planning, monitoring and evaluation

Department:
Planning, Monitoring and Evaluation
REPUBLIC OF SOUTH AFRICA

# SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)

## GUIDELINES

*Version: May 2015*

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# 1 Introduction

These guidelines:

1. Explain the reasons for introducing a more consistent system for assessing the impact of new policy initiatives, laws and regulations on core government priorities, even when the regulations are not directly linked to those priorities; and
2. Outline the key procedures and techniques for the new system of socio-economic impact assessments.

The guidelines should make it possible to conduct at least an initial, mostly qualitative assessment of a proposed law or regulation.

The first section outlines the mandate and structures supporting the socio-economic impact assessment system (SEIAS). The second section explains how SEIAS will work to support greater alignment across the state while gradually developing a more efficient and effective legislative programme. The third part presents the main procedures and responsibilities associated with SEIAS. The fourth part presents the main methods used in SEIAS. The final section provides answers to some frequently asked questions (FAQ).

# 2 Mandate and establishment of the SEIAS

In South Africa, Cabinet decided on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation and regulations in February 2007. The approval followed a study commissioned by the Presidency and the National Treasury[1] in response to concerns about the failure in some cases to understand the full costs of regulations and especially the impact on the economy.

To implement the Cabinet decision, from 1 October 2015 Cabinet Memoranda seeking approval for draft policies, Bills or regulations must include an impact assessment that has been signed off by the SEIAS Unit. Cabinet Memoranda have been reviewed for departments to include information generated by the SEIAS in the recommendations. In addition, the Memoranda provide for a summary of the main findings of the final impact assessment as well as annexing a full report (refer to the Presidency Guide for the Drafting of the Cabinet Memoranda[2]). Policies and Regulations that are internally signed by Ministers should also be subjected to SEIAS.

The implementation of SEIAS is overseen by an Interdepartmental Steering Committee made up of Senior Officials of the Presidency (Cabinet Office), DPME, Economic Development Department, National Treasury, Department of Trade and Industry, Department of Environmental Affairs, Department of Labour, Department of Public Service and Administration,

[1]The detailed background study on impact assessments and their relevance for South Africa (2005) is available on www.thepresidency.gov.za.

[2] The full Guide for the Drafting of the Cabinet Memoranda is available from the Cabinet Secretariat at 012 300 5518/323 8292 or 021 464 2161/464 2162/3

Department of Social Development, State Security and the Chief State Law Advisors. The Steering Committee is intended to provide guidance and support and to oversee the implementation of SEIAS. DPME will be responsible for the establishment of a SEIAS unit to ensure the implementation, quality control and capacity support for SEIAS across government. It will be responsible for ensuring that the guidelines and templates are regularly updated and it will support the institutionalisation of the new system.

# 3 The role of SEIAS

SEIAS aims:

- To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
- To anticipate implementation risks and encourage measures to mitigate them.

A challenge for SEIAS is that in a deeply unequal society like South Africa any policy will have unequal impacts. It is therefore not possible simply to compare estimates of costs and benefits. Rather, impact assessments must analyse costs and benefits to different groups. Furthermore, some costs will prove unavoidable in order to achieve government's broader national priorities.

Finally, SEIAS recognises that many costs and benefits cannot be quantified realistically. It therefore focuses principally on identifying costs and benefits analytically, and points to the specific areas where quantification would assist in evaluating policy impacts.

## 3.1 The costs and benefits of regulations

Analysis of the costs of regulations is rooted in the argument that new rules aim to change the behaviour of stakeholders inside and outside of government in order to address a recognised social problem.

In this context, policy initiatives, regulations or legislation can lead to unintended consequences in three ways:

1. Through inefficient implementation mechanisms;
2. Where stakeholders face an excessive cost from complying with the regulation;
3. By over- or underestimating the benefits associated with the new rule's aims; and/or
4. By underestimating the risks involved – in other words, by overestimating the likelihood of success in achieving the anticipated benefits.

We here consider each of these elements in turn.

First, the state has a wide variety of instruments to bring about behavioural change. Amongst many others, they include the imposition of sanctions or the provision of incentives; changes to decision-making criteria and procedures; reforms to institutions and organisational structures; and improved monitoring, including stronger reporting systems and publicity for achievements.

By encouraging drafters to identify the costs of the implementation process, SEIAS encourages them to explore more efficient ways to change behaviour. In particular, it is often quite costly to impose sanctions or provide incentives and to require detailed reporting systems. It is frequently less costly and more effective to incentivise groups other than the state to monitor and support compliance. In the labour laws, for instance, the unions take a central role in monitoring compliance by employers, greatly reducing the need for state inspectors. Similarly, public health initiatives frequently achieve more if they rely on education and positive incentives rather than harsh sanctions.

A less easily identified cost arises when an implementation mechanism opens the door to corruption. It is important to ensure that proposals provide adequate controls on the discretion of individual officials to benefit or harm the public or enterprises. These controls typically take the form of clear criteria for official decisions; requiring officials to publish their decisions and justify them in terms of the criteria provided; and establishing an easily accessible and fair appeals route.

Second, the cost to stakeholders of complying with regulations takes two forms: the regulatory burden and the cost of behavioural change itself.

The regulatory burden generally comprises reporting requirements and applications for permissions and licences. These systems should avoid excessive delays in providing permits as well as unnecessarily complex and time-consuming reporting and registration requirements. They should be realistic about the capacity of the relevant state agencies, or simply processing documents may lead to major delays.

In addition, the desired behavioural change should not in itself prove excessively onerous compared to the anticipated benefits. Thus, regulations that keep street traders from busy public places may mean they lose their livelihoods. The regulation may nevertheless be justified, but drafters should assess the costs as well as the anticipated benefits before they finalise rules.

Third, drafters may overestimate or underestimate the cost and benefits of succeeding in implementing a new rule. For instance, for many years the benefits of providing anti-retroviral treatment for people with HIV were underestimated, leading to inadequate policies in this regard. Similarly, the costs to employment creation from building RDP houses far from city centres appear to be systematically underestimated, leading to inadequate support for public transport and the densification of urban areas.

Finally, drafters are often overly optimistic about the likelihood of achieving the aims of legislation. Typically, a drafter will support her or his proposal by pointing to the gains from success, without noting that those gains may be very unlikely to occur. Risks to success arise from economic, political and social factors outside the control of the state or that are not covered by the proposed rules. For instance, a law that reduces the price of inputs along the value chain may not succeed because a lower price, by itself, may not be sufficient to incentivise the desired investments.

The procedures and methods in SEIAS aim to enable drafters consistently to assess all four kinds of unintended costs and risks that may arise out of new policy initiatives, regulations and legislation.

### 3.2 National priorities in SEIAS

In South Africa, SEIAS must help ensure that government policies do more to support the core national priorities. It therefore requires that new rules be measured in terms of their impact on

1. Social cohesion and security (safety, food, financial, energy and etc.)
2. Economic inclusion,
3. Economic growth, and
4. Environmental sustainability.

Policy makers should assess the likely impact of policy, regulation or law on all these priorities in order to ensure not only that the implementation process is efficient but also that it is effective from the standpoint of national aims.

They must also take into consideration that policies, legislation and regulations may have an impact on concurrent functions.

A common risk is that policy/law makers focus on achieving one priority without assessing the impact on other national aims at all. In particular, measures around infrastructure, the social services and the environment often have unforeseen implications for economic growth and inclusion. In addition, measures to support economic inclusion may impose excessive costs on growth, and vice versa.

A more complex challenge arises when meeting national priorities leads to contradictory outcomes. For instance, economic growth on the current path is environmentally unsustainable, since it is highly emissions intensive. New rules must manage the transition to a greener economy in ways that minimise the costs to economic growth, employment and the poor. Similarly, regulations to protect workers and communities from exploitative practices may deter some investments. A balance has to be struck between protecting the vulnerable and supporting a growing economy that will ultimately provide them with more opportunities.

SEIAS can clarify how proposed policies and regulations are likely to affect all the national priorities, but it will not pre-empt tough decisions in these difficult cases. It should, however, ensure more reasoned and effective measures and programmes, which strike an appropriate and sustainable balance between national imperatives.

The underlying challenge is that efforts to achieve our national priorities necessarily impose some costs on some social groups. After all, these priorities have been adopted because the economic and social systems inherited from apartheid reproduce unsustainable inequalities and exclusion. SEIAS must help determine when the benefits from state action justify the cost of transformation, as well as whether the implementation costs have been minimised as far as possible.

Policy initiatives, legislation and regulations typically have a different impact on:

- the richest 10% of households, which control almost half of the national income and virtually all formal enterprises, and the poorest 40% of households that gets less than 6% of national income;
- the metros and other major urban areas, and the poorest regions of the country, which are essentially the former homeland areas;
- employers and employees;
- women and men as well as youth and older people; and
- existing industries, which have a range of established state supports, and new industries, which require new measures around infrastructure, skills development and access to capital.

In sum, given complex government priorities in a divided society, SEIAS must generate an assessment of the impacts of a proposed rule that goes beyond a simple cost-benefit analysis. It must help decision makers to understand and balance the socio-economic impacts of proposals on different constituencies. It thus constitutes a tool to improve policy proposals, not a simple measure of their net value.

# 4 Procedures and responsibilities

SEIAS consists of a set of common procedures and support institutions for assessing the socio-economic impact of new or to be amended policies, regulations and legislations.

## 4.1 Procedures

SEIAS distinguishes six main stages in the policy process.

1. The decision to develop (or amend) policies, regulations or legislations in order to address an identified social or economic problem.
2. An initial assessment involving (a) identification of options for addressing the problem and (b) a rough evaluation of the costs and benefits of each option for different social or economic groups.
3. Agreement on the basic option and finalisation of the draft policy initiatives, regulations or legislation in a process that includes appropriate consultation and a continual review of the impact assessment as the proposals evolve.
4. Development of a final impact assessment that provides a detailed evaluation of the likely effects of the legislation in terms of implementation and compliance costs as well as the anticipated outcome.
5. Publication of the draft policy initiatives, regulation or legislation for public comment and consultation with stakeholders, with the final assessment attached.
6. Revision of the draft and the final assessment based on comment from the public and stakeholders, if required, and submission of the draft policy initiatives, regulation or legislation for approval with the final assessment attached.

The SEIAS procedures shape a structured process, where the costs, benefits and risks of draft rules are continuously assessed and used to strengthen proposals. The assessment is not a once-off exercise but rather an on-going analytical process that happens alongside and informs the development of policies, legislations and regulations.

A SEIAS analysis of a rule will not dictate specific remedies. This is particularly important where rules have been agreed with stakeholders, limiting the ability to change them. In these cases, SEIAS should serve primarily to inform the position of the state in engaging with stakeholders.

The SEIAS applies to:

- New or to be amended primary legislation, although the impact assessment need not be published for matters affecting national security;
- Subordinate legislation that can have a significant impact on society;
- Significant regulations, legislations and policy proposals; and
- Major amendments of existing legislation, regulations, policies and plans that have country coverage with high impacts.

Every new rule or policy should be subject to an initial assessment. The effort expended on the final assessment should however be proportional to the likely impact of a rule. It does not make sense to bring in expensive consultants or spend months on assessments of routine updates of regulations, for instance. The initial assessment should indicate the amount of time and resources required for the final assessment.

A more in-depth analysis and broader consultation with stakeholders should be undertaken for proposals where the initial assessment suggests there will be substantial implementation costs, compliance costs, outcomes, risks or political sensitivity. In contrast, if a proposal seems unlikely to have a significant impact, either by itself or through subordinate regulations, the final assessment can be more limited.

In many cases, legislation provides an enabling framework for more detailed regulations, which in turn determine the impact. In these cases, the subordinate regulations should be the main subject of the assessment process.

The following regulations are exempt from the SEIAS:

- Automatic increases in statutory fees as long as the increase is at or below the headline inflation rate measured by the Consumer Price Index, and
- Regulations giving effect to budget decisions (such as the Division of Revenue Act).

The above exemptions are however subject to assessment and engagement with the sponsoring departments.

The information contained in the published impact assessment should be suitable for public consumption in line with the provisions of the Promotion of Access to Information Act, 2000 (taking into consideration updates and amendments to the Act). Where an assessment cannot be published because it requires or generates classified information, the drafters must state their reasons.

### 4.2 Roles and responsibilities

The responsibility for developing an assessment of policies, regulations or legislative proposals under SEIAS falls to the sponsoring government department. Departments should develop appropriate capacity to ensure quality assessments, whether conducted entirely by their own officials or in conjunction with external experts.

A SEIAS unit in the Department of Planning, Monitoring and Evaluation will provide oversight and training, and generally support government departments in implementing SEIAS. The National Treasury can also provide technical assistance, when required.

While departments may contract out elements of the technical analysis, the impact assessment and its conclusions should be finalised by department officials. Experience shows that buying a complete assessment from consultants leads to two problems: first, the product often does not adequately reflect government priorities; and second, it is frequently subject to allegations of bias.

In short, departments are responsible for the following.

1. Departments must ensure that their policy-making processes conform with SEIAS, starting with the initial impact assessment immediately after the mandate to develop a process is received.
2. Departments should make sure that the effort expended on the impact assessment is proportional to the likely impact of the new regulations or regulatory changes.
3. Both the initial and final impact assessments must use the formats and methods established by guidelines issued by the DPME.
4. Departments must publish the draft final assessment with the policies, legislations or regulations when it goes for public comments and consultation, unless it can provide sound reasons not to, which will generally relate to security and confidentiality.
5. Departments are responsible for attaching the final impact assessment to legislation, regulations or policy when submitted for approval by the relevant authorities, whether Cabinet, the Minister or Parliament. Directors General and Ministers are expected to sign for the quality of impact assessments by their departments when they submit them to Cabinet.

## 5 Methodology

By their nature, impact assessments require an estimate of the likely effects of an action that has not yet been undertaken. To achieve that end, they analyse the existing situation so as to forecast the effects of a change in the rules. The discussion here aims to establish some common approaches to make these estimates as reliable and consistent as possible. Again, the aims are to improve proposals, not simply to accept or reject them as is; many of the costs and benefits will be described but not quantified; and the SEIAS process should always identify the main risks to achieving the desired outcomes and ways to mitigate them.

The SEIAS builds on two fundamental approaches to evaluating the impact of a new rule:

1. Technical analysis, where researchers identify from their investigations, published studies and more or less complex simulations how the new rule will likely to affect different groups in society, and
2. Participatory research, mostly through consultation with stakeholders, in order to get an assessment of the impact of a new rule from those most affected and knowledgeable about the context.

Policy makers must manage the following challenges in the assessment process.

First, as noted above, it is important to ensure that the assessment process is proportionate to likely impact of the proposed rule. A relatively minor technical change, for instance to modify standards for solar water heaters, would require some consultation with producers and consumer representatives, as well as a fairly rough calculation of the cost of re-tooling production lines and the implications for the final price. In contrast, assessment of, say, the National Health Insurance policies, legislation and regulations will require a large research programme and ideally some modelling of the economic and social impacts. It would also necessitate a very broad programme of consultation with representatives of various healthcare providers, the public (as healthcare consumers), employers, unions and provincial health departments, amongst many others.

Second, the assessment process must manage the biases that, especially in such an unequal society, inevitably affect both the people doing the assessment and their respondents. For this reason, as noted in the assessment formats proposed in the next section, estimates of costs and benefits should always be linked to the affected groups. In addition, assessments should explicitly look at the impact of proposed new rules on the core national priorities of social cohesion and security, economic inclusion and growth, and environmental sustainability.

A particular challenge arises in evaluating stakeholders' inputs. By definition, stakeholders often know more about the context and likely impact of any policy than government officials. But their information is also necessarily shaped by their own interests. Framing the consultation in terms of the broader, longer term national interest helps contain overt self-interest bargaining. Nonetheless, some bias will persist in all stakeholder inputs. Their information is critical for sound decision making, but it must be evaluated carefully against research as well as other stakeholders' views.

A further issue around stakeholders is that some elite groups – notably suburban ratepayers associations, professional groups and business associations – have more capacity to engage with drafters than comparatively impoverished, poorly organised and vulnerable people and groupings. In any democracy, however, the government does not just mediate between stakeholders, but is responsible for representing the long-term interests of the majority of the population and the country as a whole. It is therefore critical that the drafter consult where possible with representatives of the majority of the electorate, for instance through union and community leaders.

Third, any new rule inevitably imposes some burdens on those who benefited from the pre-existing laws and structures. In South Africa, in particular, achieving a more equitable and inclusive society requires systematic changes in the behaviour of formal enterprises and relatively well-off communities. Relatively small sacrifices on their part can lead to a significant improvement in the conditions of the majority. The challenge is to identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration.

The impact assessment should help manage these risks by pointing to ways to reduce the burdens associated with change as well as identifying benefits to offset them. Many relatively well-off households and businesspeople understand that a more equitable and inclusive economy will benefit them in the longer run both by providing a more welcoming and supportive society and by reducing the level of crime.

Fourth, impact assessment should support the alignment and integration of government strategies by identifying the economic impacts of non-economic measures and the social effects of economic measures. By extension, impact assessments for rules that target improvements around infrastructure, social services, the environment and security should include an estimate of the impact on economic growth, investment, employment creation and equity. Similarly, rules designed to affect economic activities, for instance supporting investment or employment creation, should be assessed in terms of their implications for the environment, social cohesion and security.

Finally, policy makers need to decide how far they can go in quantifying the impact of their measures, in addition to providing a broad qualitative analysis. As noted above, any quantification necessarily involves estimates, since the assessment relies on predictions for outcomes that do not yet exist. For many assessments, only an understanding of the broad order of magnitude is required, based on an evaluation of how the measure will affect different groups. Again, SEIAS aims to clarify decisions and focus discussions, not to come up with a simple numerical judgment. Even if no definitive cost-benefit analysis is possible, the impact assessment should point to major concerns and opportunities.

That said, modelling techniques can simulate the impact of some kinds of measures, including the indirect economic effects. They provide more precise (although not necessarily more accurate) estimates. For most new rules and policies, however, the cost and time required for modelling outweigh the benefits. Furthermore, the precision of the models often masks unproven assumptions, building in a hidden bias.

## 6 Frequently Asked Questions

a) Who should do the impact assessment?

*The impact assessment should be managed by the drafters of the policy. As a rule, they should carry out the initial assessment, which should be approved by their Director General. Where the proposal affects other departments or government agencies, they should discuss the assessment with these bodies.*

*Who does the final assessment depends on how complex an analysis is required, which in turn depends largely on the scope of the proposal being assessed. For major interventions, it is desirable to ensure an expert analysis, possibly including a modelling exercise. As a rule of thumb, the drafters should seek outside expertise to help fill out sections of the form that they cannot complete using their own knowledge.*

b) Will Cabinet consider a proposal without the impact assessment?

*From [DATE], only proposals that have an impact assessment attached will be considered by Cabinet.*

c) Stakeholders just lobby for their own interests – why should I listen?

*Stakeholders generally know more about their conditions and the likely impact of a proposal than government officials. If drafters simply ignore their inputs, they often come up with erroneous estimates of the cost of new measures. The time spent in consultation should be viewed as participatory research. If the stakeholders appear to have exaggerated views, then more academic research should be used to check them.*

*It is useful to frame discussions with stakeholders by (a) requiring that their inputs provide alternative ways to solve the problem identified, if they do not like the one that has been drafted, and (b) requiring that they consider how their inputs would impact on broader development and growth. This approach seeks to move the discourse from power and self interest to reason and evidence. Experience demonstrates that it generates much more meaningful and thoughtful discussions.*

d) All this research will just stop us from implementing anything.

*SEIAS permits drafters to adjust the scope of the assessment process to the significance of each proposal. In any case, a failure to take unintended consequences into account can mean policies become unnecessarily contentious, impose large undesirable costs on society, or are simply ignored.*

e) My job is to provide a specific service. Why should I care about the priorities of other departments that are listed in the assessment format?

*The failure to align government around core priorities has undermined service delivery and economic transformation. Taking the impact on national priorities into account with every measure, even if it is not directed at those priorities, is critical to improve the alignment of government actions. The process also builds in a quid pro quo, since other departments also have to take into account your priorities, as long as they align with the national mandate.*

f) Will the impact assessment count even if I can't quantify costs and benefits?

*Often only a qualitative analysis of the impact of a policy is possible or desirable. That kind of estimate improves the policy process by pointing to areas where costs and risks can be moderated or where they are patently excessive relative to the anticipated benefits of the policy. The impact assessment should serve more to focus discussion and identify areas of debate and improvement than to provide a fully quantified accounting.*

g) How should I quantify costs and benefits if they're intangible or very broad or long term? For instance, improved ECD leads to better educational outcomes and income over a person's whole lifetime. That can't be meaningfully put into a single number.

*Often it is important to point to the existence of major costs and benefits, even if they can't be fully quantified. Again, the aim is mostly to ensure that policy makers take these costs and benefits into account. There are techniques for quantifying them if it proves really necessary, but usually it is less important than having a broad understanding of the issues involved.*

**Thank you for co-operating with this effort to improve policy making and achieve a more coherent, sustainable, prosperous and secure society!**

# IN THE HIGH COURT OF SOUTH AFRICA
# (GAUTENG DIVISION, PRETORIA)

**Case No. 34523/2017**

**In the matter between:**

AFRIBUSINESS NPC

**Applicant**

**and**

THE MINISTER OF FINANCE

**Respondant**

## RETURN: SERVICE OF NOTICE OF MOTION

**IT IS HEREBY CERTIFIED:**

That on the 23RD DAY OF MAY 2017 at 14h40 at STATE ATTORNEY, GROUND FLOOR, SALU BUILDING, CNR FRANCIS BAARD & THABO SEHUME STREETS, PRETORIA, 0002 being the office and principal place of business of the State Attorney a copy of the NOTICE OF MOTION, FOUNDING AFFIDAVIT - A G GREYLING AND ANNEXURES was served on MRS ALLY (RECEPTION) after the certified copy of the original document was displayed and the nature and contents thereof was explained to the said person, the said person is also a responsible employee of the State Attorney and apparently not less than sixteen years of age and whom accepted service on behalf of THE MINISTER OF FINANCE . Rule 4[9].

**SHERIFF CHARGES/EXPENSES:** (You may require that this account be taxed and vouched before payment)

| Description | Tariff | QTY | Amount | Description | Tariff | QTY | Amount |
|---|---|---|---|---|---|---|---|
| Service | 55.00 | 1 | 55.00 | | | | |
| Registration & Return | 36.50 | 1 | 36.50 | | | | |
| Travelling | 5.00 | 2 | 10.00 | | | | |

**TO:** THE REGISTRAR OF THE HIGH COURT, PRETORIA

| | |
|---|---|
| Zero rated items | 0.00 |
| Sub-total | 101.50 |
| VAT | 14.21 |
| Total | **115.71** |

**Account No.:** HURTERS050

**TO:** HURTER SPIES INC
P.O. BOX 14505
LYTTELTON

0140

**Your Reference:** AS0024/T KRUGER

**Goldreich VT Seboka - Deputy Sheriff**
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
**Signed at Pretoria on 26/05/17**
My Reference: **2017/00/13135.00 / JJV**

**T F Seboka Sheriff Pretoria Central - Box 478 Pretoria 0001**
**Tel: +27-12-320-3969 Fax: +27-12-320-1962**
**FNB - 620 464 393 20 - Pretoria 251445**
**Acc Name: Mellow Dune Trading**
**VAT No./BTW Nr.: 4090202740**

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# IN THE HIGH COURT OF SOUTH AFRICA
# [GAUTENG DIVISION, PRETORIA]

**CASE NO: 34523/2017**

In the matter between :-

**AFRIBUSINESS NPC** Applicant

**and**

**THE MINISTER OF FINANCE** Respondent

## NOTICE OF INTENTION TO OPPOSE

**BE PLEASED TO TAKE NOTICE THAT** the Respondent hereby files his Notice of Intention to oppose the application and that he appoints the undermentioned address of his attorney for the service upon him of any pleadings or other documents in this application .

**DATED at PRETORIA on this 13th day of JUNE 2017.**

**ATTORNEYS FOR THE RESPONDENT**
STATE ATTORNEY PRETORIA
SALU BUILDING
255 FRANCIS BAARD STREET
CNR THABO SEHUME
(ENTRANCE THABO
SEHUME
**Ref:** 897/3793/17/Z32
**Tel:** (012) 309 1575
**Fax:** (012) 309 1641/2

Enq: Ms. Thembelihle Nhlanzi

**TO:** **THE REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA**
**PRETORIA DIVISION**

**AND**

**TO:** **HURTER SPIES ATTORNEYS**
**ATTORNEYS FOR APPLICANT**
Cnr. DF Malan & Union Ave
Afriforum Building
Kloofsig, Centurion
Tel: (012) 941 9239
Fax: (012) 644 1997
(Ref: T Kruger/AS0026)

13.6.17
11:44

Ontvang Sonder Benadeling
Received Without Prejudice
Hurter Spies Ing / Inc

78

# IN THE HIGH COURT OF SOUTH AFRICA
# [GAUTENG DIVISION, PRETORIA]

**CASE NO: 34523/2017**

In the matter between :-

**AFRIBUSINESS NPC**

Applicant

**and**

**THE MINISTER OF FINANCE**

Respondent

## FILING SHEET

**BE PLEASED TO TAKE NOTICE THAT** the Respondent hereby files his Answering Affidavit.

**DATED at PRETORIA on this 2nd day of AUGUST 2017.**

**ATTORNEYS FOR THE RESPONDENT**
STATE ATTORNEY PRETORIA
SALU BUILDING
255 FRANCIS BAARD STREET
CNR THABO SEHUME
(ENTRANCE THABO
SEHUME
**Ref:** 897/3793/17/Z32
**Tel:** (012) 309 1575
**Fax:** (012) 309 1641/2
**Enq:** Ms. Thembelihle Nhlanzi

**TO:** **THE REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA**
**PRETORIA DIVISION**

**AND**
**TO:** **HURTER SPIES ATTORNEYS**
**ATTORNEYS FOR APPLICANT**
Cnr. DF Malan & Union Ave
Afriforum Building
Kloofsig, Centurion
Tel: (012) 941 9239
Fax: (012) 644 1997
(Ref: T Kruger/AS0024)

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**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 34523/17**

In the matter between:

**AFRIBUSINESS NPC** Applicant

And

**THE MINISTER OF FINANCE** Respondent

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**ANSWERING AFFIDAVIT**

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I, the undersigned,

**DONDO MOGAJANE**

do hereby make oath and state that:

1. I am the Director-General in the National Treasury. I am duly authorised to depose to this answering affidavit on behalf of the Minister of Finance ("**the Minister**").

2. The Minister of Finance is both the head of the National Treasury and the member of Cabinet that is responsible for the administration of the Preferential Procurement Policy Framework Act 5 of 2000 ("**the PPPFA**"). It is solely in his ministerial

capacity that he is cited by Afribusiness NPC ("**Afribusiness**"), the applicant in this application.

3. To the best of my knowledge and belief, the facts to which I depose herein are both true and correct, and they are within my personal knowledge unless I state otherwise, or unless the contrary is apparent from the context. Where I make legal submissions, I do so upon the advice of the Minister's legal representatives, which I believe to be correct.

**INTRODUCTION AND OVERVIEW**

4. I have read Afribusiness's founding affidavit in this application. The application attacks the legality of regulations, recently promulgated under the PPPFA, which are concerned with public procurement ("**the 2017 Regulations**" or "**the Regulations**"). In support of its attack, Afribusiness characterises these Regulations as being unfairly discriminatory in favouring only black people. It does so primarily on the basis of an argument that the Regulations unfairly exclude white people. As such, Afribusiness submits that the Regulations are invalid, unlawful and that they fall to be set aside.

5. In my submission, Afribusiness's sense of victimhood in this regard is misplaced, as its allegations of exclusion have no factual basis. It is also not without irony. Afribusiness as an organisation is the progeny of Afriforum, which in turn is the progeny of Solidarity. Solidarity's history stretches back over 110 years and, until at least the 1980s, was staunchly in support of the reservation of jobs for white people. Afribusiness's description of its current mission, which is published on its website (but which it deliberately and peculiarly fails to disclose in its founding affidavit), is of an "*organisation [that] was established to appeal*" and "*to act as spokesperson for the Afrikaans business community*".

6. The Constitution does not countenance the advancement of narrow parochial or racially-based interests at the expense of the interests of the public, or of the communalistic and egalitarian values that the Constitution espouses. However, it does not go so far as to force people or companies, on pain of sanction, to transform. Private companies or employers may, for example, permissibly ignore the Constitution's call for transformation in the workplace, decline to hire any new black staff and instead employ a staff consisting of solely white men. Under the Constitution, the freedom to do so, provided that those persons or companies do not actively unfairly discriminate against any other person, is their right.

7. Organs of state are not permitted to behave in this way under the Constitution. This is because they, unlike private companies and citizens, are charged with positive obligations to "*protect, promote and fulfil*" the rights contained in the Bill of Rights. To this end, the Constitution permits them certain discretions. One of those discretions includes a discretion to make polycentric decisions in furtherance of legitimate government goals. Another is a discretion, within limits, in relation to decisions about procurement.

8. Whilst a failure to transform on the part of the private sector is not visited with legal sanction, organs of state are not prohibited, in furtherance of legitimate governmental policy objectives, from creating private-sector incentives. The Constitution permits government sufficient flexibility to pursue legitimate policy preferences provided they are based on fair and lawful categories of preference. Two such permissible categories for advancement are black people, as they form a category of persons who, under the apartheid regime, were subjected to pernicious exclusion and oppression. Under section 217(2) of the Constitution, the permissibility of this category of preference is explicit:

"1. *When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*

2. *Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –*

a. *categories of preference in the allocation of contracts; and*
b. *the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*"

(My emphasis).

9. Though Afribusiness will contend to the contrary, I shall submit that the 2017 Regulations align with the requirements of section 217(2). I shall submit that they are also aligned with the provisions of the PPPFA – the legislation specifically designed to provide a framework for the 2017 Regulations' implementation. The 2017 Regulations that Afribusiness attacks are not a product of misguided whims. They are the product of careful and extensive research. I shall submit that they are lawful and valid.

10. The purpose of the 2017 Regulations is to encourage inclusive participation in government procurement opportunities. The means by which they permit organs of state to do so is by permitting for the creation of incentives. In this affidavit, I shall submit that the 2017 Regulations seek to advance valid and constitutionally laudable categories of preference, and that they constitute the lawful and *intra vires* exercise of the Minister's policy-laden discretion.

11. Afribusiness's application proceeds from the flawed premise that the status *quo* in relation to the preceding regulations, the Preferential Procurement Policy Regulations of 2011 (**"the 2011 Regulations"**) must be retained. Under the 2011 Regulations, as Afribusiness points out, its members could profit from contracts

paid for by the public purse without lifting a finger towards transformation, and Afribusiness argues that this must remain the case. Afribusiness's gripe with the 2017 Regulations is that they upset the status *quo*. The 2017 Regulations present a risk, for un-transformed companies and other business entities, that a given organ of state, in the context of a given tender process, may decide that this should not be the case.

12. I am advised that the Constitution entrusts matters of policy, within legal constraints, to the executive branch of government. I am advised that this is a principle that is well established. I shall submit in this affidavit that it is a principle which Afribusiness's application fatally overlooks. Afribusiness asks this Court to set aside the 2017 Regulations on four bases:

    12.1. First, that the pre-qualification criteria in the 2017 Regulations are *ultra vires* the PPPFA;

    12.2. Second, that the promulgation of the 2017 Regulations was procedurally unfair;

    12.3. Third, that the promulgation of the 2017 Regulations is unlawful because it did not comply with the guidelines of the Socio-Economic Impact Assessment System Unit ("**SEIAS**");

    12.4. Fourth, that the 2017 Regulations are irrational, unreasonable, or in some other manner unfair.

13. Afribusiness contends that the process that culminated in the promulgation of the 2017 Regulations is reviewable under the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"). This, I am advised, is a point of law which I do not concede. However, even on the standards applicable under PAJA, I shall submit in this

answering affidavit that Afribusiness's review application is without merit. Even if one assumes that PAJA does apply, I am advised and respectfully submit that the application falls to be dismissed for the following reasons:

13.1. First, the application of pre-qualification criteria in terms of the 2017 Regulations is discretionary, and will not apply in every case. The discretion created falls to be exercised by the relevant organ of state in the light of all relevant circumstances, and I shall submit that it is congruent with, and *intra vires*, the provisions of the PPPFA;

13.2. Second, the procedure followed in promulgating the 2017 Regulations not only met but in fact exceeded the requirements of PAJA;

13.3. Third, the SEIAS guidelines are just that, mere guidelines, and compliance with them is not a legal prerequisite to the validity of the 2017 Regulations; and

13.4. Fourth, the categories of preference espoused under the 2017 Regulations are based on sound constitutional principles, are not irrational, unreasonable, or unfair.

14. I shall structure the remainder of this affidavit as follows:

14.1. First, I shall summarise the scheme of the PPPFA, and set out the features of the Preferential Procurement Policy Regulations of 2001 (**"the 2001 Regulations"**) and the 2011 Regulations that are salient for the purposes of the present application, and I shall indicate the manner in which the 2017 Regulations have brought about a change (and, for convenience, I attach the 2001 and 2011 Regulations hereto marked **"DM1"** and **"DM2"**);

14.2. Second, I shall summarise the reasons that justified the change brought about by the 2017 Regulations, and I shall demonstrate why the content of the Regulations is neither unfair nor unlawful;

14.3. Third, I shall summarise the process followed in bringing the 2017 Regulations to final form, and I shall demonstrate that the requirements of procedural fairness have been met;

14.4. Fourth, and in the light *inter alia* of my prior submissions, I shall summarise the reasons why I submit that Afribusiness's application falls to be dismissed;

14.5. Fifth, I shall make submissions on remedy, which I raise in the alternative to my submissions on the merits, in the event that this Court disagrees with them; and

14.6. Sixth, I shall respond to Afribusiness's affidavit *ad seriatim*.

15. I shall summarise the Minister's conclusion and prayer in the final section of this affidavit. Condonation will be sought from the Court with respect to the lateness of the filing of this affidavit, for which I apologise on the Minister's behalf, in a separate affidavit, by the person most familiar with the relevant facts (an unsigned version of which is attached hereto marked "**DM3**"). The latter condonation application will be filed simultaneously with this answering affidavit.

## RELEVANT BACKGROUND: THE PPPFA AND PREVIOUS REGULATIONS

### (a) <u>The Constitution and the PPPFA</u>

16. Procurement, as I have set out further above, is regulated under section 217 of the Constitution. The Constitution places this regulation amongst the provisions that deal with general financial matters, imposing certain obligations on government

entities to ensure the proper and responsible expenditure of public funds. Under section 217(1) of the Constitution, government entities engaging in any procurement of goods or services, must comply with five key principles. The procurement process must be –

16.1. equitable;

16.2. transparent;

16.3. fair;

16.4. competitive; and

16.5. cost-effective, in that it must result in cost-effectiveness for that public institution.

17. I have explained the constitutional imperative, under section 217(2) of the Constitution, to advance categories of persons in order to correct the injustices of the past. The PPPFA was promulgated in order to facilitate this course of action. Section 217(3) of the Constitution specifically contemplates that "*[n]ational legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented*", and the PPPFA's Preamble makes clear that section 217(3) of the Constitution is the PPPFA's reason for being:

> "*[The PPPFA is enacted] [t]o give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution; and to provide for matters connected therewith*".

18. The PPPFA allows government entities conducting a tender process to evaluate tender submissions according to certain prescribed criteria. It bears pointing out, for the purposes of the present application, that none of the evaluative factors concern

the issue of "*functionality*". The PPPFA permits organs of state to follow the policy that they themselves select. The legal framework for the implementation of the preferential procurement policy required by the PPPFA, which is set out at section 2, is centred around the issue of price, and it expects no more than the following:

> "*(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:*
>
> *(a) A preference point system must be followed;*
>
> *(b)*
> *(i) for contracts with a Rand value above a prescribed amount of a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;*
> *(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;*
>
> *(c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;*
>
> *(d) the specific goals may include –*
> *(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;*
> *(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;*
>
> *(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;*
>
> *(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and*
>
> *(f) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of*

*state without prejudice to any other remedies the organ of state may have.*

*(2) Any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance".*

19. The framework for preference as contemplated by the PPPFA thus contemplates an evaluation on the basis of two scenarios:

19.1. For contracts that are designated as high-value (**"high-value contracts"**), in evaluating a tender submission out of 100 points, 90 of those points have to be allocated to the price submitted by the tenderer, and the 10 remaining points are allocated to the categories of preference referred to in the Constitution.

19.2. Where the contract is below a prescribed threshold value (**"low-value contracts"**), then 80 of the 100 points go towards evaluating the price tendered, and the 20 remaining points can be used to evaluate the tenderer's compliance with requirements relating to categories of preference.

20. The remainder of the requirements of the preferential procurement framework under our law arise from the various iterations of the Minister's regulations. Under section 5(1) of the PPPFA, the Minister is empowered to make regulations regarding "*any matter that may be necessary or expedient to prescribe in order to achieve the objects*" of the PPPFA, and the 2017 Regulations, as was the case in regard to the 2001 and 2011 Regulations, are authorised by the latter provision. I describe the features of the previous regulations that are salient to the present application below.

**(b) Key features of the previous Regulations**

21. There were two previous iterations of regulations prior to the promulgation of the new ones. It is in these previous iterations of the regulations that the requirement of "*functionality*" has its genesis.

22. Of further significance for present purposes is the fact that both iterations of the regulations allowed for "*functionality*" to be applied by organs of state as a discretionary measure:

22.1. Under Regulation 8(1) of the 2001 Regulations, organs of state were required to indicate "*in the tender documents*" if, in respect of particular tenders, "*tenders w[ould] be evaluated on functionality and price*". Under Regulation 8(5), the conditions of tender could also permissibly state that "*a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication*".

22.2. Under Regulation 4(1) of the 2011 Regulations, organs of state were similarly required to "*indicate in the invitation to submit a tender if that tender w[ould] be evaluated on functionality*". In terms of Regulation 4(2), the criteria to be applied were required to be "*objective*". Similarly to Regulation 8(5) of the 2001 Regulations, Regulation 4(5) of the 2011 Regulations permitted "*functionality*" to act as a 'gatekeeper', or threshold requirement, to an evaluation in terms of the preference points under the PPPFA. Tenderers that failed to "*achieve... the minimum qualification score for functionality*" could permissibly be excluded from the tender process prior to the stage at which the 80/20 or 90/10 PPPFA-evaluation begins.

23. There is one further significant feature of the two prior iterations of the regulations that bears mention. It is the threshold that forms the dividing line between the 80/20 and 90/10 requirement:

23.1. Under the 2001 Regulations, low-value contracts (those that would be determined in accordance with the 80/20 split) were defined as contracts below R500 000, and high-value contracts concerned tender processes that contemplated that this amount would be exceeded.

23.2. Under the 2011 Regulations, the threshold was doubled, and low-value contracts were defined as all contracts for goods or services of a value lower than R1 000 000.

24. I discuss the key changes that have been introduced by the 2017 Regulations below.

**(c) <u>Key changes in the 2017 Regulations</u>**

25. Under the 2017 Regulations, the presence of the discretionary requirement of "*functionality*" has been retained. Whereas it was given a more lengthy definition under the 2011 Regulations, under the 2017 Regulations, its more concise definition, namely the "*ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents*", effectively means the same thing.

26. The key aspects of the 2017 Regulations that, for the purposes of the present application, do represent a significant change vis-à-vis the previous regime are as follows:

26.1. The threshold at which a low-value contract becomes a high-value contract has been changed from R1 000 000 to R50 000 000. Tenders for goods and services that do not exceed the latter amount will thus be subject to the 80/20 preference-points allocation referred to in section 2 of the PPPFA;

26.2. In terms of Regulation 4 of the Regulations, organs of state are explicitly permitted to "*apply [one or more species of a set of] prequalifying criteria*", which are specified in the Regulation, "*to advance certain designated groups*"; and

26.3. In terms of Regulation 9, with respect to contracts exceeding an amount of R30 000 000, where a given organ of state deems in its discretion that subcontracting to "*advance designated groups*" is "*feasible*", that organ of state may provide that the successful tenderer "*must subcontract a minimum of 30% of the value of the contract*" to one or more of a list of persons which the Regulations specifies.

27. Where an organ of state decides that subcontracting of a contract exceeding an amount of R30 000 000 is feasible, it may provide that the successful tenderer "*must subcontract a minimum of 30% of the value of the contract*" to the following categories of persons:

27.1. Exempted Micro Enterprises ("**EMEs**") or Qualifying Small Enterprises ("**QSEs**"), as defined in terms of the B-BBEE Act, in respect of which black people need not hold any shareholding at all;

27.2. EMEs or QSEs that are at least 51% owned by black people;

27.3. EMEs or QSEs that are at least 51% owned by black people between the ages of 14 and 35 (i.e. who are "*youth*" as defined in terms of the National Youth Development Agency Act 54 of 2008);

27.4. EMEs or QSEs that are at least 51% owned by black people who are women;

27.5. EMEs or QSEs that are at least 51% owned by black people with disabilities;

27.6. EMEs or QSEs that are at least 51% owned by black people living in rural or underdeveloped areas or townships;

27.7. A cooperative which is at least 51% owned by black people;

27.8. EMEs or QSEs which are at least 51% owned by black people who are military veterans; or

27.9. More than one of the categories set out above.

28. The prequalifying criteria permitted under Regulation 4 allow for preference in respect of similar categories of persons to those I have set out above. Provided that the requirement is advertised, organs of state procuring goods and services may permissibly disqualify tenderers who meet "*one or more*" of the following criteria:

28.1. Tenderers not having a minimum B-BBEE status level of contributor;

28.2. Tenderers who are not EMEs or QSEs; Tenderers who do not intend to subcontract a minimum of 30% of the contract concerned to the categories of persons set out at paragraphs 27.1 to 27.9 above.

29. The 2017 Regulations were brought into force in order further to facilitate inclusive participation in government procurement opportunities. It is nevertheless one of the

central complaints of Afribusiness that the 2017 Regulations are unfairly or unlawfully exclusionary and discriminatory. For this reason, there are two features of Regulations 4 and 9 above that bear emphasis for the purposes of the present application:

29.1. The first feature is that, contrary to Afribusiness's contentions, the categories of persons to whom organs of state may legitimately give preference in both Regulations 4 and 9 are not exclusive to any particular race;

29.2. The categories of preference which Regulations 4 and 9 seek to support are either small businesses, or otherwise previously disadvantaged persons, and are in my submission constitutionally unobjectionable.

30. What the 2017 Regulations thus seek to do is to harmonise the B-BBEE Act and related legislation with government policy, the latter of which is imbued with the constitutionally laudable goals of transformation and empowerment. There is nothing on the face of the 2017 Regulations that has been challenged for legality, and Afribusiness brings no such challenge. I respectfully submit that the reasons that they were adopted and implemented were lawful as well. I summarise these reasons below.

**THE REASONS FOR THE ADOPTION OF THE 2017 REGULATIONS**

31. Government has identified public procurement as a tool to leverage socio-economic redress and transformation. One of the reasons for the initiation of the process that culminated in the 2017 Regulations stems from Cabinet. Cabinet has taken a decision that the public sector preferential procurement system requires further work in order to align it with the objectives of the revised Broad-Based Black Economic Empowerment Act 53 of 2003 ("**the B-BBEE Act**") and its Codes of

Good Practice. Treasury convened a **"Task Team"** consisting of the Chief Procurement Officer and senior representatives of the Departments of Trade and Industry, Economic Development, Small Business Development and Public Enterprises, for this purpose.

32. Another reason that has motivated the change made in the 2017 Regulations is the evidence received by Treasury from the public regarding the effectiveness of the 2011 Regulations in achieving the desired ends. Treasury received submissions from "*companies of previously disadvantaged individuals*", holding that the system under the 2011 Regulations "*fails in practical terms to demonstrate how it empowers suppliers or contractors that were disadvantaged by the apartheid system*".

33. Yet a further reason for the adoption of a new iteration of the Regulations is the experience of State Owned Enterprises (**"SoEs"**) under the 2011 Regulations, from whom Treasury has received a number of complaints (I attach some examples of these complaints hereto marked **"DM4"**). Under the 2001 Regulations, SoEs were exempted in order to permit them a degree of flexibility. As is set out in the Task Team's report (**"the Report"**) (which is attached hereto marked **"DM5"**), SoEs expressed the view to Treasury that an exemption from the 2011 Regulations –

> "*[would allow SoEs] to exercise their economic position to give preference to more exclusively 'black' companies through supplier development programmes, as companies, and [that, in their view,] applying the preference point system [under the 2011 Regulations] w[ould] allow 'white' companies to win government contract[s] solely on price alone, which is in contradiction to preferential strategies contributing to the economic empowerment of 'black' people and enterprises*".
>
> (My emphasis). (See page 11 of the Report).

34. The views of SoEs in regard to the continued application of the 2011 Regulations accords with the views of the Minister of Economic Development (**"Minister Patel"**);

and with Minister Patel's view from a policy perspective as to how procurement should move forward. Government's policy as set out in its **"New Growth Plan"** points out that measures towards black economic empowerment (**"BEE"**) still suffer from three major shortcomings:

> *"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 no 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."*
>
> (My emphasis).

35. The New Growth Path, for these reasons, 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"* (see pages 50 and 51 of the New Growth Plan, a copy of which is attached hereto marked **"DM6"**).

36. In reviewing the 2011 Regulations, the Task Team took a number of considerations into account. In order *inter alia* to assess the claims of SoEs that the Regulations do not go far enough to deal with redress, the Task Team undertook a statistical analysis of the manner in which the 2011 Regulations have been implemented to date.

37. The Task Team found that the complaints as to the problems with the 2011 Regulations, empirically, did indeed have merit:

> *"[T]he statistics ... of the past two financial years suggest that government is hardly paying half the anticipated premium [that it would be paying if preferential procurement were being optimally addressed]; with up to 29 per cent of the total value of contracts paid to B-BBEE non-compliant companies ... ; the total premium ... may imply that price is still the determining factor on who wins government contracts"*.
>
> (Page 15 of the Report; My emphasis).

38. Having reached this conclusion, the Task Team examined the manner in which policies aimed at socio-economic and small-business development had fared in developed countries: Canada, Australia and the USA. It found *inter alia* that, although "*different policy instruments [were] used by governments for the implementation of policies aimed at socio-economic development using public procurement as leverage*", the upliftment of previously marginalised groups through procurement measures was utilised in each one of these. On the strength of its analysis of these countries, the Task Team came *inter alia* to the following conclusions (see page 32 of the Report):

38.1. "*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*".

38.2. "*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*".

38.3. The "*South African legal framework does not provide for the use of set-asides for the advancement of socioeconomic policy objectives leveraging public procurement*" (page 35 of the Report). "*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*" (page 32 of the Report).

39. Consequently, in the light *inter alia* of the statistical and comparative observations above, the Task Team analysis of the PPPFA together with the 2011 Regulations reached *inter alia* the following conclusion:

> "*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.*"

40. In relation to the pre-qualification requirement, the Task Team concluded *inter alia* as follows:

> *"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 [2011 Regulations] be amended to give powers to [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 [2011 Regulations]. … .*
>
> ….
>
> *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 [2011 Regulations]. Through this provision sectors like textile[s] have been insulated from cheap foreign imports which threatened to destroy the sector between the late 90s and around 2005. … .*
>
> *The state should put measures that will ensure that [the] premium paid as a result of doing business with small and micro enterprises does not escalate more than the provisions of the PPPFA … . We have already indicated that organs of state are paying far less premiums than anticipated in the [PPPFA]. All that is required is to ensure that there are enough suppliers of the commodity which will ensure competition. The more competition, the high[er] [the] possibility of reduced prices, [and] the l[ower] [the] premium [that] will be paid by the [relevant] organs of state*".
>
> (Pages 35 and 36 of the Report).

41. The changes that have been introduced by the Minister in the 2017 Regulations were informed by these considerations. I submit that they give rise to nothing objectionable. As a matter of substance and content, I submit that the 2017 Regulations are fair and lawful *inter alia* because –

41.1. they follow a "*preference points system*" as required by section 2(1)(a) of the PPPFA;

41.2. they permit the application of the 80/20 and 90/10 split for contract value that is contemplated in section 2(1)(b) of the PPPFA;

41.3. they do not interfere with the requirement that tenders with a higher price must be given pro-rata lower scores, in terms of section 2(1)(c) of the PPPFA;

41.4. they permit tenders to be awarded to tenderers who do not score the highest points only in the circumstances permitted under section 2(1)(f) of the PPPFA;

41.5. they do not interfere with the application of section 2(1)(g) of the PPPFA;

41.6. They are compliant with the principles set out in section 217 of the Constitution in that they are –

41.6.1. transparent, in that the mechanisms set out are clear and require all bidders to be notified of tender requirements at the outset;

41.6.2. fair and equitable, in that they require the application of uniform and objective systems of measurement for the evaluation of all qualifying tenders, and permit disqualification (at the discretion of a given organ of state, in the circumstances of a given tender) for quantifiable preferences to be allowed, on a uniformly applicable basis, for categories of persons that are constitutionally legitimate;

41.6.3. competitive, in that, within the confines of the requirements of a given tender, as informed by policy, only the highest-scoring tenderer will prevail (save in the circumstances that exceptions are permitted under the PPPFA); and

41.6.4. cost-effective, in that the scores on which tenderers will be evaluated are, by vast preponderance, based on price.

42. For these reasons, I respectfully submit that Afribusiness's contentions that the Regulations are substantively unlawful has no merit.

43. I make the same submission in regard to Afribusiness's contention that the 2017 Regulations are the result of an unfair procedure. The rigorousness of the process followed appears from my submissions below.

**SALIENT FEATURES OF THE PROCESS FOLLOWED IN ADOPTING THE 2017 REGULATIONS**

44. I am advised that the Constitutional Court has held procedural fairness to be a crucial component of the modern democratic state. I am advised that the requirement of procedural fairness is also a crucial component of natural justice, which requires that the enactment of the 2017 Regulations complies with the principle of *audi alteram partem*.

45. Section 3 of PAJA concerns "*procedurally fair administrative action affecting any person*". Section 3(2)(b) of PAJA requires a person whose rights or legitimate expectations would be "*materially and adversely*" affected to be given, *inter alia*, "*adequate notice of the nature and purpose of the proposed administrative action*", and a "*reasonable opportunity to make representations*". Regulation 18(2)(a) of the regulations promulgated under PAJA ("**the PAJA Regulations**") requires that, where the administrative action concerned calls for a notice and comment procedure, the time period permitted for comment must be no less than 30 calendar days.

46. In my submission, the promulgation of the 2017 Regulations complied with these requirements. Indeed, it exceeded them. The Regulations were first published on Treasury's behalf on 14 June 2016. In terms of the PAJA Regulations, it would

have been permissible for the date for submissions to close on 15 July 2016. What happened in fact was that the closing date for submissions was extended for more than a calendar month further – to 23 September 2016. There can thus be no doubt that the mandatory requirements in respect of time periods were met.

47. In my respectful submission, the opportunity afforded to the public to make representations was also meaningful. During the initial and extended time periods, Treasury received and considered dozens upon dozens of submissions. I attach a list of the entities from which submissions were received marked **"DM7"**. The submissions included comments from both the private and public sector from entities that included the following:

| Entity | Date of submission |
|---|---|
| The City of Cape Town | 7 July 2016 |
| The Department of Trade and Industry | 12 July 2016 |
| MBB Services International | 13 July 2016 |
| Mott Macdonald | 13 July 2016 |
| The International Trade Commission of South Africa | 13 July 2016 |
| South African Airways | 14 July 2016 |
| The South African Revenue Services | 15 July 2016 |
| MAN Truck & Bus | 15 July 2016 |
| Standard Bank of South Africa | 15 July 2016 |
| The Airport Company of South Africa | 15 July 2016 |
| KPMG | 15 July 2016 |
| Nashua | 15 July 2016 |
| MTN | 15 July 2016 |
| First Rand Bank Limited | 15 July 2016 |

| | |
|---|---|
| Johnson & Johnson | 15 July 2016 |
| Webber Wentzel | 15 July 2016 |
| Master Builders South Africa | 18 July 2016 |
| Association of Quantity Surveyors | 18 July 2016 |
| Mckinsey & Company | 4 August 2016 |
| JUTA and company (Pty) Ltd | 23 August 2016 |
| AMEGO consulting | 15 September 2016 |

48. The comments received represented a broad range of views. I do not attach them all, to avoid overburdening these papers. Treasury has however summarised the comments, and its responses to them, in the table attached hereto marked "**DM8**". Some examples include the following:

| Public comment | Treasury response |
|---|---|
| So you need to include as part of 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. | Noted: These regulations move from a premise that Public procurement should benefit all South Africans although giving preference to the previously disadvantaged groups. |
| Th[e] [subcontracting] requirement must be entered as tender pre-qualifying criteria for doing business in South Africa, be it Public or Private Sector. Such innovations will go a long way in transforming the country. | Appreciation noted. However it is not possible to extend the regulations to the private sector as they are only applicable to organs of state. |
| 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. |

| | |
|---|---|
| [The prequalification criteria in the new Regulations should be] take[n] out in total … [as it is] unconstitutional | Noted: Competition can still take place within the tenderers of a BEE status level however it is agreed that there should be a limit to what can be used as pre-qualification criteria and mechanisms to prevent abuse of the system. |
| I would suggest that the PPPFA should increase the weighting of B-BBEE score by 10 to 20 points respectively. Big business will then take transformation seriously. Furthermore, transformation does not mean that costing or pricing offered will be threatened in any way. | Noted and rejected: the regulations seek to compliment the aims of the BEE Act and streamline enterprise development into public preferential procurement. |
| 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 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. |
| Omit th[e] clause [on prequalification]. Tenderers should not be eliminated on the basis of their BBBEE status. BBBEE status is already provided for in sections 5 & 6. If this clause is kept, it will be abused by some organs of state. | Rejected: prequalification happens even prior to evaluation on 80/20 or 90/10 point system. |
| [It is] propose[d] that the mandatory sub-contracting regulation be reconsidered, and that research be undertaken as to what alternatives could exist to ensure an adequate number of EME / QSE suppliers in various medical device fields over the coming years. | Subcontracting will be revisited so that it is not a one size fits all. It will also place discretion on organs of state to determine subcontracting based on sector and value of contract. The subcontracting value and threshold will be revisited so that it is not too restrictive even where it could be applied to tenders below R30 million. This regulation must be aligned with the provisions to form joint ventures and consortiums. |

49. In my submission, Treasury's table attached to this affidavit further supports the Minister's submission that the process followed in the course of promulgating the 2017 Regulations was indeed procedurally fair. I submit that Afribusiness's contentions to the contrary must be rejected.

## AFRIBUSINESS'S GROUNDS OF REVIEW FALL TO BE DISMISSED

50. Afribusiness submits that the 2017 Regulations fall to be set aside on four bases. In my respectful submission, none of these purported bases has merit. The reasons why appear, in part, in my submissions above and, to the extent that they concern questions of law, I am advised that they will be expanded upon in legal argument. However, for convenience, to the extent that I have not traversed Afribusiness's allegations above, I summarise the reasons why I submit that each of Afribusiness's grounds of review falls to be dismissed.

### (a) <u>The prequalification criteria in the new Regulations are *ultra vires* the PPPFA</u>

51. I am advised that, in the context of public procurement, there is no general prohibition against the use of prequalification criteria. Indeed, through the gateway of the requirements concerning what will constitute an "*acceptable tender*", prequalification criteria have been applied, and complied with, since the promulgation of the 2001 Regulations.

52. In my submission, the only real question is whether the categories of persons to which the 2017 Regulations apply show a preference that does not comply with the Constitution or the PPPFA.

53. I have set out above why I submit that the categories contained in the 2017 Regulations are permissible. I have also explained that their application will in every instance be discretionary, and will depend upon the circumstances applicable to each tender process.

(b) **The promulgation of the 2017 Regulations was procedurally unfair**

54. I have addressed this allegation comprehensively in my submissions above. On the rules that apply to disputes of fact in motion proceedings, I am advised that there is no basis upon which my submissions can be gainsaid.

55. Given that Treasury met or exceeded the requirements of PAJA and the PAJA Regulations, and afforded more than twice as long as is required for the promulgation of the Regulations in terms of the latter, I submit that this challenge falls to be rejected as well.

(c) **The process that culminated in the 2017 Regulations failed to comply with SEIAS**

56. In my respectful submission, there are two reasons why Afribusiness's allegations in regard to SEIAS need not detain the Court:

56.1. The first reason is that they are, by their own definition, mere guidelines, and not binding requirements of law

56.2. The second reason is that they do not purport to lay down any legally binding prerequisites for the Regulations' validity.

57. It follows, in my submission, that Afribusiness's SEIAS-related challenge is also without merit.

(d) **The 2017 Regulations are irrational, unreasonable or unfair**

58. The allegations under this rubric have also been addressed in my submissions above. In submitting that this purported ground of view lacks merit, I reiterate my submissions that the Regulations –

58.1. were formulated for rational reasons;

58.2. are rationally connected to the government's and constitutional policy objectives of transformation and the economic empowerment of persons who are previously disadvantaged, both of which are legitimate governmental objectives;

58.3. are reasonable on their terms, in that they are discretionary in nature, apply only in appropriate circumstances where they are deemed to be "*feasible*"; and

58.4. follow upon a rigorous process of consultation, in which all comments were meaningfully considered.

59. If so, then I respectfully submit that this challenge too falls to be dismissed.

**THE APPROPRIATE REMEDY IN THE ALTERNATIVE**

60. I have submitted above that the Regulations are not unlawful or invalid, and that Afribusiness's application should be dismissed for this reason. However, even if this Court disagrees, I am advised that the matter will not end there.

61. I am advised that the consequences of a finding of invalidity are a matter for the discretion of the court. I am further advised that the question of whether or not the Regulations should be set aside is a separate, fact-based enquiry.

62. In the event that this Court finds that the Regulations are unlawful or invalid, I am advised that it has a discretion as to the nature of the appropriate, just and equitable remedy that it may grant. In terms of section 172 of the Constitution, I am advised that a court may also limit the retrospective effect of a declaration of invalidity or suspend a declaration of invalidity for any period and on any conditions.

63. I stand by my submissions that the present application has no merit. However, if this Court finds that I am wrong and decides to set the Regulations aside, there will be a *lacuna* in the regulations applicable under the PPPFA. This *lacuna* would no doubt be to the prejudice of organs of state seeking to procure goods and services.

64. My submissions in regard to remedy proceed from this premise. In the event that the Court reaches the issue of remedy, I submit that the appropriate remedy would be the suspension of any order of invalidity for 12 months, in order to allow the Minister, Treasury and the Task Team to remedy the defect.

65. To the extent necessary, further legal argument will be presented on the Minister's behalf at the hearing in this regard.

***SERIATIM* RESPONSE**

66. I now respond on a paragraph-by-paragraph basis to the allegations in the applicant's founding affidavit. I shall not repeat what I have already stated, but ask that it be read as if incorporated below. Where I do not deal with a particular allegation, it should be taken to be denied to the extent that it is inconsistent with what I have stated above.

67. **Ad paragraphs 1.1 to 2.1 of Afribusiness's founding affidavit**

The contents of these paragraphs are admitted.

68. **Ad paragraphs 2.2 to 2.5 thereof**

68.1. I admit the date of Afribusiness's establishment. However, it bears pointing out that, in these paragraphs, Afribusiness 'waters down' its true political agenda. Although it describes itself neutrally and self-servingly as a "*representative body and collective spoke[s]-person for its members in the*

*business community*", it conspicuously fails to state who those "*members*" are.

68.2. Afribusiness's own description of itself and its mission on its website is of an "*organisation [that] was established to appeal to the Afrikaans community*" and "*to act as spokesperson for the Afrikaans business community*". Whilst I deny that Afribusiness, in the approach that it takes to the present application, actually does represent the interests of the Afrikaans community, the fact that it attempts to hide its intentions or objectives in these paragraph is a matter for concern.

68.3. Save as aforesaid, the contents of these paragraphs are admitted.

69. **Ad paragraphs 3.1 to 4.1**

The contents of these paragraphs are admitted.

70. **Ad paragraph 4.2 to 4.3**

70.1. These paragraphs summarise the basis on which Afribusiness contends that the Regulations are unlawful, and should be reviewed and set aside.

70.2. I have explained further above why I submit that this application has no merit.

70.3. I therefore deny the contents of these paragraphs, and refer to my submissions further above.

71. **Ad paragraphs 4.4 to 4.4.2**

I admit the contents of these paragraphs.

72. **Ad paragraph 5.1**

I admit the contents of this paragraph.

73. **Ad paragraph 5.1.1**

73.1. I admit that the Regulations introduced pre-qualification criteria.

73.2. However, for reasons I traversed further above, I deny that the criteria solely concerned "*black categories of people*".

73.3. I similarly deny that the introduction of pre-qualification criteria "*restrict[ed] the inclusion of well established companies from tendering for … contracts*". I have explained further above that, at best for Afribusiness, the only "*well established companies*" whose ability to participate in tender processes may be restricted by the Regulations are companies that refuse to work either with EMEs or with black people.

73.4. It is of course the prerogative of those "*well established companies*" to continue to do business in this way. However, what they may not do is to simultaneously claim some form of entitlement to contracts with the South African state. It is not for Afribusiness (or the interests that it represents) to dictate to government the terms on which government will enter into contracts. If Afribusiness's members supporters do not wish to subcontract aspects of government contracts to EMEs or previously disadvantaged people, they must live with the consequences of that election.

74. **Ad paragraphs 5.1.2 to 5.1.3**

I admit the contents of these paragraphs.

75. **Ad paragraph 5.2**

75.1. I do not understand the intended meaning of this paragraph.

75.2. In this paragraph, Afribusiness does not contend that the Minister allowed a period of time for notice and comment that was unlawful. This notwithstanding, the contents of the paragraph appear to suggest that there is something "*conspicuous[ly]*" legally turpid about the time period that was in fact permitted.

75.3. To the extent that Afribusiness seeks to make such a suggestion, it is denied. Pursuant to the extension of the time period permitted for public comment, the public was, in fact, permitted far more than what was statutorily required.

76. **Ad paragraph 5.3**

76.1. It is interesting to note that the South African Institute of Race Relations ("**IRR**") lists Afriforum, the 'parent' organisation of Afribusiness, as one of its donors (see the printout from the IRR's website in this regard, which is attached hereto marked "**DM9**").

76.2. I admit that the IRR submitted a submission during the course of the process permitted for comment. It did so prior to the extension of the time period for public comment, on 15 July 2016.

76.3. I admit that, at that time (i.e. prior to the extension of the time period for public comment), the IRR made the submission that the time period

permitted for comment was too short. However, for reasons I have traversed above, I deny that the submission was correct.

76.4. However, even if it were correct at the time of making the submission, I submit that the submission has now become irrelevant, given the subsequent extension of the permissible time period for public comment. In the extended time period, it is a submission that the IRR has not repeated.

76.5. Save as aforesaid, the contents of this paragraph are denied.

77. **Ad paragraphs 5.4 to 5.5**

Save to deny that the initial time period permitted for comment was too short, or that the length of the initial time period is relevant, given its subsequent extension, I admit the contents of these paragraphs.

78. **Ad paragraph 5.6**

I admit the contents of these paragraphs.

79. **Ad paragraph 5.7**

79.1. I admit that the date for comments on the draft Regulations was extended, retrospectively.

79.2. Save as aforesaid, the contents of this paragraph are denied.

80. **Ad paragraphs 5.8 to 5.9**

80.1. In summarising the contents of Afribusiness's email of 15 September 2016, Afribusiness conspicuously omits to mention the fact that it was "*able to draft [its] comments within the extension [of] time provided as we have the*

*capacity to do the necessary research in time*". This omission is self-serving. In the present application, Afribusiness appears to have done an about-face.

80.2. Save as aforesaid, the contents of these paragraphs are admitted.

81. **Ad paragraphs 6.1 to 6.5**

81.1. I admit the aspects of these paragraphs that purport to quote from the Constitution and the PPPFA to the extent that they accord with the provisions of the Constitution and the PPPFA.

81.2. I do not understand the import of the statement "*[a] perusal of the [PPPFA] illustrates that, in principle, all suppliers are able to compete for Government contracts and preference plays a role only during the award stage of the procurement process*", and I deny it. To the extent that Afribusiness intends to insinuate, from this statement, that the Regulations are in any way unlawful, I deny the insinuation as well.

81.3. In any event, I am advised that the latter sentence constitutes a submission of law. To the extent necessary, counsel for the Minister will expand on my denial or make further submissions in this regard at the hearing of the matter.

82. **Ad paragraphs 6.6 to 6.7**

82.1. I admit the contents of these paragraphs only to the extent that –

82.1.1. they accord with the import and meaning of the relevant provisions of the PPPFA; and

82.1.2. they are not in conflict with the submissions I made earlier in this affidavit.

82.2. I specifically deny the suggestion that the PPPFA in any way prohibits the application of pre-qualification criteria other than the criteria referred to. I refer to my submissions above in this regard.

82.3. Save as aforesaid, the contents of these paragraphs are denied. To the extent necessary, further submissions will be made in this regard at the hearing of the matter.

83. **Ad paragraphs 7.1 to 7.4**

I have set out the nature and content of the Regulations further above. I admit the contents of these paragraphs only to the extent that they are consistent with my prior submissions, and with the import of the Regulations themselves.

84. **Ad paragraphs 8.1 to 8.3**

84.1. In these paragraphs, Afribusiness makes submissions in regard to the alleged effect of the Regulations. On the basis of the latter allegations, Afribusiness asks this Court to conclude that the Regulations are "*ultra vires the stipulations of the Constitution*".

84.2. I have explained the actual effect of the Regulations further above, and I deny the contents of these paragraphs to the extent that they are inconsistent with them.

84.3. Without derogating from the generality of the aforegoing denial, I specifically deny that the Regulations –

84.3.1. have the effect that tenders may be awarded to firms that have failed to score the highest points on price and BBBEE status in a manner that is in conflict with the PPPFA;

84.3.2. have the effect that a tender process will necessarily fall foul of the PPPFA, or of the Constitution; or

84.3.3. are otherwise *ultra vires* the PPPFA or the Constitution.

85. **Ad paragraph 8.4**

85.1. In this paragraph, Afribusiness alleges *inter alia* that, "*[i]n terms of the 2011 Regulations[,] bidders who did not submit B-BBEE status level verification certificates … were not disqualified from the bidding process*", but "*merely*" had to do better than other bidders on price. The implication is that they are now disqualified under the 2017 Regulations.

85.2. I deny that this is a necessary result of the Regulations – even for bidders who eschew B-BBEE entirely. The exaggerated nature of this submission gives away what I submit is Afribusiness's true gripe with the potential effect of the Regulations, which is that –

85.2.1. under the 2011 Regulations, it was possible for Afribusiness and its members to entirely ignore the developmental objectives and policy of government, and for entities wishing to tender for government work to continue to exclude small businesses, women, black people and people with disabilities from their work force with impunity;

85.2.2. under the current Regulations, there are circumstances in which this may not be possible.

85.3. The 'rub' for Afribusiness is thus that businesses who wish to continue to exclude small businesses from the industry, or to exclude such previously

disadvantaged persons from their employ (which are the businesses whose interests Afribusiness represents) may, depending on objectively measurable criteria selected by a given organ of state for a given tender process on the basis of specific circumstances, be disqualified from doing business with government.

85.4. It remains Afribusiness's prerogative, including that of its members, as I have explained further above, to exclude small businesses from the market, or to avoid transformation within the interests of its own members, should it so choose. However, it cannot simultaneously claim an entitlement to obtain contracts from government while it does so. I refer to my submissions further above in this regard. To the extent that the contents of these paragraphs are inconsistent with them, they are denied.

86. **Ad paragraphs 9.1 to 9.3**

I admit the contents of these paragraphs.

87. **Ad paragraph 9.4**

87.1. I deny the contents of this paragraph. I specifically deny that –

87.1.1. the 30-day period initially permitted for public comment was inadequate; and

87.1.2. the extended period permitted for public comment was inadequate.

87.2. The complaint of the IRR concerned the initial time period permitted for comment. The IRR did not make further submissions during the extended time period, and it has not sought to challenge the Regulations since then. I

deny Afribusiness's speculative and unsubstantiated suggestion that there is an "*inference*" to be drawn, "*overwhelming*" or otherwise, that the IRR "*did not have sufficient time*" to comment. In any event, I am advised and submit that this complaint is not one that can lie in Afribusiness's mouth.

87.3. I therefore reiterate my submission that the process followed in making the Regulations was lawful and procedurally fair, as set out further above.

88. **Ad paragraphs 9.5 to 9.6**

88.1. I reiterate my denial that the period permitted for public comment was inadequate. I refer to my submissions in this regard further above. There is no basis for Afribusiness's bald contentions to the contrary, and I deny that they are correct.

88.2. I specifically deny the hyperbolic allegation that the period permitted for public comment rendered the prospect of fairness "*completely nugatory*", and also the submission that the period granted for public comment "*amounts to cynical, callous and dishonest representation*". This latter allegation is also unsubstantiated and, as such, is gratuitous and should be withdrawn.

89. **Ad paragraphs 10.1 to 10.3**

89.1. The guidelines attached to Afribusiness's affidavit under these paragraphs are just that – guidelines. I deny that they carry any legally binding import and, in any event, Afribusiness points to none.

89.2. I deny that compliance with the guidelines of SEIAS is a prerequisite for the legality of the Regulations.

90. **Ad paragraphs 11.1 to 11.3**



90.1. I admit the content of the Regulations quoted by Afribusiness in these paragraphs to the extent that the quoted aspects are consistent with the terms of the Regulations themselves. However, I deny the calamitous interpretation that Afribusiness asks this court to ascribe to them.

90.2. Afribusiness suggests that the fact that administrators are entitled, in terms of the Regulations, to a discretion as to whether the requirement of "*functionality*" will be determinative of a given tender process, leads to the conclusion that contracts under the 2017 Regulations may permissibly be awarded to a "*tenderer [that] does not have the ability to provide the goods or services*". Having regard *inter alia* to my submissions further above, I submit that there are at least three reasons that this is not the case:

90.2.1. First, the question whether "*functionality*" should be a determinative evaluative criterion, in my respectful submission, should rightly be made in the context of any given case. In circumstances where, for example, the tender process requires the relevant organ of state to be furnished with serviettes, or motor cars, the 'expertise' necessary to do so will be ubiquitous, and so common sense dictates that the primary criterion should be price.

90.2.2. Secondly, the absence of "*functionality*" in the context above as a determinative criterion would not present a danger that a tender would be awarded to a tenderer who shows no capacity to carry the tender out, as such a decision would plainly be irrational under the principle of legality, and unreasonably under PAJA.

90.2.3. Thirdly, the discretion as to whether tenders would be evaluated solely on "*price*", as required by the PPPFA, or on "*functionality and price*", has availed decision-makers in all tender processes made under both the 2001 and 2011 Regulations, which of course means that the existence of the discretion in the 2017 Regulations presents nothing new.

90.3. The procurement processes that are run in terms of the 2017 Regulations will be determined in the discretion of the decision-makers of the authorised functionaries of each individual organ of state. Whilst I cannot comment on the process followed by each specific organ of state, from my experience in procurement, I can confirm in this regard that –

90.3.1. where tender processes are concerned solely with goods, what is relevant to ensure that performance is fit for purpose is the specification of those goods. When one procures goods they are evaluated on specification first then price and B-BBEE points; whereas

90.3.2. the utility of the functionality criterion arises primarily only in the context of services, as opposed to goods. Mixed cases, such as tender processes for goods with a service component are best evaluated by a combination of specification and functionality (for example, supply and installation of computers).

90.4. In the light of my submissions above, I deny that –

90.4.1. the regime permitted by the Regulations is 'nonsensical';

90.4.2. the regime permitted by the Regulations permits organs of state to select what, in the circumstances of a given tender, is not "*the most able tenderer*"; and

90.4.3. under the Regulations, an organ of state "*may simply decide not to take functionality into account at all*".

90.5. I also deny Afribusiness's submission that "*race, gender and disability*" do not constitute objective criteria. As the terms are defined by law, I submit that the allegation is plainly incorrect.

91. **Ad paragraph 12**

91.1. Save to admit that the Regulations raise the prior threshold value for low- and high-value contracts, the content of this paragraph is denied.

91.2. Afribusiness's submissions in this paragraph depart from the premise that the Regulations permit "*the BEE-score of a tenderer [to be] used to circumvent the lowest price score in considerabl[y] more cases than previously*". I have already explained why I submit that the notion that the Regulations permit BEE considerations to trump the appropriate considerations under the PPPFA is incorrect. I therefore deny this assertion and refer to my prior submissions.

91.3. All that the 2017 Regulations add to the prior iterations is that entities such as those represented by Afribusiness, which choose to ignore the legitimate national imperatives affording opportunities to black people, women, disabled people and small businesses, due to the increase in the threshold between low- and high-value contracts, may have to review their approach.

91.4. I therefore deny Afribusiness's hyperbolic assertion that the Regulations will "*open the floodgates for State tenders to be awarded at inflated prices to inefficient suppliers*", which has no basis in fact.

91.5. To the extent that Afribusiness seeks to suggest in this paragraph that entities who employ black, female or disabled people necessarily inflate their prices or are inefficient, that suggestion is not only incorrect: it is also offensive.

92. **Ad paragraphs 13.1 to 13.2**

92.1. For the reasons I have set out above, I deny that Afribusiness has established an entitlement to any of the relief sought in its notice of motion.

92.2. I submit that it should be dismissed with costs, including the costs of two counsel.

**CONCLUSION AND PRAYER**

93. For all of the reasons above, I deny that Afribusiness has made out a case for the relief sought. On the contrary, I submit that its application has no merit.

94. I therefore submit that Afribusiness's application should be dismissed with costs, including the costs of two counsel.



**DEPONENT**

The deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at PRETORIA on this the 3rd day of **AUGUST 2017**, the regulations contained in Government Notice no. R1258 of 21 July 1972, as amended, and Government Notice no. R1648 of 19 August 1997, as amended, having been complied with.

**COMMISSIONER OF OATHS**

ELEANOR DELAINE GROENEWALD
COMMISSIONER OF OATHS
EX OFFICIO
SA POLICE SERVICE LEGAL OFFICIAL
PRESIDIA BUILDING 256 PAUL KRUGER STREET
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SOUTH AFRICAN POLICE SERVICE
LITIGATION & ADMINISTRATION
2017 -08- 03
HEAD OFFICE
SUID-AFRIKAANSE POLISIEDIENS

**PREFERENTIAL PROCUREMENT REGULATIONS, 2001 PERTAINING TO THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT: NO 5 OF 2000**

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## REGULATIONS

The Minister of Finance has, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000), made the regulations contained in the Schedule.

## SCHEDULE

### PART ONE

### DEFINITIONS AND APPLICATION

**Definitions**

1. In these regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act bears the same meaning, and-

(a) **"Act"** means the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000);

(b) **"Agent"** means a person mandated by another person ("the principal") to do business for and on behalf of, or to represent in a business transaction, the principal, and thereby acquire rights for the principal against an organ of state and incur obligations binding the principal in favour of an organ of state;

(c) **"Comparative price"** means the price after the factors of a non-firm price and all unconditional discounts that can be utilised have been taken into consideration;

(d) **"Consortium or Joint Venture"** means an association of persons for the purpose of combining their expertise, property, capital, efforts, skill and knowledge in an activity for the execution of a contract;

(e) **"Contract"** means the agreement that results from the acceptance of a tender by an organ of state;

(f) **"Disability"** means, in respect of a person, a permanent impairment of a physical, intellectual, or sensory function, which results in restricted, or lack of, ability to perform an activity in the manner, or within the range, considered normal for a human being;

(g) **"Firm price"** is the price that is only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax which, in terms of a law or regulation is binding on the contractor and demonstrably has an influence on the price of any supplies, or the rendering costs of any service, for the execution of the contract;

(h) **"Historically Disadvantaged Individual (HDI)"** means a South African citizen –

(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa,1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa,1993 (Act No 200 of 1993) ("the Interim Constitution"); and / or

(2) who is a female; and / or

(3) who has a disability:

Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI;

(i) **"Management"** in relation to an enterprise or business, means an activity inclusive of control and performed on a daily basis, by any person who is a principal executive officer of the company, by whatever name that person may be designated, and whether or not that person is a director;

(j) **Non-firm prices"** means all prices other than "firm" prices;

(k) **"Person"** includes reference to a juristic person;

(l) **"Rand value"** means the total estimated value of a contract in Rand denomination which is calculated at the time of tender invitations and includes all applicable taxes and excise duties;

(m) **"Small, Medium and Micro Enterprises (SMMEs)"** bears the same meaning assigned to this expression in the National Small Business Act, 1996 (Act No102 of 1996);

(n) **"Sub-Contracting"** means the primary contractor's assigning or leasing or making out work to, or employing, another person to support such primary contractor in the execution of part of a project in terms of the contract;

(o) **"Tender"** means a written offer or bid in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services or goods;

(p) **"Trust"** means the arrangement through which the property of one person is made over or bequeathed to a trustee to administer such property for the benefit of another person;

(q) **"Trustee"** means any person, including the founder of a trust, to whom property is bequeathed in order for such property to be administered for the benefit of another person.

**Application**

2.(1) Despite anything to the contrary contained in any law, these regulations apply to organs of state as contemplated in section 1(iii) of the Act.

(2) 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.

(3) An organ of state may deviate from the framework contemplated in section 2 of the Act in respect of a pre-determined tariff based professional appointments.

## PART TWO

## PREFERENCE POINT SYSTEM, EVALUATION OF TENDERS, AWARDING OF TENDERS NOT SCORING HIGHEST POINTS, CANCELLATION AND RE-INVITATION OF TENDERS

### The 80/20 preference point system

3.(1) The following formula must be used to calculate the points for price in respect of tenders / procurement with a Rand value equal to, or above R 30 000 and up to a Rand value of R500 000. Organs of state may, however, apply this formula for procurement with a value less than R 30 000, if and when appropriate:

$$Ps = 80\left(1 - \frac{Pt - P\,min}{P\,min}\right)$$

Where
Ps = Points scored for price of tender under consideration

Pt = Rand value of offer tender consideration

Pmin = Rand value of lowest acceptable tender

(2) A maximum of 20 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in sub-regulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

### The 90/10 preference point system

4.(1) The following formula must be used to calculate the points for price in respect of tenders / procurement with a Rand value above R500 000:

$$Ps = 90\left(1 - \frac{Pt - P\,min}{P\,min}\right)$$

Where
Ps = Points scored for price of tender under consideration

Pt = Rand value of tender under consideration

Pmin = Rand value of lowest acceptable tender

(2) A maximum of 10 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in sub-regulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

**The 80/20 preference point system for the sale and letting of assets.**

5.(1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value equal to, or above R 30 000 and up to a Rand value of R500 000 and which relate to the sale and letting of assets. Organs of State may, however, apply this formula for sales and letting of assets with a rand value less than R30 000, if and when appropriate:

$$Ps = 80\left(1 + \frac{Pt - Ph}{Ph}\right)$$

Where
Ps = Points scored for price of tender under consideration
Pt = Rand value of tender under consideration
Ph = Rand value of highest acceptable tender

(2) A maximum of 20 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in sub-regulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

**The 90/10 preference point system for the sale and letting of assets**

6.(1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value above R500 000 and which relate to the sale and letting of assets:

$$Ps = 90\left(1 + \frac{Pt - Ph}{Ph}\right)$$

Where

| | | |
|---|---|---|
| Ps | = | Points scored for price of tender under consideration |
| Pt | = | Rand value of tender under consideration |
| *Ph* | = | Rand value of highest acceptable tender |

(2) A maximum of 10 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in sub-regulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

**Stipulation of preference point system to be used**

7. An organ of state must, in the tender documents, stipulate the preference point system which will be applied in the adjudication of tenders.

**Evaluation of tenders on functionality and price**

8.(1) An organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price.

(2) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value equal to, or below, R500 000, not exceed 80 points.

(3) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value above R500 000, not exceed 90 points.

(4)When evaluating the tenders contemplated in this item, the points for functionality must be calculated for each individual tenderer.

(5)The conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication.

(6)The points for price, in respect of a tender which has scored the specified number of points contemplated in sub-regulation (5) must, subject to the application of the evaluation system for functionality and price contemplated in this regulation, be established separately and be calculated in accordance with the provisions of regulations 3 and 4.

(7) Preferences for being an HDI and / or subcontracting with an HDI and / or achieving specified goals must be calculated separately and must be added to the points scored for functionality and price.

(8) Only the tender with the highest number of points scored may be selected.

**Award of contract to tender not scoring the highest number of points**

9. Despite regulations 3.(4), 4.(4), 5.(4), 6.(4) and 8.(8), a contract may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points.

**Cancellation and re-invitation of tenders**

10.(1) In the event that, in the application of the 80/20 preference point system as stipulated in the tender documents, all tenders received exceed the estimated Rand value of R500 000, the tender invitation must be cancelled.

(2) In the event that, in the application of the 90/10 preference point system as stipulated in the tender documents, all tenders received are equal to, or below R500 000, the tender must be cancelled.

(3) An organ of state which has cancelled a tender invitation as contemplated in sub-regulations (1) and (2) must re-invite tenders and must, in the tender documents, stipulate the preference point system to be applied.

(4) An organ of state may, prior to the award of a tender, cancel a tender if-

(a) due to changed circumstances, there is no longer need for the goods or services tendered for; or

(b) funds are no longer available to cover the total envisaged expenditure; or

(c) no acceptable tenders are received.

## PART THREE

## DUTY TO PLAN, GENERAL CONDITIONS, PRINCIPLES, DECLARATIONS, PENALTIES, TAX CLEARANCES AND TENDER GOALS

### Duty to plan for invitation of tenders

11. An organ of state must, prior to making an invitation for tenders-

(a) properly plan for, and, as far as possible, accurately estimate the costs of, the provision of services or goods for which an invitation for tenders is to be made;

(b) determine the appropriate preference point system to be utilised in the evaluation of the tenders; and

(c) determine the deliverables or performance indicators in terms of which a person awarded a contract will be assessed.

### General conditions

12.(1) An organ of state may, in the adjudication of tenders, give particular consideration to procuring locally manufactured products. Preferences in this regard may be accommodated within the ambit of the Act's 80/20 or 90/10 point systems. For specific industries (identified by the Department of Trade and Industry), where the award of tenders to local manufacturers are of critical importance, such tenders may be advertised with a specific tendering condition that only locally manufactured products will be considered.

Should preference points be awarded for local manufacturing and/or content, the award of such points must be clearly specified in the tendering conditions.

(2) Only a tenderer who has completed and signed the declaration part of the tender documentation may be considered for preference points.

(3) An organ of state may, before a tender is adjudicated or at any time, require a tenderer to substantiate claims it has made with regard to preference.

(4) An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally.

(5) A discount which has been offered conditionally must, despite not being taken into account for evaluation purposes, be implemented when payment is effected.

(6) In the event that different prices are tendered for different periods of a contract, the price for each period must be regarded as a firm price if it conforms to the definition of a "firm price".

(7) Points scored must be rounded off to the nearest 2 decimals.

(8) In the event that two or more tenders have scored equal total points, the successful tender must be the one scoring the highest number of preference points for specified goals. Should two or more tenders be equal in all respects, the award shall be decided by the drawing of lots.

**Principles**

13.(1) Preference points stipulated in respect of a tender must include preference points for equity ownership by HDIs.

(2) The equity ownership contemplated in sub-regulation (1) must be equated to the percentage of an enterprise or business owned by individuals or, in respect of a company, the percentage of a company's shares that are owned by individuals, who are actively involved in the management of the enterprise or business and exercise control over the enterprise, commensurate with their degree of ownership at the closing date of the tender.

(3) In the event that the percentage of ownership contemplated in sub-regulation (2) changes after the closing date of the tender, the tenderer must notify the relevant organ of state and such tenderer will not be eligible for any preference points.

(4) Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership.

(5) Subject to sub-regulations (1), (2), (3) and (4), all claims made for equity ownership by an HDI must be considered according to the following criteria:

(a) Equity within private companies must be based on the percentage of equity ownership;

(b) Preference points may not be awarded to public companies and tertiary institutions;

(c) The following formula must be applied to calculate the number of points for equity ownership by an HDI:

$$NEP = NOP \times \frac{EP}{100}$$

Where

NEP = Points awarded for equity ownership by an HDI

NOP= The maximum number of points awarded for equity ownership by an HDI

EP = The percentage of equity ownership by an HDI within the enterprise or business, determined in accordance with sub-regulations (1), (2), (3) and (4).

(6) Equity claims for a Trust may only be allowed in respect of those persons who are both trustees and beneficiaries and who are actively involved in the management of the Trust.

(7) Documentation to substantiate the validity of the credentials of the trustees contemplated in sub-regulation (6) must be submitted to the relevant organ of state.

(8) A Consortium or Joint Venture may, based on the percentage of the contract value managed or executed by their HDI members, be entitled to equity ownership in respect of an HDI.

(9) The number of points scored for a Consortium or Joint Venture must be added to the number of points scored for achieving specified goals.

(10) The points contemplated in sub-regulation (9) must be added to the points scored for price, in order to establish the total number of points scored.

(11) Subject to regulations 9 and 10, the contract must be awarded to the tender which scores the highest points.

(12) A person awarded a contract as a result of preference for contracting with, or providing equity ownership to, an HDI, may not subcontract more than 25% of the value of the contract to a person who is not an HDI or does not qualify for such preference.

**Declarations**

14. A tenderer must, in the stipulated manner, declare that-

(a) the information provided is true and correct;

(b) the signatory to the tender document is duly authorised; and

(c) documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the relevant organ of state.

**Penalties**

15.(1) An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.

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

(a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;

(b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;

(c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and

(d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.

**Tax clearance certificate**

16. No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Service ("SARS") certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS.

**Specific goals**

17.(1) The tendering conditions may stipulate that specific goals, as contemplated in section 2(1)(d)(ii) of the Act , be attained.

(2) The stipulation contemplated in sub-regulations (1) must include the method to be used to calculate the points scored for achieving specific goals.

(3) Over and above the awarding of preference points in favour of HDIs, the following activities may be regarded as a contribution towards achieving the goals of the RDP (published in *Government Gazette* No. 16085 dated 23 November 1994):

(a) The promotion of South African owned enterprises;

(b) The promotion of export orientated production to create jobs;

(c) The promotion of SMMEs;

(d) The creation of new jobs or the intensification of labour absorption;

(e) The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;

(f) The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;

(g) The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;

(h) The promotion of enterprises located in rural areas;

(i) The empowerment of the work force by standardising the level of skill and knowledge of workers;

(j) The development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and

(k) The upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.

(4) Specific goals must be measurable and quantifiable and organs of state must monitor the execution of the contract for compliance with such goals.

**Short title**

18. These regulations are called the Preferential Procurement Regulations, 2001.

**T A MANUEL, MP**
**MINISTER OF FINANCE**

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# Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

*Regulation Gazette* No. 9544 *Regulasiekoerant*

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# GOVERNMENT NOTICES

## NATIONAL TREASURY

**No. R. 501**

**8 June 2011**

**NOTICE IN TERMS OF SECTION 1(III)(f) OF THE PREFERENTIAL PROCUMENT POLICY FRAMEWORK ACT, 2000 (ACT NO. 5 OF 2000)**

I, Pravin J. Gordhan, Minister of Finance, acting in terms of section 1(III)(f) of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), hereby give notice that the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) and its Regulations shall apply to all public entities listed in Schedules 2 and 3 of the Public Finance Management Act, 1999 (Act No. 1 of 1999) with effect from 07 December 2011.

Signed at Pretoria on this 6th day of June 2011.

**PRAVIN J. GORDHAN**
**MINISTER OF FINANCE**

No. R. 502

8 June 2011

# PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000: PREFERENTIAL PROCUREMENT REGULATIONS, 2011

I, Pravin J. Gordhan, Minister of Finance, acting in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), hereby make the Regulations set out in the Schedule.

Signed at Pretoria on this 6th day of June 2011.

PRAVIN J. GORDHAN
MINISTER OF FINANCE

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## PART ONE

## DEFINITIONS AND APPLICATION

### Definitions

1. In these Regulations, any word or expression to which a meaning has been assigned in the Act has the meaning so assigned, and, unless the context otherwise indicates-

(a) **"Act"** means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);

(b) **"all applicable taxes"** includes value-added tax, pay as you earn, income tax, unemployment insurance fund contributions and skills development levies;

(c) **"B-BBEE"** means broad-based black economic empowerment as defined in section 1 of the Broad-Based Black Economic Empowerment Act;

(d) **"B-BBEE status level of contributor"** means the B-BBEE status received by a measured entity based on its overall performance using the relevant scorecard contained in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

(e) **"Broad-Based Black Economic Empowerment Act"** means the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);

(f) **"comparative price"** means the price after the factors of a non-firm price and all unconditional discounts that can be utilized have been taken into consideration;

(g) **"consortium or joint venture"** means an association of persons for the purpose of combining their expertise, property, capital, efforts, skill and knowledge in an activity for the execution of a contract;

(h) **"contract"** means the agreement that results from the acceptance of a tender by an organ of state;

(i) **"designated sector"** means a sector, sub-sector or industry that has been designated by the Department of Trade and Industry in line with national development and industrial policies for local production, where only locally produced services, works or goods or locally manufactured goods meet the stipulated minimum threshold for local production and content;

(j) **"firm price"** means the price that is only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax, which, in terms of the law or regulation, is binding on the contractor and demonstrably has an influence on the price of any supplies, or the rendering costs of any service, for the execution of the contract;

(k) **"functionality"** means the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer;

(l) **"imported content"** means that portion of the tender price represented by the cost of components, parts or materials which have been or are still to be imported (whether by the supplier or its subcontractors) and which costs are inclusive of the costs abroad, plus freight and other direct importation costs, such as landing costs, dock dues, import duty, sales duty or other similar tax or duty at the South African port of entry;

(m) **"local content"** means that portion of the tender price which is not included in the imported content, provided that local manufacture does take place;

(n) **"non-firm prices"** means all prices other than "firm" prices;

(o) **"person"** includes a juristic person;

(p) **"stipulated minimum threshold"** means that portion of local production and content as determined by the Department of Trade and Industry;

(q) **"rand value"** means the total estimated value of a contract in South African currency, calculated at the time of tender invitations, and includes all applicable taxes and excise duties;

(r) **"sub-contract"** means the primary contractor's assigning, leasing, making out work to, or employing, another person to support such primary contractor in the execution of part of a project in terms of the contract;

(s) **"tender"** means a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals;

(t) **"total revenue"** bears the same meaning assigned to this expression in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act and promulgated in the *Government Gazette* on 9 February 2007;

(u) **"trust"** means the arrangement through which the property of one person is made over or bequeathed to a trustee to administer such property for the benefit of another person; and

(v) **"trustee"** means any person, including the founder of a trust, to whom property is bequeathed in order for such property to be administered for the benefit of another person.

**Application**

**2.** (1) These regulations apply to organs of state as contemplated in section 1 (ii) of the Act and all public entities listed in schedules 2, 3A, 3B, 3C and 3D to the Public Finance Management Act, 1999, Act No. 1 of 1999, (as amended by Act 29 of 1999) and municipal entities.

(2) 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.

## PART TWO

## PLANNING AND STIPULATION OF PREFERENCE POINT SYSTEM TO BE UTILIZED, EVALUATION OF TENDERS ON FUNCTIONALITY, PREFERENCE POINT SYSTEM AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT STATUS, AWARD OF CONTRACTS TO TENDERERS NOT SCORING THE HIGHEST NUMBER OF POINTS AND THE CANCELLATION AND RE-INVITATION OF TENDERS

**Planning and stipulation of preference point system to be utilized**

**3.** An organ of state must, prior to making an invitation for tenders-

(a) properly plan for, and, as far as possible, accurately estimate the costs of the provision of services, works or goods for which an invitation for tenders is to be made;

(b) determine and stipulate the appropriate preference point system to be utilized in the evaluation and adjudication of the tenders; and

(c) determine whether the services, works or goods for which an invitation for tenders is to be made has been designated for local production and content in terms of regulation 9.

**Evaluation of tenders on functionality**

4. (1) An organ of state must indicate in the invitation to submit a tender if that tender will be evaluated on functionality.

(2) The evaluation criteria for measuring functionality must be objective.

(3) When evaluating tenders on functionality, the-

(a) evaluation criteria for measuring functionality;
(b) weight of each criterion;
(c) applicable values; and
(d) minimum qualifying score for functionality,

must be clearly specified in the invitation to submit a tender.

(4) No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation.

(5) Tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the preference point systems prescribed in regulations 5 and 6.

**The 80/20 preference point system for acquisition of services, works or goods up to a Rand value of R1 million**

5. (1) (a)The following formula must be used to calculate the points for price in respect of tenders (including price quotations) with a Rand value equal to, or above R 30 000 and up to a Rand value of R1 000 000 (all applicable taxes included):

$$Ps = 80\left(1 - \frac{Pt - P\,min}{P\,min}\right)$$

Where

Ps = Points scored for comparative price of tender or offer under consideration;
Pt = Comparative price of tender or offer under consideration; and

Pmin = Comparative price of lowest acceptable tender or offer.

(b) Organs of state may apply the formula in paragraph (a) for price quotations with a value less than R 30 000, if and when appropriate:

(2) Subject to sub-regulation (3), points must be awarded to a tenderer for attaining the B-BBEE status level of contributor in accordance with the table below.

| B-BBEE Status Level of Contributor | Number of Points |
|---|---|
| 1 | 20 |
| 2 | 18 |
| 3 | 16 |
| 4 | 12 |
| 5 | 8 |
| 6 | 6 |
| 7 | 4 |
| 8 | 2 |
| Non-compliant contributor | 0 |

(3) A maximum of 20 points may be allocated in accordance with sub-regulation (2).

(4) The points scored by a tenderer in respect of B-BBEE contribution contemplated in sub-regulation (2) must be added to the points scored for price as calculated in accordance with sub-regulation (1).

(5) Subject to regulation 7, the contract must be awarded to the tenderer who scores the highest total number of points.

**The 90/10 preference point system for acquisition of services, works or goods with a Rand value above R1 million**

6. (1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value above R1 000 000 (all applicable taxes included):

$$Ps = 90\left(1 - \frac{Pt - P\min}{P\min}\right)$$

Where

Ps = Points scored for comparative price of tender or offer under consideration;

Pt = Comparative price of tender or offer under consideration; and

Pmin = Comparative price of lowest acceptable tender or offer.

(2) Subject to sub-regulation (3), points must be awarded to a tenderer for attaining their B-BBEE status level of contributor in accordance with the table below:

| B-BBEE Status Level of Contributor | Number of Points |
|---|---|
| 1 | 10 |
| 2 | 9 |
| 3 | 8 |
| 4 | 5 |
| 5 | 4 |
| 6 | 3 |
| 7 | 2 |
| 8 | 1 |
| Non-compliant contributor | 0 |

(3) A maximum of 10 points may be allocated in accordance with sub-regulation (2).

(4) The points scored by a tenderer in respect of the level of B-BBEE contribution contemplated in sub-regulation (2) must be added to the points scored for price as calculated in accordance with sub-regulation (1).

(5) Subject to regulation 7, the contract must be awarded to the tenderer who scores the highest total number of points.

**Award of contracts to tenderers not scoring the highest number of points**

7. (1) A contract may be awarded to a tenderer that did not score the highest total number of points, only in accordance with section 2 (1) (f) of the Act.

**Cancellation and re-invitation of tenders**

8. (1) (a) In the event that, in the application of the 80/20 preference point system as stipulated in the tender documents, all tenders received exceed the estimated Rand value of R1 000 000, the tender invitation must be cancelled.

(b) If one or more of the acceptable tenders received are within the prescribed threshold of R 1000 000, all tenders received must be evaluated on the 80/20 preference point system.

(2) (a) In the event that, in the application of the 90/10 preference point system as stipulated in the tender documents, all tenders received are equal to, or below R1 000 000, the tender must be cancelled.

(b) If one or more of the acceptable tenders received are above the prescribed threshold of R 1 000 000, all tenders received must be evaluated on the 90/10 preference point system.

(3) An organ of state which has cancelled a tender invitation as contemplated in sub-regulations (1)*(a)* and (2)(a) must re-invite tenders and must, in the tender documents, stipulate the correct preference point system to be applied.

(4) An organ of state may, prior to the award of a tender, cancel a tender if-

(a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or

(b) funds are no longer available to cover the total envisaged expenditure; or

(c) no acceptable tenders are received.

(5) The decision to cancel a tender in terms of sub-regulation (4) must be published in the *Government Tender Bulletin* or the media in which the original tender invitation was advertised.

## PART THREE

## LOCAL PRODUCTION AND CONTENT, B-BBEE STATUS LEVEL CERTIFICATES, CONDITIONS, DECLARATIONS, REMEDIES, TAX CLEARANCE, REPEAL OF REGULATIONS AND SHORT TITLE AND COMMENCEMENT

### Local Production and Content

9. (1) An organ of state must, in the case of designated sectors, where in the award of tenders local production and content is of critical importance, advertise such tenders with a specific tendering condition that only locally produced goods, services or works or locally manufactured goods, with a stipulated minimum threshold for local production and content will be considered.

(2) The National Treasury will issue instructions, circulars and guidelines to all organs of state, with specific reporting mechanisms to ensure compliance with sub-regulation (1).

(3) Where there is no designated sector, an organ of state may include, as a specific tendering condition, that only locally produced services, works or goods or locally manufactured goods with a stipulated minimum threshold for local production and content, will be considered, on condition that such prescript and threshold(s) are in accordance with the specific directives issued for this purpose by the National Treasury in consultation with the Department of Trade and Industry.

(4) Every tender issued in terms of regulation 9 must be measurable and audited.

(5) Where necessary, for tenders referred to in sub-regulations (1) and (3), a two-stage tendering process may be followed, where the first stage involves functionality and minimum threshold for local production and content and the second stage price and B-BBEE with the possibility of price negotiations only with the short listed tenderer/s.

**Broad-Based Black Economic Empowerment Status Level Certificates**

10. (1) Tenderers with annual total revenue of R5 million or less qualify as Exempted Micro Enterprises (EMEs) in terms of the Broad-Based Black Economic Empowerment Act, and must submit a certificate issued by a registered auditor, accounting officer (as contemplated in section 60(4) of the Close Corporation Act, 1984 (Act No. 69 of 1984)) or an accredited verification agency.

(2) Tenderers other than Exempted Micro-Enterprises (EMEs) must submit their original and valid B-BBEE status level verification certificate or a certified copy thereof, substantiating their B-BBEE rating.

(3) The submission of such certificates must comply with the requirements of instructions and guidelines issued by the National Treasury and be in accordance with notices published by the Department of Trade and Industry in the *Government Gazette*.

(4) The B-BBEE status level attained by the tenderer must be used to determine the number of points contemplated in regulations 5 (2) and 6 (2).

**Conditions**

11. (1) Only a tenderer who has completed and signed the declaration part of the tender documentation may be considered.

(2) An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally.

(3) A discount which has been offered conditionally must, despite not being taken into account for evaluation purposes, be implemented when payment is effected.

(4) Points scored must be rounded off to the nearest 2 decimal places.

(5) (a) In the event that two or more tenders have scored equal total points, the successful tender must be the one scoring the highest number of preference points for B-BBEE.

(b) However, when functionality is part of the evaluation process and two or more tenders have scored equal points including equal preference points for B-BBEE, the successful tender must be the one scoring the highest score for functionality.

(c) Should two or more tenders be equal in all respects, the award shall be decided by the drawing of lots.

(6) A trust, consortium or joint venture will qualify for points for their B-BBEE status level as a legal entity, provided that the entity submits their B-BBEE status level certificate.

(7) A trust, consortium or joint venture will qualify for points for their B-BBEE status level as an unincorporated entity, provided that the entity submits their

consolidated B-BBEE scorecard as if they were a group structure and that such a consolidated B-BBEE scorecard is prepared for every separate tender.

(8) A person must not be awarded points for B-BBEE status level if it is indicated in the tender documents that such a tenderer intends sub-contracting more than 25% of the value of the contract to any other enterprise that does not qualify for at least the points that such a tenderer qualifies for, unless the intended sub-contractor is an exempted micro enterprise that has the capability and ability to execute the sub-contract.

(9) A person awarded a contract may not sub-contract more than 25% of the value of the contract to any other enterprise that does not have an equal or higher B-BBEE status level than the person concerned, unless the contract is sub-contracted to an exempted micro enterprise that has the capability and ability to execute the sub-contract.

(10) A person awarded a contract in relation to a designated sector, may not sub-contract in such a manner that the local production and content of the overall value of the contract is reduced to below the stipulated minimum threshold.

(11) When an organ of state is in need of a service provided by only tertiary institutions, such services must be procured through a tendering process from the identified tertiary institutions.

(12) Tertiary institutions referred to in sub-regulation (11) will be required to submit their B-BBEE status in terms of the specialized scorecard contained in the B-BBEE Codes of Good Practice.

(13) (a) Should an organ of state require a service that can be provided by one or more tertiary institutions or public entities and enterprises from the private sector, the appointment of a contractor must be done by means of a tendering process;

(b) Public entities will be required to submit their B-BBEE status in terms of the specialized scorecard contained in the B-BBEE Codes of Good Practice.

**Declarations**

**12.** A tender must, in the manner stipulated in the tender document, declare that-

(a) the information provided is true and correct;

(b) the signatory to the tender document is duly authorised; and

(c) documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the relevant organ of state.

**Remedies**

**13.** (1) An organ of state must, upon detecting that-

(a) the B-BBEE status level of contribution has been claimed or obtained on a fraudulent basis; or

(b) any of the conditions of the contract have not been fulfilled,

act against the tenderer or person awarded the contract.

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

(a) disqualify the person from the tendering process;

(b) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;

(c) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;

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

(e) forward the matter for criminal prosecution.

**Tax clearance**

**14.** No tender may be awarded to any person whose tax matters have not been declared by the South African Revenue Service to be in order.

**Repeal of Regulations**

**15.** The Preferential Procurement Regulations, 2001, as published in *Government Gazette* No R. 725 of 10 August 2001, are hereby repealed as from 07 December 2011.

**Short title and commencement**

**16.** These Regulations are called the Preferential Procurement Regulations, 2011 and shall come into effect on 07 December 2011.

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**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**



**CASE NO: 34523/17**

In the matter between:

**AFRIBUSINESS NPC** Applicant

And

**THE MINISTER OF FINANCE** Respondent

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**AFFIDAVIT IN SUPPORT OF CONDONATION**

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I, the undersigned,

**THEMBELIHLE NHLANZI**

do hereby make oath and state that:

1. I am an attorney employed in the office of the State Attorney, Pretoria. I am the attorney of record for the respondent the Minister of Finance (**"the Minister"**), in this matter. I am duly authorised to bring this application and to depose to this affidavit in support of it.

To the best of my knowledge and belief, the facts to which I depose herein are both true and correct, and they are within my personal knowledge unless I state otherwise, or unless the contrary is apparent from the context.

**THE NATURE AND PURPOSE OF THIS AFFIDAVIT**

2. The application with which this affidavit is concerned is an attack on the legality of regulations, recently promulgated under the PPPFA, which are concerned with public procurement (**"the 2017 Regulations"** or **"the Regulations"**).

3. I have read Afribusiness's founding affidavit in this application, as well as an unsigned version of the Minister's affidavit. I do not address the merits of the application in this affidavit.

4. In this affidavit, I shall instead ask that this Court condone the late filing of the Minister's answering affidavit in the application. The reason why I depose to this affidavit separately is because I am the one who has personal knowledge of the relevant facts.

5. I should emphasise that, although the Minister's answering affidavit is late, the Minister did not simply allow the time period for filing the affidavit to pass by. Far from it. The reason that this condonation application is required is because the Minister, having realised that the consideration of the record in the application would take it beyond the required time period contacted Afribusiness and sought to agree to an extension. Afribusiness refused, and instead required the Minister to apply to this Court for condonation. I shall set out the reasons why I humbly pray that condonation be granted immediately below. I shall thereafter set out my conclusion and prayer.

6. I mentioned above that the main application is one asking this Court *inter alia* to review the validity of a law-making process. I am advised that litigants will ordinarily bring such applications in terms of Rule 53 of the Uniform Rules of Court (**"the Rules"**). An application in terms of Rule 53 would require the Minister to furnish Afribusiness with the record of his decision to implement the 2017 Regulations, after which Afribusiness would be afforded an opportunity to supplement its founding affidavit.

7. What Afribusiness has done in the present application is to bring its review in terms of Rule 6 of the Rules instead. Whilst this procedure permits the application to be determined more expeditiously, it does not absolve the Minister of the duty, in order to make full disclosure to this Court, that the record of the decision to bring the Regulations into force be seriously considered.

8. The present application was served at the offices of the State Attorney, Pretoria on 19 May 2017. It unfortunately did not find its way to the relevant officials within Treasury until weeks later, when instructions were sought from the Minister as to whether he wished to oppose the application. However, once this happened, Treasury arranged for the instruction of counsel, and for the necessary prior consultations with counsel, immediately.

9. Treasury had briefed and met with counsel by 29 June 2017. It immediately began collating the record and, on 4 July 2017, when it became apparent that the finalisation of an answering affidavit within the required time period would be impossible, I contacted Afribusiness in order to agree to an extension of the time period for filing. My email confirming as much is attached hereto marked **"TN1"**.

10. Afribusiness refused the Minister's request the next day. It was refused without reasons. I attach Afribusiness's email in this regard marked **"TN2"**.

11. Given the refusal, Treasury pressed forward with the preparation of the record with all possible speed. The vast majority of what constitutes a voluminous record of its decision was collated by 5 July 2017, and immediately provided the documents to counsel. Counsel was furnished with the remainder of the record by 14 July 2017. After receipt and consideration of the documents, counsel proceeded to draft this answering affidavit as soon as possible.

12. This answering affidavit was due to be filed on 5 July 2017. I file this affidavit almost 21 days later. I therefore accept that it has been filed outside of the required time period. I am however advised that this Court has the discretion to condone the late filing of this affidavit where the Minister furnishes this Court with a full explanation, and is able to persuade the Court that there is good cause for it to do so.

13. I am advised that the factors to which this Court will have regard in deciding whether or not condonation should be granted are trite. Having regard to the latter principles, I respectfully submit that –

    13.1. the extent of the delay in filing this answering affidavit, which I accept is significant, is not egregious;

    13.2. this is particularly so given the causes of the delay, set out above, which include the fact that Treasury was required to collate and consider a voluminous record of decision outside of the time periods permitted for it to do so under Rule 53;

13.3. I have explained the delay in full, and I respectfully submit that I have furnished this Court with a reasonable explanation, which does not arise from dilatory conduct on the part of either the Minister or Treasury;

13.4. the issues raised in the present application are clearly important, affecting, as they do, the rules of procurement that are applied throughout the country;

13.5. the effect of the delay on the administration of justice, especially when the importance of the regulation is considered, is negligible;

13.6. the Minister's defence of the Regulations has reasonable prospects of success on the merits, alternatively there are reasonable prospects that this Court will find that the appropriate remedy is for the Regulations to be suspended;

13.7. the application concerns a matter of public importance beyond the interests of the applicant and it would not be in the interests of justice to determine it without regard to the answering affidavit filed on the Minister's behalf;

13.8. the applicant will suffer no prejudice if condonation is granted as it would have sufficient opportunity to reply to the answering affidavit.

**CONCLUSION AND PRAYER**

14. I apologise to the Court for the delay in the filing of this affidavit. For the reasons I have set out above, I humbly pray that condonation be granted, and that costs be granted in respect of the condonation application in the event only of opposition.

AD

**DEPONENT**

The deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at _____ on this the _____ day of **AUGUST 2017**, the regulations contained in Government Notice no. R1258 of 21 July 1972, as amended, and Government Notice no. R1648 of 19 August 1997, as amended, having been complied with.

**COMMISSIONER OF OATHS**

Full Names:

Capacity:

Address: