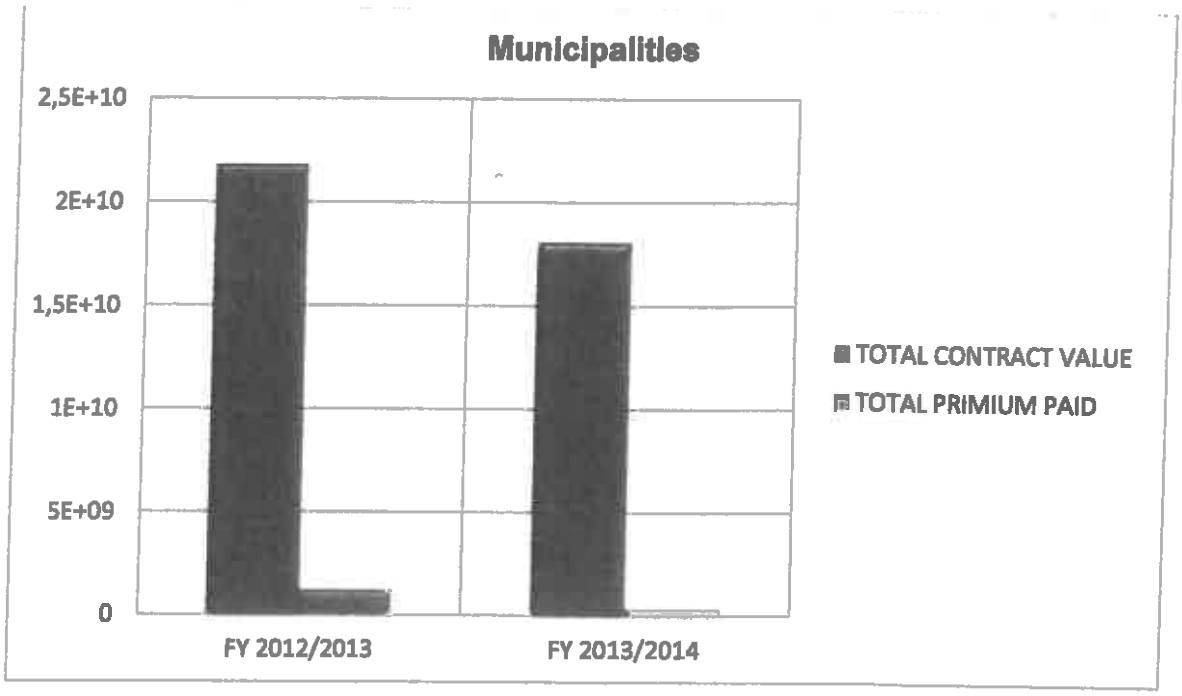


Table 4.4: Municipal total value of contracts awarded compared with total premium paid



A total premium value of 3.3 and 1.7 per cent was paid by Public Entities in the 2012/13 and 2013/14 financial years respectively. In the same period Municipalities paid a total value premium of 5.6 and 1.7 per cent respectively.

A premium of 10.2 per cent and 4.1 per cent was paid to companies at BEE level 1- 3 for the 2012/2013 and 2013/2014 financial years respectively by public entities and constitutional Institutions respectively, during the same period 39 per cent and 83 per cent was paid to BEE level 1 – 3 suppliers by municipalities.

Based on table 4.1 and 4.2 above inference can be drawn that more contracts are awarded to transforming companies/ suppliers from B-BBEE level one to B-BBEE level four which includes exempted micro enterprises. Companies from B-BBEE level six to eight are awarded lesser contracts than those at level one to four. Non- compliant companies/ suppliers are awarded contracts which are comparable to transforming companies at level three and outperform those at BEE level two and one if contract values are considered. From this can be deduced that whilst strides are made on public procurement redress price still favours the well established companies who win bids in spite of being BEE non-compliant.

Table 4.3 and 4.4 draw comparison between total contracts awarded and total premium paid, from this it is reasoned that the maximum premium of 11 and 25

per cent is hardly paid if the total value of contracts is considered, this may be attributed to competitive prices by suppliers.

4. FINDINGS ON THE PPPFA

Government adopted the PPPFA in fulfilment of section 217 of the constitution and in order to redress and transform public procurement which previously favoured well established companies owned by whites to the exclusion of black owned companies.

The architecture of apartheid was based mainly on racial segregation in all facets of life including socio- economic aspects. Government is the single largest spender on procurement of goods and services; it is therefore not surprising that procurement is used to leverage on socio-economic transformation.

With the introduction of the PPPFA government is prepared to pay a premium of up to 11.1 per cent and 25 per cent for the 90/10 and 80/20 preference point system respectively. The intention is to ensure redress and transformation. However the statistics in section 3 above of the past two financial years suggest that government is hardly paying half the anticipated premium; with up to 29 per cent of the total value of contracts paid to B-BBEE non-compliant companies as per table 4.1 and 4.2; the total premium of 3.3; 1.7; 5.6 and 1.7 per cent as per table 4.3 and 4.4, may imply that price is still the determining factor on who wins government contracts. It is submitted that the current preference point system needs to be re-examined and may be consider introducing the new threshold as suggested by other state institutions.

Procurement Regulations 2011 abolished the use of RDP goals as preference points with the introduction of the B-BBEE status level of contributor but also introduced designated sectors for local production and content. The designations are required in order to protect those sectors from foreign cheap imports which obliterate local industries and are also crucial for protecting employment in those sectors. The practice note on prohibition on set-asides is still in force however almost ten sectors have been designated for local production and content for preferential public procurement. It is submitted that designations are a form of set - asides. What is not stated when the sectors are

designated is the level of transformation in those sectors. The danger with set-asides for local production and content is that it may work against the aims of the PPPFA by protecting the very same companies that benefitted from apartheid government especially where large capital investment is needed for new entrants. Local municipalities on the other hand can no longer set-aside certain contracts for companies in their local jurisdiction.

When in the statistical section tables 4.1 and 4.2 are considered, there is an observation that companies at B-BBEE level 1 – 3 were awarded contracts with a combined value of more than 50 per cent of the total value for the 2012/13 and 2013/14 financial years. These are companies with 51 per cent and more black ownership. This represents a positive sign on the implementation of the Procurement Regulations 2011 indicating an incentive for transforming companies/ suppliers using preferential public procurement. The challenge however still remains on how institutions and municipalities in particular can design their BEE strategies to ensure that public procurement plays a role in local economic development within their area of jurisdiction, as the regulations are limited in this aspect.

The second one is the exclusion of the RDP goals which are prescribed by the PPPFA to the preference of B-BBEE charters. Prof Quinot6 states that The Preferential Procurement Regulations further narrow down organs of state's discretion in formulating their own preferential procurement policies. He further to state that an argument may be made that the Preferential Procurement Regulations, 2011 are not in compliance with the PPPFA to the extent that the Regulations attempt to restrict the framework for preferential procurement policies to BEE credentials to the exclusion of other goals contemplated in the PPPFA. Section 2(1) (d) of the PPPFA allows organs of state to formulate supply management policies in terms of which preference points may be awarded on one or both grounds, namely "persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability" and "implementing the programme of the Reconstruction and Development Programme". The Preferential Procurement Regulations 2011, however, seem to restrict organs of state to only award preference points on the first of the two grounds contemplated in the Act, namely BEE status. It is

arguable that the Preferential Procurement Regulations, 2011 are unlawful in this regard.

5. Generic schemes and methods for using procurement to attain socio-economic objectives.

A preferential procurement policy is a procurement policy that promotes objectives additional to those associated with the immediate objective of the procurement itself. The procurement of supplies, services and engineering and construction works has been used internationally to support a number of socioeconomic or political (secondary) objectives including:

- the stimulation of economic activity;
- the protection of national industry against foreign competition;
- improving the competitiveness of certain industrial sectors;
- remedying regional disparities; and
- achieving certain more directly social policy functions such as the fostering of the creation of jobs, the promotion of fair labour conditions and the use of local labour, the prohibition of discrimination against minority groups, the improvement of environmental quality, the encouragement of equality of opportunity between men and women, and the promotion of the increased utilization of the disabled in employment.

Table 4. 1: Generic scheme type and description

Reservation	Contracts or portions thereof are reserved for contractors who satisfy certain prescribed criteria e.g. contractors who: ▪ are owned, managed and controlled by a target population group;

	▪ are classified as being a small business enterprise; ▪ have equity ownership by companies with prescribed characteristics; or ▪ are joint ventures between non-targeted and targeted joint ventures.
Preference:	Although all contractors who are qualified to undertake the contract are eligible to tender, tender evaluation points are granted to those contractors who satisfy prescribed criteria or who undertake to attain specific goals in the performance of the contract.
Indirect:	Procurement strategies and requirements are used to promote policy objectives by constraining the manner in which the procurement is delivered or by being used to generate offsets in parallel to the procurement e.g. specifications require that work associated with the contract is undertaken in a manner that supports policy objectives or offsets whereby undertakings such as the provision of bursaries, participation in an economy, the provisions of community centres etc. that are unrelated to the procurement itself are, in order to secure the contract, committed to.
Supply side	Supply side measures are provided to targeted enterprises to overcome barriers to competing for tenders or for participating in procurements within the supply chain, e.g. access to bridging finance and / or securities, mentorship, capacitation workshops etc.

Table 4. 2: Scheme type, Method and actions associated with the method.

SCHEME TYPE	METHOD	ACTIONS ASSOCIATED WITH THE METHOD
Reservation	#1 Set-asides	Allow only enterprises that have prescribed characteristics to compete for the contracts or portions thereof, which have been reserved for their exclusive execution.
	#2 Qualification criteria	Exclude firms that cannot meet specific requirements or norm, relating to the policy objective from participating in contracts other than those provided for in the law.
	#3 Contractual conditions	Make policy objectives a contractual condition, e.g. fixed percentage must be subcontracted out to enterprises that have prescribed characteristics or a joint venture must be entered into.
	#4 Offering back	Offer tenders that satisfy criteria relating to policy objectives an opportunity to undertake the whole or part of the contract if that tenderer is prepared to match the price and quality of the best tender received.
Preference	#5 Preference at short listing stage	Limit the number of suppliers who are invited to tender on the basis of qualifications and give a weighting to policy objectives along with the commercial criteria such as price and quality at the short listing stage.

	#6 Award criteria	Give weight to policy objectives along with the usual commercial criteria such as price and quality at the award stage.
Indirect	#7 Product service specification	State requirements or service specification e.g. by specifying labour based construction methods.
	#8 Design specifications, contract conditions and procurement processes to benefit particular contractors.	Design specifications and/ or set contract terms to facilitate particular targeted groups of suppliers.
Supply side	#9 General assistance	Provide support for targeted groups to compete for business without giving these parties any favourable treatment in the actual procurement.

A qualitative risk assessment on the implementation of a preferential procurement policy which has objectives that can be realised by creating a demand for goods and services from, or to secure the participation of, targeted groups and targeted enterprises, using the first eight methods listed in Table4.2 above formed the basis of scheme type two method six in South Africa. The assumption is that the implementation method under consideration is managed and implemented in a manner so as to achieve the most favourable outcomes, indicates that preference schemes (methods 5 (preference at the short listing stage) and 6 (award criteria)), whilst not guaranteeing that socio-economic objectives will be met, is the method that is most likely not to compromise immediate / primary procurement objectives if appropriately managed. The analysis furthermore indicates that method 3 (contractual conditions), method 7 (product / description specification), and method 8 (design of procurement to

benefit particular contractors) have the potential under certain circumstances to satisfy primary objectives while method 1 (set asides), method 2 (qualification criteria), and method 4 (offering back) are most likely to compromise such objectives. However the wording of the President's pronouncement is directed at scheme 1 and method 1 therefore any options explored should be directed at this option or most likely complement the option where the intention is to implement the President's pronouncement taking cognisance of the legislative framework mentioned in the preceding paragraphs.

1. Preferential Procurement in other countries

In the following paragraphs we briefly look at how other countries are using public procurement for secondary policy objectives including socioeconomic and political policy objectives. The aim is to present information on the schemes or methods used and the policy instrument without expressing an opinion on the success or failures of the policy objectives of those countries. One should also bear in mind that these policy initiatives are realized within the legislative context and history of each country. The following countries have been randomly selected for analysis on socioeconomic policies that leverage on public procurement for their achievement: Canada, United States of America and Australia.

5.1. Country 1: Canada

Procurement Strategy for Aboriginal business: Guidelines for buyers/ Government Officials

Policy Instrument: Contracting Policy Notice 1997 – 6

Policy Objective

The objective of the Procurement Strategy for Aboriginal Business (PSAB) policy is to assist Aboriginal business development by increasing Aboriginal business participation in the awarding of contracts by the Federal departments and agencies. The PSAB is intended to make use of the government's purchasing system to help Aboriginal business development and grow.

Summary of the policy

5.1.1. Mandatory set-aside for Aboriginal business

The PSAB requires all contracting authorities, where the procurement is valued in excess of $5,000, and is destined primarily for Aboriginal populations as defined in TBS Contracting Policy Notice 1996-2, to restrict the procurement exclusively to qualified Aboriginal suppliers where operational requirements, best value, prudence and probity, and sound contracting management can be assured.

Given the significance of the Aboriginal population set-aside to the PSAB, departments and agencies should always, as an initial step in any procurement destined primarily for Aboriginal populations, set aside the procurement in order to conclusively determine whether there are any qualified Aboriginal suppliers. This can be done by means of appropriate advertising either in the *Government Business Opportunities* publication or by the electronic bidding methodology, as necessary. Only if this first step fails to identify qualified Aboriginal suppliers, should the procurement be then opened up to a larger market.

5.1.2. Selective set-asides for Aboriginal business

Contracts destined for Aboriginal populations which are valued at less than $5,000 may also be set aside for qualified Aboriginal suppliers if it is practical to do so.

All departments and agencies are authorized and encouraged to set procurements aside voluntarily under this program where operational requirements, best value, prudence and probity, and sound contracting management can be assured. A decision to set aside voluntarily should be founded on knowledge and expertise of the Aboriginal supplier community, meeting departmental objectives, best business practices, and the nature of the requirement.

5.1.3. Joint Ventures

Where Aboriginal businesses may not yet be in a position to bid on very large projects, they can enhance their competitive edge by building and expanding partnerships and strategic alliances with others. Joint ventures consisting of Aboriginal and non-Aboriginal businesses, or two or more Aboriginal businesses, may qualify as Aboriginal suppliers under the PSAB provided that the Aboriginal business or businesses have at least 51 per cent ownership and control of the joint venture.

5.1.4. Aboriginal Business Sub-contracting Plans

Sub-contracting plans in federal procurement opportunities can be of further benefit to Aboriginal business. All departments and agencies awarding contracts are encouraged to request Aboriginal business sub-contracting plans within their solicitation documents.

5.1.5. Electronic Bidding – Public Advertisements

Electronic bidding applies to higher value procurement opportunities. These opportunities are posted in the Government Business Opportunities (GBO) publication and in the electronic bidding medium. Both are recognized for public advertising of procurement opportunities under the PSAB, as well as for other procurements. In the case of electronic bidding, suppliers determine which opportunities interest them and request copies of the bid documents from the electronic bidding provider.

If the procurement opportunity is being set aside under the PSAB, only Aboriginal suppliers are eligible to compete. There are two aspects of eligibility. An eligible Aboriginal supplier must qualify as an Aboriginal firm by submitting the completed certificate contained in the "*Requirements for the Set-Aside Program for Aboriginal Business*" in each bid package. If the certificate is not included, the bid is considered non-compliant. The Aboriginal supplier must also have the capacity to fulfil the requirements of the contract.

The contracting authority should indicate that a procurement opportunity is being set aside by including a clear statement to that effect at the beginning of the Notice of Proposed Procurement (NPP) and in the solicitation document. The statement should also be used for Advance Contract Award Notice(s) (ACANs).

In summary, the statement is a tool that should be used prominently in each solicitation method if the procurement is being set aside.

To notify Aboriginal firms of contract opportunities identified for set-asides, electronic bidding may be used to publish Solicitations of Interest. Should no Aboriginal firm respond to a Solicitation of Interest, the procurement plan will be changed to open the requirement to all bidders, but at the same time may include provisions/criteria requiring bidders to develop Aboriginal sub-contracting plans as part of their proposals. Any exemption from the application of the trade agreements (NAFTA, WTO-AGP and AIT) acquired by virtue of having invoked the PSAB expires upon a return to open competition through a re-solicitation.

5.1.6. Direct solicitation

Another method for tendering federal government contracts under the PSAB is direct solicitation. Examples of direct solicitations can include an information letter mailed to a list of potential sources, advertisement of the opportunity in trade publications, or telephone solicitation.

5.1.7. Tendering from Source Lists

Suppliers are chosen from established source lists of pre-qualified suppliers. Each list identifies potential suppliers for a specific good or service. Source lists may be used for most low dollar value opportunities. A permanent list of suppliers may be utilized under the PSAB where the Aboriginal supplier base is a known factor. Departments and agencies are encouraged to maintain source lists of qualified and eligible Aboriginal businesses for low dollar value opportunities and other requirements below the electronic bidding threshold. Source lists should be updated on a regular basis to ensure new sources of supply have an opportunity to compete. No source lists should be maintained for more than two years without being updated. Generally, the list should be rejuvenated at much shorter intervals.

Where a source list is used for a procurement opportunity set-aside there should be a clear and prominent statement in the notification of the contracting opportunity to the effect that it is set aside for Aboriginal suppliers only.

Aboriginal suppliers identified on source lists must nevertheless attach to their bid the certification found within the *"Requirements for the Set-Aside Program for Aboriginal Business"* document attached to the solicitation package.

On occasion, the contracting authority may conclude that no qualified Aboriginal suppliers exist, yet the requisitioning department has identified the procurement as a set-aside. In this case the obligation to source the requirement to Aboriginal firms cannot be rejected by a simple "note to file" saying that no Aboriginal supplier is known. The efforts of the contracting authority to find Aboriginal businesses with the capability to perform the requirement should be clearly documented on the file. These could include, for example, contacting the requisitioning department to request a potential source list of Aboriginal firms or requesting from the Access to Federal Procurement Directorate a list of potential Aboriginal suppliers.

5.2. Country 2: United States of America: Federal departments and Agencies

Opportunities for small business, veteran-owned small business, service-disabled veteran-owned small business, HUB Zone small business, small disadvantaged business, and women-owned small business concerns.

Policy Instrument: Federal Acquisition Regulation

Objective of the policy

The objective of the policy is to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUB Zone small business, small disadvantaged business, and women-owned small business concerns. To provide the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

Summary of the policy

5.2.1. Establishment of the office of Small and Disadvantaged Business Utilization

Heads of contracting activities are responsible for effectively implementing the small business programs within their activities, including achieving program goals. They are to ensure that contracting and technical personnel maintain knowledge of small business program requirements and take all reasonable action to increase participation in their activities' contracting processes by these businesses. The Small Business Act requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization.

5.2.2. Encouraging small business participation in acquisitions.

Encouraging participation of small business includes but not limited to:

Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

Plan acquisitions such that, if practicable, more than one small business concern may perform the work;

Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government; and Encourage prime contractors to subcontract with small business concerns

5.2.3. Locating small business sources.

The contracting officer must, to the extent practicable, encourage maximum participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUB Zone small business, small disadvantaged business, and women-owned small business concerns in acquisitions by taking the following actions:

Before issuing solicitations, make every reasonable effort to find additional small business concerns, unless lists are already excessively long and only some of the concerns on the list will be solicited. This effort should include contacting the SBA procurement centre representative or, if a procurement centre representative is not assigned, the SBA may assign one or more procurement

center representatives to any contracting activity or contract administration office to carry out SBA policies and programs. Assigned SBA procurement center representatives are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its procurement center representatives security clearances required by the contracting agency

Publicize solicitations and contract awards through the Government-wide point of entry.

5.2.4. Solicitation

The contracting officer must encourage maximum response to solicitations by small business, veteran-owned small business, service-disabled veteran-owned small business, HUB Zone small business, small disadvantaged business, and women-owned small business concerns by taking the following actions:

Allow the maximum amount of time practicable for the submission of offers;

Furnish specifications, plans, and drawings with solicitations, or furnish information as to where they may be obtained or examined;

Provide to any small business concern, upon its request, a copy of bid sets and specifications with respect to any contract to be let, the name and telephone number of an agency contact to answer questions related to such prospective contract and adequate citations to each major Federal law or agency rule with which such business concern must comply in performing such contract other than laws or agency rules with which the small business must comply when doing business with other than the Government.

5.2.5. Data collection and reporting requirements.

Agencies must measure the extent of small business participation in their acquisition programs by taking the following actions:

- Require each prospective contractor to represent whether it is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUB Zone small business, small disadvantaged business, women-owned small business, EDWOSB concern, or WOSB concern

eligible under the WOSB Program, Small Business Program Representations).

- Accurately measure the extent of participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUB Zone small business, small disadvantaged business, and women-owned small business concerns in Government acquisitions in terms of the total value of contracts placed during each fiscal year, and report data to the SBA at the end of each fiscal year.
- When the contract includes, Post Award Small Business Program Representation, and the conditions in the clause for representing are met;
- Require a contractor that represented itself as a small business concern prior to award of the contract to represent its size status; and
- Permit a contractor that represented itself as other than a small business concern prior to award to represent its size status.

5.2.6. Procurement process: Set-asides for small businesses.

Contracting officers are required to set-aside individual or class of acquisitions for competition among small business. The following requirements must be met:

1. it must be determined to be in the interest of maintaining or mobilising the nation's full productive capacity, war, or national defence program;
2. Assuring that a fair proportion of government contracts in each industry category is placed with small business utilising the total small business set-aside or partial set-aside. Total set-aside applies a threshold value where contracting is reserved for small businesses.

The regulations also set parameters for withdrawing, modifying and dissolution of small business set-aside, for example where it will be detrimental to public interest (payment of more than a fair market price).

5.3. Country 3: Australia

Indigenous Opportunities Policy (IOP)

Policy Instrument: Government Procurement Rules

Policy objective

The Indigenous Opportunities Policy aims to increase the number of Indigenous Australians trained and employed as a result of awarding large Australian Government contract(s) as well as increasing the level of involvement of Indigenous businesses in the delivery of goods and services under those contracts.

Summary of the Policy

5.3.1. Public Procurement Process using the IOP

For the purpose of promoting employment and training opportunities for Indigenous Australians, where projects involve expenditure over $5 million ($6 million for construction) in regions where there are significant Indigenous populations, officials must:

Consult with the IOP Administrator in the Department of the Prime Minister and Cabinet, the Commonwealth Indigenous Coordination Centres or equivalent Commonwealth Office, and community council or group, as appropriate, in the planning stages of those projects.

In each procurement process under those projects require each tenderer to submit as part of their tender a plan for providing training and employment opportunities to local Indigenous communities and for the use of Indigenous suppliers that are small and medium enterprises.

5.3.2. The Indigenous Training, Employment and Supplier Plan

A Plan must set out what an organisation will do to provide training, employment and business opportunities for Indigenous Australians.

The Plan must contain information on what organisations will do in four areas:

- Training Indigenous Australians
- Employing Indigenous Australians
- Working with Indigenous businesses that are small to medium enterprises, and
- Activities which incorporate IOP objectives in to the running of the organisation as a whole.

The IOP Administrator encourages organisations to set training, employment and Indigenous business targets when designing their Plans. Plans must be developed and submitted electronically using the Indigenous Opportunities Policy online management information system (MyPlan).

The review of Plans does not form part of an Approach to Market assessment process, unless stated otherwise in the Approach to Market documentation. Once reviewed Plans are given an approved or rejected status.

A Plan will be rejected if it has not been completed correctly or includes activities that the IOP Administrator considers will not increase the number of Indigenous Australians trained and employed and/or the level of involvement of Indigenous businesses in the delivery of goods and services. If a Plan is rejected, the IOP Administrator will provide reasons and an opportunity for an organisation to revise and resubmit the Plan.

5.3.4. Compliance

Organisations that are awarded contracts affected by the Indigenous Opportunities Policy are required to implement their Indigenous Training, Employment and Supplier Plan, and report annually to the IOP Administrator on the implementation of and outcomes achieved under the Plan.

The IOP Administrator will contact each organisation if it fails to meet these requirements and the organisation will be given the opportunity to address any of the matters raised. The IOP Administrator will also advise affected non-corporate Commonwealth entities of any action it takes in this regard.

5.3.3. Reporting

5.3.3.1. The IOP Administrator

The IOP Administrator is required to report annually to Government on the implementation of, and outcomes achieved, under the Policy. The report will include information on:

- non-corporate Commonwealth entities' application of the Policy
- the training and employment opportunities created for Indigenous Australians as a result of the Policy (including baseline data), and
- Opportunities created for Indigenous Australian suppliers under the Policy.

5.3.3.2. Non-corporate Commonwealth entities

To enable the IOP Administrator to perform meet its reporting requirements, non-corporate Commonwealth entities are requested to report to the IOP Administrator on an annual basis on the number of projects to which the Policy applied each financial year, including a description of the activities undertaken under each project, and any action taken in relation to non-compliance with contractual requirements related to the Plan.

In addition, the IOP Administrator requests non-corporate Commonwealth entities to provide a copy of the any new 'Indigenous Opportunities Policy' clauses (and any relevant documentation) they develop for ATMs and contracts to the IOP Administrator via the IOP mailbox. This facilitates the ongoing refinement of the Policy; and advises the IOP Administrator of any new contracts executed to which the Policy applies.

This allows the IOP Administrator to offer timely assistance and support to organisations as they begin to implement their Plans and notify them when reports are due and when Plans are due for renewal, including working with entities' contract managers when a sample of Plans are reviewed each year.

6. Comparative analysis and recommendations

6.1. Comparative analysis

There are different policy instruments used by governments for the implementation of policies aimed at socio-economic development using public procurement as leverage. From the observation of the three countries, it would appear that secondary legislative instruments (Regulations, Rules and Policy letters) are predominant. These policy objectives whilst they may be taken over a long period they exist within an environment that is changing rapidly, may be the use of secondary or third level legislative instruments provides flexibility for changes in policy to adapt with the ever changing business environment if one were to make inference from the three countries.

Small business development requires a comprehensive and integrated strategy involving multiple government departments, government agencies, big business, small business enterprises and the designated groups. Pertinent information about the sector groups or small businesses should be at government's timely reach in order to make appropriate policy decisions. Policy decisions may include joint ventures and subcontracting with small businesses or designated sectors in public procurement contracting. Leveraging on public procurement is but one area in the broader SMME development strategy.

Small business development and upliftment of the previously marginalised groups through public procurement is a trend that has been adopted by the three countries under review. The use of set-asides in public procurement for horizontal policy objectives in all three countries is juxtaposed with the right of the state to pay a fair market price. By paying a fair market price governments ensure that the primary objective (value for money) of public procurement is not compromised.

Unlike in other countries, in South Africa the odds are stacked against government, the majority were excluded from the mainstream of the economy, land development divided along racial lines, infrastructure development favoured white dominated areas. The majority must be empowered as opposed to minorities in other countries. South Africa opted for preferential point system at evaluation and award of the bid based on the broader South African legislative framework.

6.2. The Supply Chain Management System

It is important to highlight that preferential procurement takes place within a regulated system of public procurement in government. The constitution states that public procurement must take place within a system which is fair, equitable, competitive, transparent and cost effective. The Supply Chain Management (SCM) system that was adopted by government finds it expression through the Treasury Regulations and Practice/ Instruction Notes issued in terms of the Public Finance Management Act (PFMA). The system prescribes procurement methods and the threshold values linked with the procurement method. For the purposes of this paper the analysis will be limited to quotations. Practice Note 8 of 2007/2008 on threshold values for the procurement of goods, works or services states that Accounting officers / authorities should invite and accept written price quotations for requirements up to an estimated value of R500 000 from as many suppliers as possible, that are registered on the list of prospective suppliers.

The guide for accounting officers on the implementation of the SCM system, paragraph 4.6 on the establishment of a database of suppliers when obtaining quotations proposes that to stimulate the promotion of BEE and the development of HDIs and SMMEs, it is suggested that institutions should advertise in the local media for businesses to register as potential suppliers for goods and services to be obtained by means of quotations. The accounting officer/ authority may further categorise the suppliers according to the goods/ services they are capable of supplying. Quotations for the required goods/ services should be obtained from all potential suppliers in the specific category or on rotation basis from various suppliers. Using a source list or locating categories of suppliers for low value procurement is an international practice, as can be observed from the intention of the guide; it can be used for the promotion of horizontal procurement policies.

6.2.1. Recommendations related to the Supply Chain Management system

Departments and public entities spend a portion of their goods and services budgets through quotations sourced from the database of suppliers managed by accounting officers/ authorities of the respective departments and public entities. National treasury is finalising a national database of suppliers for government departments. The supplier database has the potential to be utilised

for the implementation of the President's pronouncement that government set-aside 30% of appropriate categories of State procurement for purchasing from SMMEs, Co-operatives as well as township and rural enterprises.

With the allocated budget of departments and public entities, these institutions are in a position to determine when drawing their demand management plans (procurement plans included), the estimated monetary value of procurement that will be carried out through quotations using their internal database for prospective suppliers. Potentially purchases of between R 2000 - R 500 000 may be sourced through the database. In the analysis above, it is stated that one of the intentions of the database of prospective suppliers is to stimulate the promotion of BEE and the development of HDIs and SMMEs. It is suggested that institutions may be required for efficiency and effective purposes to classify the database of prospective suppliers in line with their preferential procurement strategy in reaching the target announced by the President.

The National Treasury (Office of the Chief Procurement Officer) may as well consider the classification of suppliers in the national supplier database in line with the preferential procurement strategy of government as a whole. It may be well expected that institutions may not be able to meet or exceed the 30% target through quotation alone.

There are no major policy changes expected in implementing this recommendation, guidelines or to a greater extent an instruction note may be appropriate in assisting institutions implement the policy proposal.

Institutions may as part of their preferential procurement strategy promote on identified procurement contracts the use joint ventures and subcontracting as part of preferential procurement strategy in line with the target announced by the President. Subcontracting suppliers may be sourced from the institution's database of prospective suppliers. This recommendation does not require major policy changes however institutions will be required to communicate this information when advertising bids and drawing procurement contracts. Institutions may develop internal policies on joint ventures and subcontracting using suppliers in their database for subcontracting.

6.2.2. Recommendations related to the preferential procurement framework.

It is suggested that the South African legal framework does not provide for the use of set-asides for the advancement of socioeconomic policy objectives leveraging on public procurement. The reasons advanced in most instances range from constitutional provisions, section 9 on equality and section 217 on procurement. Since no supplier or business may be prohibited from tendering for state contracts, government opted for a system that allows all that meet the tender requirements to tender but award points to the most transforming tenderers/ suppliers.

As an addition prequalification of tenderers should be introduced before tenders are evaluated further on points and price. The recommendation intends to introduce prequalification conditions in line with the broader preferential strategy of government in the evaluation of bids. It is the intention of the recommendation that the Preferential Procurement Regulations 2011 be amended to give powers to the national treasury to issue instructions to organs of state on preferential procurement in line with the broader preferential procurement strategy. The amendment should be modelled to regulation 9 of the Preferential Procurement Regulations 2011. *(This recommendation is made fully aware that the PPPFA does not give such power to the Minister but it has already been done through Regulation 9)*

A flexible but standardised approach should be adopted. The approach should still ensure balance between value for money and redress. It should ensure the empowerment of sectors identified for socio-economic development. Preference of specific sectors may be subjected to financial threshold values designed specifically for the purposes of government procurement contract requirements. The aim is to introduce a differentiated approach to preferential procurement whilst retaining the preference point system.

Prequalification criteria will ensure that small enterprises are able to compete with similar enterprises in order to ensure that they are protected from big enterprises that are able to win tenders on the basis of price alone. Prequalification criteria currently applied under provisions of Regulation 9 of the Preferential Procurement Regulations 2011. Through this provision sectors like textile have been insulated from cheap foreign imports which threatened to

destroy the sector between the late 90s and around 2005. Although regulation 9 may be deemed as not falling within the ambit of the PPPFA, it is necessary for the protection of domestic industries. In conclusion prequalification of suppliers before they are evaluated further in terms of price and preference is necessary for levelling the playing field in a way that ensures that these enterprises are developed in a meaningful way.

The state should put measures that will ensure that premium paid as a result of doing business with small and micro enterprises does not escalate more than the provisions of the PPPFA which is calculated at 25 and 11.1 per cent per contract. We have already indicated that organs of state are paying far less premiums than anticipated in the act. All that is required is to ensure that there are enough suppliers of the commodity which will ensure competition. The more competition, the high possibility of reduced prices, the less premium will be paid by the organs of state.

The amendments may introduce a new standard bidding documents for prequalification and reporting requirements.

It is anticipated that if the recommendation and policy changes are implemented following procurement changes will be affected:

- Advertisement of tenders;
- Prequalification and evaluation of tenders;
- Tender award and
- Monitoring and Reporting

6.2.3. The PPPFA in its entirety needs to be revised to address amongst others the following:

a) Ambiguity between the PPPFA and its regulations;

b) Supplier development;

c) Industry transformation; and

d) Implementation challenges raised by various stakeholders.

In the meantime the following measures may be piloted to cater for the challenges raised:

a) **Price determined model**

Identify commodities that a fixed price determination can be applied to. With these identified commodities, institutions will conduct market research to determine actual cost of that commodity and provide the industry with a fixed price that all bidders should accept and only compete on empowerment level of contribution.

b) **Sub-contracting**

To allow institutions to provide a sub-contracting model that would provide incentives for companies that sub-contract with small companies that are at least 50% black owned (within the requirements of the PPPFA regulations)

c) **Incubation programme for new entrants**

Identify sectors with empowerment bottlenecks and prescribe a programme where established companies would engage new entrants and provide them with mentoring as part of supplier development.

7. Conclusion

The above recommendations are based on the assessment of the South African legal framework, a brief review of other countries that are using preferential procurement for socio-economic policy objectives and looking at the various schemes that may be used for horizontal policy objectives leveraging on public procurement. It will be prudent for policy makers to test the recommendations with legal expert prior to even drafting policy instruments.

List of sources

1) Aboriginal Procurement Manual Policy

2) Best Practice Guide B1: Formulating and Implementing preferential procurement policies March, 2004: First edition of CIDB document 1007

3) Commonwealth Procurement Rules: Australia Government, July 2014

4) Federal Acquisition Regulations

5) Geo Quinot 2014, Research the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Officer (Internal Report);

6) Government of the Republic of South Africa. *National Development Plan, 2011 Vision 2030*;

7) Government Gazette 1994 No. 16085: *The White Paper on Reconstruction and Development;*

8) The Constitution of the Republic of South Africa, Act 108 of 1996

9) Indigenous Opportunities Policy: Australia Government

10) Parliament Monitoring Group, Parliament of South Africa 2000: *Ad Hoc Finance Committee on Preferential Procurement Policy Framework Bill*;

11) Phoebe Bolton 2006, Government Procurement as a policy tool in South Africa: Journal of Public Procurement Volume 6 issue 3;

12) The Presidency: Compliance of State Owned Entities to the Government's Development & Transformation Agenda, 2012;

13) Procurement Strategy for Aboriginals Business 1996 - 2

14) The Preferential Procurement Policy Framework Act, Act 5 of 2000

15) Preferential Procurement Regulations 2001;

16) The Preferential Procurement Regulation 2011

17) Small Business Procurement Goals: Policy letter 99 – 1

18) Women Enterprise Program: Policy Letter 80 – 4

19) World Bank: http//web.worldbank.org/local economic development.

Six: Broad-based Black Economic Empowerment (BBBEE)

Government has adopted the position that black economic empowerment (BEE) should seek to empower all historically disadvantaged people rather than only a small group of black investors. To this end, it adopted the Broad-Based BEE Act, which calls for expanded opportunities for workers and smaller enterprise as well as more representative ownership and management.

Current BEE provisions have, however, in many instances failed to ensure a broad-based approach, instead imposing significant costs on the economy without supporting employment creation or growth. The present BEE model remains excessively focused on transactions that involve existing assets and benefit a relatively small number of individuals. The New Growth Path requires a much stronger focus on the broad-based elements of the BEE regulations – ownership by communities and workers, increased skills development and career pathing for all working people, and support for small enterprise and co-ops – as well as a new emphasis on procurement from local producers in order to support employment creation.

The following shortcomings have emerged in the implementation of BEE. First, ownership and senior management issues receive disproportionate emphasis. The unintended consequences of this trend include "fronting", speculation and tender abuse. Second, the regulations do not adequately incentivise employment creation, support for small enterprises and local procurement. The preferential procurement regulations aggravate this situation by privileging ownership over local production. Finally, the broad-based BEE regulations penalise public entities as suppliers. The democratic state owns public entities on behalf of our people yet the regulations do not count them as "black empowered".

A major re-think is needed of the BEE framework and policy to achieve South Africa's developmental and growth goals. The dti



and EDD will work with the relevant government departments and the BBBEE Advisory Council to ensure:

- A substantial revision of the BBBEE Codes to do more to incentivise employment creation; investment in new productive capacity by black entrepreneurs, including small businesses and co-ops (using among others stronger local procurement); skills development and employment equity; collective and other forms of broad-based ownership; and sector strategies to create jobs;
- Consistent implementation of broad-based (instead of narrow) BEE in all sectors, with a systematic assessment of the effects on the cost of capital and investment; and
- Continuous monitoring and evaluation of the impact of broad-based BEE on overall equity, employment creation, support for new entrepreneurs, growth and innovation.

Seven: Labour policies

The labour-market policies left by apartheid, which shaped racially based inequality and exploitation, could not provide the basis for a

LIST OF ORGANIZATIONS / INDIVIDUALS THAT SUBMITTED COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016.

NO	NAME OF INSTITUTION/ NAME OF INDIVIDUAL	DATE SUBMITTED
1.	Nombuso Msomi	17/06/2016
2.	Johan Van Wyk	21/06/2016
3.	Africandi Strategic Transformation Solutions	20/06/2016
4.	M and L Medical Suppliers CC trading as VIVA Medical	20/06/2017
5.	UWP Consulting: Simnikiwe Xawuka	20/06/2016
6.	Black Youth in Business Forum: Xolile Rabushe	20/06/2016
7.	Protem: Jako Duvenhage	21/06/2016
8.	SWB Holdings PTY Ltd: Sandile Masondo	21/06/2016
9.	SKA Africa: Ntokozo Sosibo	21/06/2016
10.	Gauteng Provincial Treasury: Carel van Heerden	27/06/2016
11.	Brisika: Helen Venter	28/06/2016
12.	BSN Medical: Nils von Klemperer	28/06/2016
13.	CARIFRO: Michele Rivarola	29/06/2016
14.	Mongano Jantjies	29/06/2016
15.	Vumesa Pty Ltd: Vumani H Khumalo	29/06/2016
16.	Impande Consulting: Siyanda Mwelase	29/06/2016
17.	CESA: Gillian Wand	30/06/2016
18.	Geoff Kaschula	04/07/2016
19.	Rawlins Wales & Partners	04/07/2016
20.	Sol Plaatje Municipality: Phetole Sithole	04/07/2017
21.	CAT Admin Services: CJ Esterhuizen	05/07/2016
22.	Mthuthuzeli Gqoma	05/07/2016
23.	Nokulunga Nene	06/07/2016
24.	National Department of Works: Izak de Villiers	06/07/2016
25.	Robben Island Museum: Freddy Raseote	06/07/2016
26.	National Treasury: Misaveni Ngobeni	06/07/2016
27.	Africoast Consulting Engineers: Lisa van der Merwe	07/07/2016
28.	City of Cape Town: Jessie Shonhiwa	07/07/2016
29.	Peter Fischer	07/07/2016
30	ARYX Consulting: Renay Heynes	08/07/2016
31.	S&W Limpopo: Danie Basson	11/07/2016
32.	Thabo Atlhoiang	11/07/2016
33.	Impumelelo Consulting Engineers	11/07/2016
34.	APG Logistics: Nosipho Gxumisa	12/07/2016
35.	SENTEC: Reshni Maharaj	12/07/2016
36.	Northern Cape Department of Education: Joseph Senakgomo	12/07/2016
37.	Department of Trade and Industry: Dr Tebogo Makube	12/07/2016
38.	Cerimele Construction: Niekie Basson	13/07/2016
39.	Aletia Naidoo	13/07/2016
40.	Industrial Development Corporation: Faith Mashele	13/07/2016
41.	MBB Services International: Dieter Heinsoln	13/07/2016
42.	MOTT MACDONALD: Douglas Smetherham	13/07/2016
43.	MCPM: Ashana Naidoo	13/07/2016
44.	ITAC: Mzoxolo Koyana	13/07/2016

45.	Lukhozi Consulting Engineering: Greg Tucker	13/07/2016
46.	ILISO Consulting Engineering: Clint G Koopman	14/07/2016
47.	IPASA: Dr Konji Sebati	14/07/2016
48.	RAF: M Moremi	14/07/2016
49	Core Focus: Gustav Coetzee	14/07/2016
50.	SAA: Mzolisi Rungqu	14/07/2016
51	Laurika Nxumalo (Miss)	14/07/2016
52.	Auditor General SA: Walter Bhengu	14/07/2016
53.	Gautrain Management Agency: Abigal Kumalo	14/07/2016
54.	Grand Tellumat Manufacturing: Hannes Mouton	14/07/2016
55.	National Research Foundation: Talelo Lekalake	14/07/2016
56.	SAWiC: Ms Vuyiswa Ndzakana	15/07/2016
57.	TaranisCo Advisory CC: Gerrit Davids	15/07/2016
58.	National Energy Regulator: Mosibudi Ralematha	15/07/2016
59.	HAW& INGLIS CIVIL ENGINEERING: Adrian Robinson	15/07/2016
60.	SA MRC: Mongezi Mdhluli	15/07/2016
61.	SARS: Itumrleng Tlhomelang	15/07/2016
62.	MAN Truck& Bus (S.A.): Jordin Tribe	15/07/2016
63.	Standard Bank SA: Tatenda Goredema	15/07/2016
64.	SAWiC: Nompumelelo Pakade	15/07/2016
65.	BEE Advisory Council: Lindiwe Makhanya	15/07/2016
66.	Safcec: Frederik Oosthuizen	15/07/2016
67.	SOEPF: SOEPF Secretariate	15/07/2016
68.	B-BBEE Commission: Adv. Lindiwe Madonsela	15/07/2016
69.	Rand Water: Thabisa Mange	15/07/2016
70.	JG AFRIKA: Paul Olivier	15/07/2016
71.	CESA: D.S. TEMPLE	15/07/2016
72.	ACSA: Nomvula Mthethwa	15/07/2016
73.	Blacklite: Ajay Lalu	15/07/2016
74.	KPMG: Gustav von Bratt	15/07/2016
75.	Mercedes Benz South Africa: Refilwe Ramatlhodi Ndhlovu	15/07/2016
76.	CIDB: Inba Thumbiran	15/07/2016
77.	NASHUA: Bhavik Khoosal	15/07/2016
78.	National Department of Public Works: Maria Lekota	15/07/2016
79.	TRANSNET: Jocelyn M. Louw	15/07/2016
80.	CESA: Gillian Wands	15/07/2016
81.	MTN: Moses Mashisane	15/07/2016
82.	SAMED: Tanya Vogt	15/07/2016
83.	SAFCEC: Frederik Oosthuizen	15/07/2016
84.	ZAA Engineering Projects & Naval Architecture (Pty) Ltd: Wanda Ellison	15/07/2016
85.	Bigen Africa Services (Pty) Ltd: Corlia van Wyk	15/07/2016
86.	First Rand Bank Limited: Yvette Singh	15/07/2016
87.	Johnson &Johnson: Kirti Narsai	15/07/2016
88.	Ms Susan Campbell	15/07/2016
89.	KZN edtea: Cebile Khanyile	15/07/2016
90.	Abbot: Elsa Moroney	15/07/2016
91.	Black Business Council: Pule M. Mokoena	15/07/2016
92.	SABS: Boitumelo Masako	15/07/2016
93.	BPMA: Kingsley Tloubatla	15/07/2016

94.	SOEPF: SOEPF Secretariate	15/07/2016
95.	SACTAWU: Simon Eppel	15/07/2016
96.	CONLOG (Pty) Ltd: Wasim Dawood	15/07/2016
97.	South African Institute of Race Relations: Dr Anthea Jeffery	15/07/2016
98.	SALGA: Charles Parkerson	15/07/2016
99.	MSD: Neren Rau	15/07/2016
100.	SAEEC: Chiboni Evans	15/07/2016
101.	Adv. K Anuridhra	15/07/2016
102.	VIVA Medical Suppliers CC: Lindsay John Curran	15/07/2016
103.	Aspen Pharma care: Stavros Nicolaou	15/07/2016
104.	Brendon Theunissen	15/07/2016
105.	Sanele Gcumisa	15/07/2016
106.	Axxiom (Pty) Ltd: Komane G. Moeketsi	15/07/2016
107.	Umsinsi Health Care: Amanda Wilde	15/07/2016
108	SAICE: Steven Kaplan	15/07/2016
109.	WEBBER WENTZEL: Adriano Esterhuizen	15/07/2016
110.	APL: Lorraine Pillay	15/07/2016
111.	SAICE (2): Steven Kaplan	16/07/2016
112.	Master Builders South Africa: Pierre Fourie	18/07/2016
113.	Professional Services Built Environment: Sandile K. Ngconbo	18/07/2016
114.	National Roads Agency: Mr Johannes Makgatho	18/07/2016
115.	Geoilocate: Sindile Bidla	18/07/2016
116.	Thandolwethu: Eunice Mbele	18/07/2016
117.	DHET: Ms A Coertze	18/07/2016
118.	Association of Quantity Surveyors: Larry Feinberg	18/07/2016
119.	OCPO (IDMS): Gysbert Cronje	19/07/2016
120.	City of Cape Town: Monique Scharffenorth	20/07/2016
121.	BCAP: Ms LL Dhlamini	20/07/2016
122.	Sasria: Mziwoxolo Mavuso	20/07/2016
123.	Department of Science and Technology: Shane Thivhafuni	21/07/2016
124.	Bayanda Dyani	22/07/2016
125.	Northern Cape Department of Education: Joseph Senakgomo	22/07/2016
126.	KZN Department of Public Works: Sherilee Frankson	22/07/2016
127.	Shuma Africa Projects	25/07/2016
128.	CESA(2): Gillian Wands	25/07/2016
129.	Cofesa: Dr Lawrence McCrystal	02/08/2016
130.	Mckinsey & Company: Nomfanelo Magwentshu	04/08/2016
131.	IPP Office: Steven Muleya	18/08/2016
132.	Free State Provincial Government: Nolette Te Brugge	22/08/2016
133.	AfriBusiness: Armand Greyling	23/08/2016 (letter requesting extension) & 15/09/2016 (submission on the draft regulations)
134.	JUTA and Company (Pty) Ltd: Annami Language –Van Zyl	23/08/2016
135.	NTR Group: Mkhuseli Ciyo	03/09/2016
136.	TIPS: Dr Neva Seidman Makgetla	07/09/2016
137.	AMEGO Consulting: N Mngomezulu	15/09/2016
138.	SAFCEC(3): Frederik Oosthuizen	22/09/2016

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
1.	NOMBUSO MSOMI (SUNSHINE)	Regulation 6 (90/10 preference point system for acquisition of goods or services for Rand value above R 100 Million.)	It would be ideal to do away with 90/10 completely as it minimises the impact of redress.	Instead, introduce 70/30 as a replacement of the 90/10. This will ensure the bridging of the inequality gap as the multi-million companies will strive not to tick the box, but to to take every step to ensure that they play an instrumental role in the transformation of economy of our beloved country.	**Rejected: Not possible to introduce a new preference points system, as the 90/10 and 80/20 is prescribed by the primary legislation the PPPFA.**
		General	International companies are not addressed. This is a big concern as we are net importers. International companies that manufacture, supply and export Original Equipment (OEM) to our country do so at ease and tax free because there are no rules applicable to them if they declare that they do not have offices/presence in our country.	If we can ensure that they commit to our BBBEE act using the scorecard, skills competency of our youth could improve. They may also be compelled to subcontract or join forces with local companies (QSEs and/SMMEs). They could also use creative means to ensure that this happens. For example, they can take our youth to their countries to learn how to repair, service and operate the machines they intend to import.	**Noted: Similar to the 2011 version, these regulations promote local procurement as a means of encouraging local manufacturing.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
		Regulation 13. Remedies	To use a figure of R30 million as a threshold for compelling companies to subcontract to EMEs may have unintended consequences. Some industries do not make such revenue. SCM officials could reduce the magnitude of the scope to be within the R30 million thresholds just to ensure that there is no subcontracting.	Instead, an alternative could be that Generic companies must subcontract to QSEs and SMMEs; and QSEs must subcontract to SMMEs. In addition to the Subcontracting as an Objective criteria "LOCALITY" needs to be factored in and only in cases where local bidders are not available can an external(outside the province/ District/ Municipality/ Municipal Ward) preference can be set by SCM officials depending on the type and size of tender. This will encourage SMMEs and Cooperatives' participation in rural and township economy.	**Noted, the threshold and the complexity of sectors to sub-contract will still be looked at to find a model that can fit and work for all sectors.** **Although we are in agreement that something must be done to promote local enterprises (geographically), public procurement must be open to all South Africans irrespective of their geographic position.**
		General	Fronting! This is a serious problem and it must be stated categorically that it must not be done and that transgressors will be prosecuted. This will potentially happen		**This concern is perfectly dealt with in the B-BBEE Act, there is no need to repeat those provisions**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			where the relationship between the main contractor and the subcontractor is not monitored contractually.		in these Regs.
		Regulation 1. Definitions	The definition of black also needs to be reviewed. In August 2015 during the KZN Procurement Indaba, the results of the study revealed that Indians are the most benefiting out of the three groups of blacks (Africans, Coloureds and Indians). It was also mentioned that Indians do business with each other and with whites, but not with blacks. Further, Indians were never really subjected to the same harsh discriminations as Africans and therefore Africans and Indians did not start from the same position when tables were eventually turned. Please consult Advocate Siza Mthethwa on this matter. Additionally, the KZN MEC for public works, Mr Ravi Pillay can also attest to this. Until the definition of 'Blacks' has been revised, inequality gap will not close soon. Regulations will change with changes in government representatives.		**Rejected: The definition used is obtained from the B-BBEE Act until Blacks are reclassified the definition will stand**
		General	Regarding Procurement in the construction industry, there is an unfair advantage in that	I propose that the qualification for bidders to bid under a certain	**Noted, matter to be raised with CIDB on**

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			the contractors in the higher grade can bid for tenders in the lower grade, while bidders in the lower grades cannot bid for tenders in higher grades. This is done deliberately to protect big companies such that in times of famine, they can still be able to collect crumbs and survive.	grade be upwardly as well as downwardly inflexible, eg, grade 9 to bid up to grade 7 and not lower than that. If there are no bidders with the requisite skills under lower grades, grade 7-9 can subcontract 70% and coach the grade 6 or lower.	**bilateral.**
2.	**AFRICANDI BUSINESS SOLUTIONS**	**1**	Clarify Definitions: Designated Group: Women, People with Disabilities; Small Enterprises Please confirm that all above are all women, people with disabilities and small enterprises irrelevant of Black ownership? Please also advise where in the PPPFA there is reference to the Designated Group, it is a definition, but cannot see that preference points are allocated for these groupings.		**Noted, the definition will be aligned to the B-BBEE Act and Codes.**
		7	Paragraph 7 – A tenderer sub-contracting a minimum of 30% of the resulting contract to: • EME's or QSE's owned by black people who are female		**Refer to Comment above.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			• EME's or QSE's owned by black people who are between the ages of 14 to 35 • EME's or QSE's owned by black people • EME's or QSE's owned by black people with disabilities Please confirm owned- by definition – is it the same as the Codes (A black owned company is one with 51% Black Voting Rights, 51% Economic Interest and all Net Value Points have been earned) • Co-operatives conducting business in the municipal area or province where the goods or services are required • Enterprises conducting business in a township or rural area in the municipal area or province where the goods or services are required • Please confirm whether Black % ownership of these co-ops or businesses is required?		
		General	The issue of Empowering Supplier in the Codes of Good Practice		**Noted: this is a preferential procurement**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			The B-BBEE codes of Good Practice introduces the term of Empowering Supplier, which in effect results in the company being deemed a non-compliant supplier if it is not deemed an Empowering Supplier. Although the Tenderer will have a B-BBEE Status Contributor Level on their certificate, e.g. Level 1 which then equates to points on the PPPFA preference point system, it will state NOT EMPOWERING SUPPLIER. How will the PPPFA Regulation treat this, will it be deemed as 0 preference points or not – this is an important issue which needs to be clarified?		**system based on preference points as a therefore we can confirm that 0 point is allocated for non-compliant suppliers.**
		General	African Economic Empowerment The Draft Regulations do not in any manner address the issue of Black African Economic Empowerment through the preferential procurement system. The B-BBEE Codes have begun to address this issue though the introduction of Economically Active Population Targets (Sub-Race		**Noted: the aim of these Regulations is to amongst other things align the PPPFA with the aims of B-BBEE as such the regulations have for the first time invoked S 2(1)(f) of the act in regulation 7 and**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			Groups of African, Indian and Coloured South Africans). These draft changes in the Regulations will have no impact on the economic empowerment of the majority of the population of Black African South Africans and this should be seriously addressed in the PPPFA. A third category of procurement – e.g. For procurement of under R50 million, should at least be set-aside for African-Owned Businesses in order to bring real economic transformation.		**introduced regulation 10 to advance targeted groups.**
3.	**VIVA MEDICAL**	**GENERAL**	We take note of the article in Die Burger on Friday 17 June and would like to comment. We are members of SAMED (The South African Medical Device Industry Association), MDMSA (Medical Devices Manufacturers of South Africa and founding members of the Western Cape Medical Devices Cluster.		**Noted: it is appreciated if some organizations see positive on the intention of the regulations.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			We formed collaboration with Allenco Medical and Sinapi Biomedical to bid on WCDOH21/2015 for infusion administration Sets. As local manufacturers of medical devices based in Cape Town we are very pleased to hear that the threshold for Government Tenders will be lifted to R100 million and that the 80:20 points system will be applied. This suggested change will assist SMME businesses to gain a foothold in the supply of local products which will lead to growth of local industries, more local employment and assist the local economy and the balance of trade. To give you a practical example of how the current system is impacting on local manufacturers.		
			A 3 Year Contract WCDOH 21/2015 tender has been finalised last week by the Western Cape Department of Health. Miss N. Malindi from Supply Chain Management at Head Office, Dorp Street mailed us the		**Noted: it's unfortunate that firstly the sector or products are not designated and no local supplier was successful**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			result which shows that not a single item out of the 43 items was awarded to. **Locally owned manufacturing companies**!		**in the items.**
			This is a more than a disappointment for local companies, particularly as we invested significantly in creating a medical devices facility - over 3 Million Rands to develop a medical clean room in Cape Town with assistance from WESGRO and the dti and the Cape Health Technology Park planning process. It seems so ironic that the dti approved funding to the tune of R7, 905,760 to assist the Western Cape Medical Devices Cluster, of which we are a founding member, but the Western Cape Department of Health did not recognise local manufacturers when selecting suppliers of infusion administration sets.		**Noted: it's unfortunate that firstly the sector or products are not designated and no local supplier was successful in the items.**
			Given that SA is facing some serious economic challenges we believe that the WCDOH has missed an opportunity to benefit the province and the country as a whole, specifically local employment.		**Noted: it's unfortunate that firstly the sector or products are not designated and no local supplier was successful in the items.**

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			In terms of tender functionality, we were advised by the Department that our products met the required standards and passed the clinical evaluations at GSH, Tygerberg, Red X and New Somerset Hospitals but that our price was slightly more expensive than the successful tenderers - 3 foreign owned companies (multinationals) namely, B.Braun (German), Carefusion (USA), Clave (USA) and Stell-Med with products from India "Harsoria". These are all global suppliers and benefit from economies of scale and ZERO PERCENT (0%) Customs Duty.(9018.90 – medical devices) when importing finished goods. Conversely, local manufacturers have to pay (20%) Custom Duty on any components imported that are needed in the manufacture of the local products.		
			Our bid consisted of a level 1 B-BBEE empowerment status submission; we were SABS 1775-1:2011 tested and we are a 100% wholly owned South African company with local manufacturing facilities		**Refer to Comments above.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			in Somerset West. Despite this our bid was simply rejected in favour of foreign owned companies, simply because of a couple of rands!		
			We are trying to grow our business in the Western Cape and by implication, employ more staff, but we are facing resistance from the very government which should be welcoming our products and services with open arms. For the next 3 years we will be excluded from our core business in the Western Cape. If the tender had been based on the 80:20 points system we would have accrued more points than our multinational competitors and would have therefore been awarded some items. We welcome these proposed changes to the Preference Points system. Any support from you would be most appreciative		**Refer to Comments above.**
4	**UWP CONSULTING**	**1**	**1. Definition** • "goods" - tangible	My suggestion is to use the definition **"Black Township"** to mean an	**Noted: The term will be aligned to the intention of the regulations and the**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
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			products including infrastructure • "services" - intangible products rendered which includes consultancy work (i.e. professional services), build and infrastructure planning • "Township" - Technically the term TOWNSHIP is synonym of SUB-URBAN but in South Africa, the term Township was used for Black residential settlements in urban areas and the Suburbs referred to White settlements in urban areas.	urban living area that any time from the late 19th century until the enactment of The **Abolition of Racially Based Land Measures Act, 1991** (Act No. 108 of 1991), were reserved for black people as defined in the Broad-Based Black Economic Economic Empowerment Act.	**B-BBEE Act.**
		7(3)	7.3 (c) The term "Quantity Surveyor" is specific to a particular profession, but the duties or responsibility defined can be	Quantity Surveyor should be replaced with **Employer Agent** which is inclusive expression for	**Noted: A more suitable and all inclusive general term will be used other**

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			performed by the Engineer or Architect.	any professional (QS, Engineer or Architect) which is dually appointed by client to perform responsibilities expressed in 7.3 (c)	**than a profession specific term.**
5	**BLACK YOUTH IN BUSINESS FORUM**	**General**	Please note as a Young black business person I'm deeply disappointed by the changes proposed and would like you to be serious and start making urgent adjustments to radically ensure participation of previously disadvantaged advantaged in the mainstream of the economy.		**Rejected: The regulations are trying to bring the previously disadvantaged groups into the mainstream of the economy.**
		13	Delete subcontracting obligations - **We demand direct contracting and not subcontracting,** you need to stipulate that Government will award 75% of contracts to Black designed groups which are EMEs and QSEs. Subcontracting does not offer any development as even commercial banks do not provide loans for subcontracts.	So delete that nonsense and give us direct contracts, and do not underestimate our abilities as Black People we are highly capable in all areas of business.	**Rejected: The regulations include both direct contracting with designated groups and sub-contracting.**
		7	The objective criteria section 2(1) f and the	So you need to include as part of	**Noted: these regulations**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			pre-qualification criteria, must be specifically linked to the transformation obligations to include Black designated groups in your procurement opportunities.	the criteria, awarding contracts directly to Black designated groups of which we demand that it be compulsory that 40% of all government contracts be awarded to Black Youth owned and managed companies.	move from a premise that Public procurement should benefit all South Africans although giving preference to the previously disadvantaged groups.
		General	Minister we are sick and tired of this Post-Apartheid Stress/trauma you are experiencing by not addressing the imbalances of the past. And if the changes are not made we will embark on strike to make sure the changes are incorporated. To hell with subcontracting and weak policies that fear white people.		Noted: the tone of the e-mail however is not acceptable.
6	PROTEM – Jako Duvenhage	7(3) and 10(1)	Can u please clarify what qualify as Black Ownership? Par 7(3) a & 10(1) b refer to "owned by black people" but I could not find a definition in the draft regulations.		Noted: The regulations will be aligned to the B-BBEE Act. The aim is to empower enterprises that are owned by designated

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
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					groups.
7	**Sandile Masondo SWB Holdings PTY Ltd**	**General**	Certainly a step in the right direction, keep up the great work! Please consider the following suggestions; 1. Black Ownership % should replace BBEEE level. Too many companies claim low BBEEE level scores yet that is actually not the case in the actual economic transformation. In the current draft, there will still secure tenders by virtue of these low BBEEE scores. If they can get away with this in the private sector transactions, National Treasury can and should set the standard on how this can be done!		**Noted: The regulations will be aligned to the B-BBEE Act. The aim is to empower enterprises that are owned by designated groups.**
			2. Enforcement Crucial Even if the current draft was implemented tomorrow, without enforcement and legal recourse/consequences in place, we will be here next year.		**Noted: Regulation 14 provides for remedies on noncompliance, in addition to this there is already a BEE Commission which deals**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
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			The efforts and dedication of the National Treasury are visible, keep it up and set the standard		with enforcement of BEE matters. Appreciation noted.
8	SKA Africa Ntokozo Sosibo	12	1. Exemption for EME; I propose that an exemption towards EME be applied in subcontracting. This will help to propel them up and beyond the EME level to the QSE level. 2. R30 million threshold; I feel that this figure is too high. I think that R1million threshold would be reasonable as it would mean R300 000. 00 on a R1 million tender.	EME's will be exempted from subcontracting requirement but will however receive the full subcontracting score.	Noted: The regulation will be revised to cater for instances where sub-contracting can be used other than a blanket approach however a threshold value will still be used other than basing it on enterprise so that redistribution can be shared even amongst designated groups.
		General	1. Exemption for EME; I propose that an exemption towards EME be applied in subcontracting. This will help to propel them up and beyond the EME level to the QSE level. 2. R30 million threshold; I feel that this figure is too high. I think that R1million threshold would be reasonable as it would mean		The threshold will be revisited to find a generally accepted one.

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
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			R300 000. 00 on a R1 million tender.		
9	**Gauteng Provincial Treasury**	**4.1.**	**Evaluation offenders on functionality** 4. (1) An organ of state must indicate in the tender documents if the tender will be evaluated on functionality. (2) The evaluation criteria for measuring functionality must be objective. (3) When evaluating a tender on functionality, the tender documents must specify- (a) the evaluation criteria for measuring functionality; (b) the points for each criteria and, if any, each sub-criteria; and (c) the minimum qualifying score for functionality. (4) The minimum qualifying score for functionality for a tender to be considered further- (a) may not be generic;	**(6) Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point systems in accordance with regulation 5 or 6, as the case may be.** **80/20 preference point system for acquisition of goods or services for Rand value up to R100 million** **5. (1) The following formula must be used to calculate the points out of 80 for price in respect of an invitation for a tender with a Rand value of up to R100 million:**	**Check original submission to identify comments.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
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			(b) must be determined separately for each tender; and (c) may not be so- (i) low that it may jeopardize the quality of the required goods or services; or (ii) high that it is unreasonably restrictive. (5) A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents is not an acceptable tender.		
10	**Brasika – Helen Venter**	**General**	This is definitely an improvement from the previous version – just 3 observations: (i) Should the Regulations not consider guiding 'organs of state' on the format of their PPPFA Policies as per the Constitution section 217(2) and PPPFA section 2(1)? (ii) Definition of 'local production and content' needs to clearly distinguish between 'social and economic development' versus 'local production and content' – refer to Constitution section 152		**Noted: The intention is to ensure that there is uniformity in the application/ implementation of preferential procurement across organs of state. Although the regulations promote social and economic development to compliment Section 152 of the Constitution, Local**

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					production and content can be clearly distinguished from S152 of the constitution.
		7.3	(iii) Regulation 7(3)(a) is illegal – on the one hand it suggests that 'additional objective criteria' may include certain sub-contracting arrangements but at the same time in Regulation 10 – provides that such arrangements may be pre-qualification criteria. When reading the Rainbow Civils judgement, this provision will not be accepted by the Courts. Furthermore, as the courts have said – 'additional objective criteria' are those criteria additional to the tender – meaning you could not have been aware of it at the tendering stage – if you are aware of it prior to tendering – then it becomes 'conditions of tender'. Refer to article of Prof P Bolton in this regard (also attached)		**Noted: Objective criteria and subcontracting are separate methods that seek to empower designated groups. They can be applied individually or collectively in a tender subject to the threshold for subcontracting. It is agreed that the elements of objective criteria become a condition of tender once indicated as such in a tender however since they are over and above the 10or 20 points allocated for BEE points hence they form an objective criteria.**
11	BNS		REFER TO FILE	REFER TO FILE	REFER TO FILE

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
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	MEDICAL (PTY) LTD	**REFER TO FILE**			
12	**Carifro – Michele Rivarola**	4	**Functionality** Functionality is a technical evaluation or the evaluation of the technical ability of a tenderer to provide the goods or services being tendered for. This is not emphasised sufficiently and in practice we have witnessed other criteria creeping into the evaluation of functionality which have nothing to do with it. Such criteria are mostly already covered in the BBB-EE scorecards and must not be included again into the functionality matrices used for evaluating tenderers' technical abilities. Whilst the Act seeks to emphasize that functionality criterion must be objective the Act falls short on being more restrictive in the criteria that can be used in compiling functionality matrices. Perhaps a set of regulations to clarify this very burning issue should be published in conjunction with the amended Act. Examples of inappropriate		**Noted and rejected: This is more of a training issue than the draft regulations.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			criteria used regularly in functionality matrices are criteria which are already used to compile BBB-EE scorecards such as: Ownership Training of graduates etc.		
		7	<u>Awards of contracts to tenderers not scoring highest points</u> The criteria listed in Par 7(3) are already criteria that are used in the evaluation of BBB-EE scorecards and therefore should not be used again. In addition Par 7(3)(a)(ii) refers to persons from the ages of 14 o 35. A minor is not competent to enter into a contract and cannot therefore be party to a subcontract agreement unless he/she is emancipated by a court. If the State wishes for services or goods to be procured from any of the entities listed in Par 7(3)(a) it should state so in the document and reserve portion of the tender for such entities as a tender precondition rather than ex post facto or as a tender		**Noted and accepted: The regulation will be aligned with B-BBEE Act and the notion of double dipping or double jeopardy will be looked further when reviewing the draft Regulations.** **The aim of the regulations is to extend the preference scheme beyond the preference points to empower designated sectors, including SMMEs,**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			criteria to evaluate functionality. In other words the amount should be in the form of a set aside and set aside for businesses/entities that have already been identified and prequalified by the entity calling for tenders. It is submitted that this regulation attempts to bypass the regulations prohibiting the use of set asides. It may also be found to be in contravention of the provisions of Chapter 2 of the Competition Act.		**Youth and Cooperatives.**
		10	Prequalification criteria for preferential procurement Whilst the advancement of target sectors and persons is desirable it has to be done within the framework of the Constitution which enshrines a right to do business with the State onto all classes of citizens. It is submitted that Par 10(1) may result in the exclusion by design of an entire class of citizens simply because their businesses do not achieve a minimum BBB-EE status.		**Noted and subject to legal vetting: This Regulation is meant to encourage transformation and reward those that are transforming.**
		13.	Subcontracting The clause is poorly worded and even more		**Accepted: The regulation will be improved to read**

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			poorly conceived. If a tenderer submits a bid of 29 million the tenderer has no obligation to subcontract any work but if the bid is 31 million the tender has an obligation to subcontract 9,3 million to one of the entities listed in Par 13(1). As previously stated if Treasury requires work to be subcontracted to a specific locally based target class or group of businesses and entities it should be done in the form of a set aside where the local enterprises have been prequalified and not at generic enterprises with specific ownership criteria located anywhere in the country. The requirement for subcontracting must also be contingent upon the class of businesses and enterprises being capable of delivering what they are required to subcontract. It may also be found to be in contravention of the provisions of Chapter 2 of the Competition Act. Construction contracts for example involve the execution of a substantial portion of work by specialist subcontractors leaving a contractor with very little if any work to be		**better. Subcontracting will also be looked at so that it is not a one size fits all approach.**

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			performed using his own resources if the regulation were to be implemented. Example R 100 million contract: - Value of specialist work R 45 million subcontracted to specialist companies in packets ranging from 5 million to 10 million - Remaining value of work R 55 million of which R 30 million is to be subcontracted to target businesses/organisation leaving contractor with 25 million of work (i.e. 25%) to be carried out using his/her own resources.		
		14	<u>Remedies</u> Par 14 is inconsistent with the provisions in the PAJ Act (as the award of a tender is deemed to be administrative action) and with a plethora of decided cases in the Supreme Court of Appeal. The paragraph should be aligned with the provisions of the PAJ Act and the cases on which Supreme Court of Appeal decisions already exist.		**Noted and Accepted: The Regulation will be revisited to understand the inconsistences and align with the provisions of PAJA.**

STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
13	**Mongamo Jantjies**	**Regulation 5**	I wish to submit the following comments with regards to the Revised 2016 PPPFA Regulations that are for our comments. The comments are as follows:	1. The proposed thresholds for 80/20 and 90/10 points systems of below and above R100 million are Supported. 2. We propose the points allocation for the tables on page 5 and 6 to be as below: **For 80/20 syste** B-BBEE Status Level Contribution 1 - 20 2 - 18 3 - 14 4 - 12 5 - 8 6 - 6 7 - 4 8 - 2 Non-compliant contributor 0	**Noted and accepted: National Treasury is working with the dti to align the points with BEE scorecard.**
		Regulation 6		**For 90/10 System** B-BBEE Status Level of Contribution Number of Points 1 - 10	**Noted and accepted: National Treasury is working with the dti to align the points with**

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				2 - 9 3 - 6 4 - 5 5 - 4 6 - 3 7 - 2 8 - 1 Non-compliant contributor	**BEE scorecard.** 0
14	**Vumesa (Pty) Ltd – Vumani H Khumalo**		We are in support of the Revised 2016 PPPFA Regulations except for the following: Clause 8.(3) talks about tossing a coin or drawing lots in cases of a tie between two or more tenderers achieving top score in a bid in both Points, B-BBEE score card and in the functionality. I would prefer that the Gazette specifies personnel to be present during that exercise, especially both bidder representatives.		**Noted and Rejected: the proposal is not practical It is not possible to always invite suppliers where there is a tie between two or more suppliers. However an organ of state can still be held accountable for any decision taken through other channels provided for in SCM.**
15	**Impande Consulting Engineers**		Our company Impande Consulting Engineering is a QSE operating in the engineering industry since 2009. As an	This requirement must be entered as tender pre-qualifying criteria for doing business in	**Appreciation noted However it is not possible to extend the regulations**

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			organization and a member of consulting engineering South Africa (CESA) we support the new proposal for 30% of work to be sub consulted to EMEs or QMEs.	South Africa, be it Public or Private Sector. Such innovations will go a long way in transforming the country.	**to the private sector as they are only applicable to organs of state.**
16	**Consulting Engineers South Africa – Gillian Wands**	**5 and 6**	The bundling of goods and services (reading engineering professional services) is unacceptable.	A separation of threshold values for engineering contracts requiring EPC methods and contracts requiring engineering professional services is strongly suggested. The BBBEE value threshold for engineering professional services of less than R1million for the 80/20 to 90/10 transition is suggested.	**Noted and rejected: The comment does not elaborate on why this will not be practical for the engineering professional services.**
		13	The sub-contracting more than 30% of engineering professional services is undesirable as this introduces significant uncontrollable professional and business risk to the lead consultant, the client and the public.		**Noted and accepted: the regulation will be revisited such that subcontracting is not a one size fits all approach.**
			Engineering professional services is a highly complex and serious business that when		**Noted and Rejected: The regulations aim to**

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			mismanaged through uninformed, inappropriate and desperate legislative attempts at transformation holds significant risk to the public. Poor quality decisions by insufficiently skilled and insufficiently experienced engineers forced by an inappropriate transformation agenda into positions of professional authority will without doubt result in increased infrastructure cost and will elevate the risk of poor decisions through uninformed negligent practises. Accelerated transformation in the engineering professional services business is a political strategy that is designed to destroy this profession. The evidence of the destruction of the engineering profession is already manifested through the excessive discounting of professional fees to unsustainably low levels where there can be no doubt as to the unacceptable compromising of the quality of the services provided by these low cost "professionals".		**encourage transformation and promotion of designated enterprises. We are not of the view that designated enterprises produce poor quality work. Organs of state working with designated enterprises are still responsible for quality output in all procurements.**
			It is the opinion of the author that these		**Refer to comment above.**

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			BBBEE transformative efforts will have a strong negative effect on the engineering profession as competent consulting firms will be excluded from participation in these (government and SOE) projects through either of legislative non-qualification or selected non participation as a result of unacceptable risk. In either case, this legislation will have the effect of destroying the pool of competent engineers applying for these projects thereby eliminating the highly desirable skills transfer and mentoring that takes place on these projects.		
			The practise by government of continuously changing the BBBEE rules to support a particular populist political agenda is not conducive to the development of a viable, strong and competent engineering profession.		**Noted and no comment.**
17	**Rawlins Wales & Partners – Ravi Somiah**	1	Definitions : **"designated group"** means : (a) black people, **(b)** women; (c) people with disabilities; or (d) small enterprises, as	Query : we interpret whites are recognised under (b) & (c)	**Accepted: The definition does not separate women along colour lines**

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			defined in the National Small Enterprise Act, 1996 (Act No. 102 of 1996)		
		4(a)	may not be generic	Query : We interpret the definition of generic under this context has having no relevance to "Generic" as defined in the Codes of Good Practice, published in Gazette No 36928, dated 11 October 2013, which refers to a annual turnover threshold of > R50M	**Rejected: this regulation has nothing to do with BEE as it deals with drawing and evaluation criteria.**
		5(1)	80 / 20 Preference point system - up to R100M	We recommend removal of the cap value and afford the tenderer to choose either 80/20 or 90/10, which would enable competitive tender responses and also afford the tenderers more flexibility when forming consortiums or JV's.	**Rejected: This requirement comes from the act and any way it is a requirement that when advertising a tender an organ of state must state the evaluation criterion/ criteria upfront in order to achieve fairness.**
		6(1)	90 / 10 Preference point system - above R100M	We recommend removal of the cap value and afford the tenderer to choose either 80/20 or 90/10, which would enable competitive tender responses and also afford	**Refer to comment above.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
				the tenderers more flexibility when forming consortiums or JV's.	
		7(2)	Objective criteria may be stipulated by the state, with reference to a tenderer sub-contracting a minimum of 30% of the resulting contract to one or more EME / QSE Black people	Recommendation: Upfront pre-determined standard criteria should be established, this would enable all tenderers to be familiar with the standard norm.	**Noted: Already the regulation provides examples of what may be used for objective criteria as such all tenderers will know upfront what criteria will be used in evaluation of tenders.**
		10(1)	The state may include pre-qualification criteria for the tenderer to sub-contract 30% of the work.	Recommendation: Upfront pre-determined standard criteria should be established, this would enable all tenderers to be familiar with the standard norm.	**Noted: Already the regulation provides examples of what may be used for objective criteria as such all tenderers will know upfront what criteria will be used in evaluation of tenders.**
		13(1)	For Contracts above R30M the tenderer must sub-contract a minimum of 30% of the value of the contract to one or more EME / QSE Black people or EME/QSE or small	Comment: Sourcing of suitable and available sub-contracting parties could impact on the tender deadline; the tender	**Rejected: This is a training issue which require organs of state to plan their procurement**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			businesses as defined in the National Small Business Act, 1996 (Act no.102 of 1996)	duration may need to be extended to accommodate this.	much better.
18	**CAT ADMIN SERVICES cc – CJ Esterhuizen**	1	Comparative price The problem is that this is a prerequisite before a price can be used as indicated in the formulas set in regulation 5(1) and 6(1). The words "fair and reasonable" is problematic as it is open for interpretation. How will the SCM unit or the Bid Evaluation committee decide if such an analysis was executed in a fair and reasonable way? This could even be interpreted that minimum and maximum levels for price be decided on which is in direct contradiction of NT policy that dictate that the setting of cost estimate as a benchmark is not an approved evaluation criteria (See SCM Practice note 2 paragraph 1.2.4). If the intention is to ensure fair price then some sort of a scale benchmark must be	"Comparative price": means the price after the factors of a non-firm price and all unconditional discounts have been taken into consideration. It is therefore my opinion that the definition as indicated in the 2011 regulations be kept as is.	**Noted and accepted: The definition in the 2011 Regulations will be considered.** **Should the definition in the draft Regulations be considered a lot of training must be considered on determination of a fair price.**

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			set. The fact that a price analysis techniques should be done is at best vague. Which technique should be used and what will the criteria to make such a price analysis acceptable? What if the price analysis was done wrongly and all the bids received is perceived as unfair and unreasonable based on the erroneous price analysis?		Noted.
			The Regulation is then further silent about what must happen if the such a price is declared "unfair" or "unreasonable"…. Must such a supplier then be disqualified? Or be given a second opportunity to change its price…? If disqualified the fairness and the reasonableness of the price becomes a "pre-qualification criterion" that is absolute open for interpretation and will be utilised by officials to manipulate the outcome of a bid proposal. The rational to ensure that Government pay		Noted.

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			reasonable and a fair price is sound, especially if single source or sole source bidding is utilised. The question is how must inflated prices through "bid rigging "be curtailed. I think that this could be done through SCM regulations that can stipulate that bids above or below a certain margin from the expected price be scrutinised by the Bid Adjudication committee for fairness and reasonableness before such a price can be seen as acceptable.		
		Regulation 1	"services" includes any services to build or maintain structure. Something is missing	Services" is all general and professional related services, including any services to build or maintain structure.	**Noted: the definition will be revisited with the aim of revision.**
		Regulation 5(1)	The R lower scale where the PPPFA act must be implemented has been removed, I fully agree with that. I hope it means that all quotations above R 10 000 or even R 2000 must adhere to the PPPFA regulations, as this is the value where most EME suppliers will receive the benefits of B-BBEE points. If minimum value is not specify it will mean	Regulation 5 (1) The following formula must be used to calculate points out of 80 for price in respect of an invitation to tender with a rand value from R 10 000 up to R10 million.	**Noted: the regulation must be revisited as it is not practical to get BEE credentials for all purchases e.g. petty cash purchases. At least the value can be reduced to R 10K to align with**

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			that all procurement even from R1 must be done through a PPPFA – 80/20 system which will definitely not adhere to the constitutional requirements of "cost effectiveness' The R100 million is also very excessive and practical it means that the state will be willingly to pay 25% more for goods and services to support B-BBEE initiatives. That will effectively mean that an amount of R 25 million more than the minimum bid could be paid. I wonder if that will be acceptable for a budgetary point of view especially in the present economic climate?		**threshold values for procurement.**
		Regulation 7.(3)	The regulation dictates that such criteria must be "specific to the context of the required goods or services" which effectively eliminate the criteria set in 3(a). First of all such criteria could be seen as excessive interference into the bid offered especially if functionality is a pre-requisite. The organ of state could even dictate that 80 % be sub-contracted.	The objective criteria stipulated in terms of sub-regulation (2), must be specific to the context of the required goods or services and must be objective.	**Noted: Objective criteria are in addition to BEE points and used only to give advantage to designated enterprises.**

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			Secondly this process is only applicable if the **"highest total points scored is not to be appointed"** … So criteria like this should be part of the bid documents and part of the TOR/specifications criteria, that will then be also set as an evaluation element regarding functionality…. Why use it as an example of an objective criteria as per section 2(1)(f)?. If it is used in this way it allow the organ of state to re-evaluate the bid but this time without the input of the Bid Committee system and to award based on preferences that has already provided preference through the B-BBEE scores and functionality criteria, so a double preference could be claimed.		
			Thirdly the QSE owned by…….. is at best vague… the argument could be that an organ of state may for example dictate that **"QSE's owned by black people who are females" must be sub-contracted"** that will effectively ensure that QSE's that are		**Noted: the regulation must be revisited to ensure fair preferential of designated enterprises.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			black owned by males… by black people…people with disabilities can be excluded from offering attender… the question is how will that be explained in a court of law as objective. It is my opinion that it will not be sanctioned as a fair objective and definitely not be in accordance with preferential procurement legislation. A further issue is that QSE rated contributor is judged in accordance with 5 elements, of which each element is tested through a rigorous point's allocation system. The allocation of points is inside each element is carefully dictated and take into consideration aspects such as "extra points" for woman owned, rural owned, disable black owned and youth owned, so the B-BBEE status level already has incorporated the targeted groups. If the PPPFA regulation afford preferences again through the regulations it could be seen as a double advantage been provided – as and how the state wants to manipulate the tender.		

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			The QSE status level as indicated in regulation 3(a) (i to iv) is vague and does not indicate clearly what is the requirement, for example "QSE owned by black people" ---- what % must be owned by black people----1% , 50% or 100%. If you now for instance as a Department state that 50% plus 1% ownership must be black owned then it could be that a QSE level contributor that obtained a level 1 through the combination of other elements be disqualified from this regulation. In conclusion this will open up the system allowing the State to manipulate a specific tender condition to advance certain tenderers and obviously to litigation. By putting the "may" into the regulation does not correct the obvious problems. It is also noted that the old **regulation11(8 and 9)** that stipulate that a person must not be awarded points for B-BBEE status level		**Noted: the regulation must be revisited to ensure fair preferential of designated enterprises.**

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STAKEHOLDER COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016					
NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			if it is indicated that such a tenderer intends sub-contracting more than 25 % to any enterprise that does not qualify for at least the points that such tenderer qualifies for…… This regulation has been excluded from the new regulations and thus it **opens the way for fronting** as it is now possible to delegate from 30% to 100% to a QSE of choice (remember the new regulation does not dictate the minimum level of the QSE) without losing any points. It will also be true after the contract has been signed and the supplier brings in new QSE sub-contractors.		
		Regulation 7(3) (b)	Financial and economic projections regarding the capacity of the tender to deliver on require goods and services should not be part of section 2(1) (f) criteria as it is directly linked with the **"ability of the supplier to perform the contractual obligation"** and therefore it could and should be part of the functionality criterion--- no reason can be seen why it must be an objective outside the functionality criteria. If such an objective is stipulated in the bid	Take out	**Noted, however the rationale for introducing objective criteria over and above the functionality criteria is to give preference to designated enterprises. The team must consider reducing objective criteria to preference other than other criteria**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			documents it will any case mean that it should be judged and evaluated the question is by whom…. The fact is that this objective is only used after the points system has already been concluded and after the Bid committee system has declared the bidder as "acceptable". Why on earth do you then want to look at the economic and financial projections again….. surely a supplier cannot be "acceptable"		**not related to preference.**
		Regulation 7(3) (c) and (d)	Not sure what the intention is …..will the quantity surveyor's projection as to the time that it is likely to take to complete an infrastructure project form part as an "critical delivery milestone" if it is the intention then the TOR/Specifications" must address that as a deliverable and it is ludicrous to indicate it as an objective criteria especially as the bidder at this stage had to be declared "acceptable". Also remember that the new NT Infrastructure policy (NT Instruction note 4 of 2016/17) dictate that such a element must be part of the planning and procurement process, so there is now way that such a crucial delivery	Take out	**Noted: Quantity Surveyor must be replaced by a term "*Professional*" as a standard general term.**

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NO	STAKEHOLDER	REGULATION	COMMENTS	PROPOSALS	NATIONAL TREASURY RESOLUTION
			requirement can be seen as an "objective criteria" in terms of Section 2(1) (f) of the Act.		
		Regulation 7(4)	The period of thirty days are way too long, if the organ of state award a bid and only report is after 30 days damages is already done. Seven working days at the most.	(4) If an organ of state ……., that organ must, within 7 working days of the award, report to the …… add (e) Approval letter of deviation from the Accounting officer or Accounting Authority as recognised by the PFMA.	**Noted: The period intends to consider the volume and the effects on operational requirements of the organs of state to fulfil this requirement. The team must consider a suitable reporting mechanism on this regulation.**
		Regulation 8 (3) (a and b)	The openness of the process should be looked at as well and it is my opinion that even two equal tenders can also be done though the drawing of lots… in front of the potential suppliers	Regulation 8(3) If two or more tenderers score equal total points in all respects, the award must be decided by the drawing of lots with the said suppliers present at the meeting.	**Noted: it is not always possible to have suppliers present on adjudication of tenders. Drawing of lots or tossing of a coin may be performed by an independent person who is not part of the meeting concerned.**
		Regulation 10 (1)	The allowance of pre-qualification criteria will effectively be used to circumvent the PPPFA Act and the Constitutional	Take out in total – un-constitutional	**Noted: Competition can still take place within the tenderers of a BEE status**

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