IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

34523/17

CASE NUMBER: _____/2017

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2017 -05- 19
T. G. MALGLE
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOF/KLERK VAN
SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

Certified a true copy of the original, filed in this office.
Gesertifiseer 'n ware afskrif van die oorspronklike, gelasseer in hierdie kantoor.
REGISTRAR OF THE HIGH COURT
GRIFFIER VAN DIE HOOGGEREGSHOF

AFRIBUSINESS NPC Applicant

and

THE MINISTER OF FINANCE Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the above-mentioned Applicant intends to apply to the above Honourable Court on a date to be allocated by the Registrar of the Court for an order in the following terms:

1. That the promulgation and adoption of the Preferential Procurement Regulations, 2017 by the Respondent is reviewed and set aside;

2. That the adoption of the Preferential Procurement Regulations, 2017 be declared invalid;

3. The Respondent be ordered to pay the costs of the application;

BALJU PRETORIA SENTRAAL
476 PRETORIA 0001
19 -05- 2017
SHERIFF PRETORIA C

4. That such further and/or alternative relief as the Honourable Court may deem just be granted to Applicant.

TAKE NOTICE FURTHER THAT the affidavit of **ARMAND GREYLING** together with the annexures attached thereto, will be used in support of the application.

TAKE NOTICE FURTHER THAT Applicant has appointed Hurter Spies Attorneys, AfriForum Building, Cnr D.F Malan & Union Avenue, Kloofsig, Centurion at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER THAT if you intend opposing this application, you are required:

(a) To notify the Applicant's attorney in writing within 15 (Fifteen) days after service of this application upon you; and

(b) Within 15 (Fifteen) days after you have so given notice of your intention to oppose the application, to file your Answering Affidavit, if any;

(c) And further that you are required to appoint in such notification an address as referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER that if no Notice of Intention to Oppose is received, or if the Answering Affidavit is not received in time, the Application will be heard on _____ 2017 at 10:00 or soon thereafter as councel may be heard.

SIGNED at PRETORIA on this 19 day of MAY 2017.

HUFFER 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)

TO : THE REGISTRAR OF THE ABOVE HONOURABLE COURT
PRETORIA

AND TO : **THE MINISTER OF FINANCE**
RESPONDENT
2nd FLOOR
OLD RESERVE BANK BUILDING
40 CHURCH STREET
PRETORIA
or
C/O THE STATE ATTORNEY
MANAKA HEIGHTS
8TH FLOOR
167 THABO SEHUME STREET
PRETORIA

(PER SHERIFF)

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 34523/17 /2017

In the matter between:

AFRIBUSINESS NPC Applicant

and

THE MINISTER OF FINANCE Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ARMAND GIDEON GREYLING

do hereby make oath and state:

1.

1.1 I am an adult male, currently employed as Law-and Policy Analyst with the Applicant, with place of employment situated at AfriForum Building, cnr DF Malan Drive & Union Avenue, Kloofsig, Centurion, Gauteng. In my capacity as such I am duly authorised to depose to this affidavit on behalf of Applicant.

1.2 The facts herein referred to fall within my own personal knowledge, except where otherwise indicated, and are true and correct.

THE PARTIES

2.

2.1 The Applicant is AFRIBUSINESS NPC, a non-profit organisation duly incorporated in terms of the relevant legislation in the Republic of South Africa, with registration number 2005/042861/08 and authorised by its Constitution to acquire, own and dispose of property apart from its members and to take, or defend itself against, legal action, with its main place of business situated at cnr DF Malan Drive & Union Road, Kloofsig, Centurion, Gauteng.

2.2 The Applicant was established in 2011 by various senior business partners. The organisation was established to act as a representative body and collective spoke-person for its members in the business community and strives to promote a successful business environment by ensuring a steady, fair and predictable economic environment.

2.3 The applicant aims to mobilise business people in a positive manner in order to ensure a healthy business environment built on free and fair competition in the market place and economic freedom.

2.4 Applicant currently has 10 500 paying members, who are business people who increasingly play a role as entrepreneurs, financiers and job creators. Applicant's members have given Applicant the mandate to protect and promote the values enshrined in the Constitution, to fight corruption, and to create a sound business platform for all to prosper in South Africa. Business conditions detrimental to Applicant's members do not only affect them, but manifest itself in job losses and economic hardship for a much wider community.

2.5 Against the aforegoing background, Applicant has with respect *locus standi* to bring the present application in terms of Section 38 of the Constitution of the Republic of South Africa, No 108 of 1996, acting as an association in the interest of its members, acting in the public interest, and acting in the interest of a group of persons. As appears from the content of this Affidavit, Applicant alleges that rights in terms of the Bill of Rights contained in the Constitution have been infringed.

3.

3.1 The Respondent is THE MINISTER OF FINANCE, cited herein in his representative capacity as the responsible person for the National Treasury and the representative of Government relating to the Preferential

Procurement Policy contemplated in Section 217 of the Constitution, with offices situated at 2nd Floor, Old Reserve Bank Building, 40 Church Street, Pretoria, Gauteng, alternatively c/o State Attorney, Manaka Heights, 8th Floor, 167 Thabo Sehume Street, Pretoria, Gauteng.

3.2 The Minister of Finance is at the heart of South Africa's economic and fiscal policy development. He should aim to advance economic growth and development, and to strengthen South Africa's democracy.

PURPOSE OF APPLICATION

4.

4.1 This is an application for the review and setting aside of the Preferential Procurement Regulations 2017 ("*2017 Regulations*"), adopted and promulgated by Respondent, and published in the Gazette on 20 January 2017. A copy of the Regulations is annexed hereto as **ANNEXURE "A1"**.

4.2 The application is instituted on the basis that Respondent acted *ultra vires* of the powers conferred upon him by the Preferential Procurement Policy Framework Act, No 5 of 2000, read with Section 217 of the Constitution. Furthermore it is submitted that Respondent failed to provide sufficient opportunity for reasonable and meaningful public participation, with reference to the notice and comment procedure implemented by the Respondent, regarding the finalisation of the Regulations, with the

consequence that the Regulations are not rationally connected to relevant information which was not taken into account by the Respondent. Furthermore it is contended that the Regulations adopted are so unreasonable that no reasonable person could have so exercised the power to promulgate same, and the Regulations were adopted arbitrarily and capriciously.

4.3 It is consequently contended that the promulgation and adoption of the Regulations by Respondent should be reviewed and set aside upon the grounds mentioned in Section 6(2)(a)(i), Section 6(2)(b), Section 6(2)(c), Section 6(2)(d), Section 6(2)(e)(i), Section 6(2)(e)(vi), Section 6(2)(f)(i) and (ii) and Section 6(2)(h) of the Promotion of Administrative Justice Act, No 3 of 2000 ("*PAJA*").

4.4 At the outset, it is respectfully submitted that:

4.4.1 the Applicant has exhausted all internal and domestic remedies available to it and that the Applicant has no alternative, but to approach the Honourable Court for the review of the administrative action taken by the Respondent.

4.4.2 the application has not been unreasonably delayed and is brought within the requisite 180 days provided for in Section 7(1) of PAJA.

THE REGULATIONS

5.

5.1 On 14 June 2016 Respondent published a notice in the Government Gazette titled "*PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000: DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2016 PUBLISHED FOR PUBLIC COMMENT*" under notice number 719. A copy of the notice is attached as **ANNEXURE "A2"**. The notice constituted an invitation for public comment on draft Regulations, and invited interested parties to submit written comments not later than 15 July 2016, whereafter comments would not be considered. The Regulations were comprehensive and dealt with numerous issues, which directly, and indirectly, impact upon the socio-economic development of South Africa. In essence, the draft Regulations:

5.1.1 introduced pre-qualification criteria to allow the advancement of primarily selected black categories of people to tender for contracts by State Organs, thereby restricting the inclusion of well established companies from tendering for the contracts;

5.1.2 increased the Rand value for the application of the 80/20 Preference Point System applying to procurement of contracts by Organs of State in terms of Section 2(1)(b)(ii) of the Preferential Procurement Policy Framework Act, No 5 of 2000 ("*PPPFA*") from R1 million to a maximum R50 million, and

similarly the minimum Rand value for application of the 90/10 Preference Point System in terms of Section 2(1)(b)(i) was increased to R50 million.

5.1.3 required of Organs of State to identify tenders, where it is feasible, to sub-contract a minimum of 30 % of the value of the contract for contracts above R30 million.

5.2 It is conspicuous that Respondent allowed the minimum period prescribed by Regulation 18(2)(a) of the Regulations On Fair Administrative Procedures, 2002, originally published under Government notice R1022 in the Government Gazette of 31 July 2002, because Respondent decided in terms of Section 4(1) of PAJA to follow a notice and comment procedure as contemplated in Section 4(1)(b) of that Act.

5.3 In consideration of the aforesaid, on the last day allowed for comment, the South African Institute of Race Relations ("*IRR*") submitted a document to Respondent titled *"FULL SUBMISSION OF PREFERENTIAL PROCUREMENT REGULATIONS – 15 JULY 2016"*. A copy of the submission is attached hereto as **ANNEXURE "A3"**. A reading of the submission serves to confirm that the IRR was formed in 1929 with a mandate of opposing racial discrimination and the promotion of goodwill and the fundamental object promoting democracy, human rights, development and reconciliation of people in South Africa. The submission unequivocally stated that the period of communication was too short to meet the constitutional requirement for proper public consultation. The submission,

nevertheless, attempted to deal with the draft Regulations. The grounds for the IRR's submission and related motivation illustrate that the substantial merits of the Regulations are questionable.

5.4 On 23 August 2016, after the time for comments to the draft Regulations had lapsed, I, on behalf of Applicant, addressed a submission relating to the time allowed for comments to Respondent, in which it was confirmed that the period of 30 days allowed by Respondent was too short. Applicant, because of the far reaching implications of the Regulations, requested a revision of the period allowed for public participation, and asked a further period between 60 and 90 days to be allowed for further comments. Reference was made to the applicable legal authority, which emphasise the importance of public participation.

5.5 In amplification of its submissions regarding the inadequacy of the mere 30 day period, Applicant referred the Respondent to the development surrounding the white paper on "*NATIONAL HEALTH INSURANCE*", which was published in the Government Gazette on 11 December 2015 by the Minister of Health. The Minister of Health allowed for comments on the white paper within a period of 3 months from date of publication thereof. On 11 February 2016 however, the Minister of Health revised the period of public participation in the Government Gazette and allowed for the further public participation until 31 May 2016. A copy of Applicant's submission is annexed as **ANNEXURE "A4"**.

5.6 On 29 August 2016 Applicant was informed per e-mail message that Respondent considered an extension for comments, and that Applicant will be advised in a week if or when such an extension has been issued. Eventually on 12 September 2016 Applicant was informed that the due date for comment has been extended to 23 September 2016. I annex hereto a series of e-mail messages exchanged between the parties as **ANNEXURE "A5"**, and a notice published in the Government Gazette of 2 September 2016, reflecting that the due date for comment on draft Regulations published on 14 June 2016 was extended to 23 September 2016, as **ANNEXURE "A6"**.

5.7 It follows from the aforegoing that on 2 September 2016 the date for comments on the draft Regulations was, with retrospective effect, extended to 23 September 2016. Due to notice only be given on 2 September 2016, a further period of effectively 3 weeks was allowed for comment, with the implication that 51 days were in practice allowed for comment.

5.8 On 15 September 2016 I, on behalf of Applicant, submitted comments pertaining to the draft Regulations to Respondent. I submitted that the extension, granted for 10 working days only, made it difficult for affected individuals such as Applicant's members to utilise the time provided and to submit substantive comments on the Regulations. I reiterated that an extension of 60 to 90 days would have sufficed to ensure a meaningful public participation process. I annex the covering e-mail message sent as **ANNEXURE "A7"**, and refers to the reply on behalf of Respondent that the National Treasury was already on 15 September 2016 in the process of

considering and collating inputs received with the view to promulgate a final version of the Regulations for implementation. I further attach as **ANNEXURE "A8"**, the submission relating to the draft Regulations submitted by Applicant.

5.9 The Regulations were promulgated on 20 January 2017, as appears from a copy of the promulgated notice and Regulations attached as **ANNEXURE "A1"**.

PROCUREMENT BY STATE ORGANS

6.

6.1 Government contracting is constitutionalised in South Africa. Section 217 of the Constitution stipulates:

"*217 **PROCUREMENT** -*

(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.

(3) *National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."*

6.2 The PPPFA lays down the national framework for the giving of preference in contract awards. A perusal of the Act 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.

6.3 The PPPFA prescribes the use of a point system to evaluate bids during the award stage. In terms of the point system, points are allocated to suppliers for price and specific goals. For high value contracts 10 points out of 100 may be allocated for the attainment of specific goals, and 90 points for price, and for lower value contracts 20 points out of 100 may be allocated for the attainment of specific goals and 80 points for price. Section 2(1)(d) and (e) of the PPPFA deal with specific goals and stipulate:

"(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 program 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."

6.4 From the aforegoing it must be clear that provision is made by the PPPFA that race, gender and disability may be taken into account in the award of State contracts as part of the 10 points to be allocated for specific goals for high value contracts, and as part of the 20 points to be allocated for specific goals for lower value contracts.

6.5 Section 2(1)(f) of the PPPFA stipulates:

"(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) en (e) justify the award to another tenderer."

6.6 Applicant contends that:

6.6.1 The provisions relating to the method of calculation of points to be awarded to tenderers are peremptory;

6.6.2 Section 2(1)(f) requires a two-stage enquiry when considering the award of tenders namely, firstly determining which tenderer has the highest points and secondly, determining whether objective criteria in addition to those contemplated in paragraphs (d) and (e) exist, justifying the award of the tender to a tenderer which does not have the highest points. The words "*In addition to*" of Section 2(1)(f) mean "*over and above*" or "*besides*".

6.6.3 The objective criteria justifying the award to a tenderer which did not score the highest points must be criteria other than those set out in Section 2(1)(d) and (e). Race, gender and disability are to be taken into account in terms of Section 2(1)(d), limited by the points to be awarded for specific goals, and therefore do not qualify as objective criteria in terms of Section 2(1)(f).

6.7 The legislature, through the PPPFA, afforded a very limited discretion to Organs of State with regard to the award of a contract to a bidder who does not score the highest points. Section 2(1)(f) of the PPPFA is an exception to the general rule, that is the award of a contract to the highest scoring bidder, and a restrictive interpretation should therefore be given to the phrase "*objective criteria in addition to those contemplated in paragraphs (d) and (e)*" of Section 2(1) of the Act. The PPPFA does not provide for pre-qualification criteria other than the objective criteria mentioned in Section 2(1)(f).

SUB-CONTRACTING ACCORDING TO PRE-QUALIFICATION CRITERIA

7.

7.1 According to the 2017 Regulations, an Organ of State may apply pre-qualifying criteria in the evaluation of a tender. These criteria must be stated in the tender documents and may include:

7.1.1 a tenderer having a stipulated minimum B-BBEE status level of contributor (Regulation 4(1)(a));

7.1.2 Exempted Micro Enterprises ("*EME*") or Qualifying Small Enterprises ("*QSE*"), in terms of a code of good practice on Black Economic Empowerment issued in terms of Section 9(1) of the Broad-Based Black Economic Empowerment Act, No 53 of 2003;

7.1.3 a tenderer sub-contracting a minimum of 30 % to an EME or QSE which is at least 51 % owned by categories of black people (Regulation 4(1)). The categories of black people mentioned include woman (Regulation 4(1)(c)(iii)), and people with disabilities (Regulation 4(1)(c)(iv));



7.2 The discretion granted by Regulation 4(1) to an Organ of State to apply pre-qualifying criteria is to be exercised "*to advance certain designated groups*". "*Designated Group*" is defined in Regulation 1 as:

> *"(a) black designated groups;*
>
> *(b) black people;*
>
> *(c) woman;*
>
> *(d) people with disabilities; or*
>
> (e) *small enterprises as defined in Section 1 of the National Small Enterprise, 1996 (Act No 102 of 1996)."*

7.3 A tender that does not comply with the pre-qualification criteria stipulated in tender documents, is an unacceptable tender.

7.4 Regulation 9 of the 2017 Regulations allow for an Organ of State to advertise tenders with a specific tendering condition that the successful tenderer must sub-contract a minimum of 30 % of the value of contracts above R30 million to advance designated groups. Similarly as in Regulation 4, the groups qualifying for sub-contracts are defined with reference to race (black people), woman and people with disabilities.

PRE-QUALIFICATION CRITERIA *ULTRA VIRES* PPPFA AND CONSTITUTION

8.

8.1 As indicated above, in terms of the PPPFA, race, gender and disability are to be taken into account as specific goals when the point system to evaluate bids during the award stage are considered. Being "*specific goals*", race, gender and disability are limited by the points to be awarded for specific goals, that is 10 points out of 100 for high value contracts, and 20 points out of 100 for lower value contracts. Race, gender and disability, in terms of the points system prescribed by the PPPFA do not qualify as objective criteria in terms of Section 2(1)(f) of the Act, simply because those criteria are in particular reflected in Section 2(1)(d), and therefore can never be "*in addition to*" the criteria contemplated in Section 2(1)(d). The framework for implementation of a Preferential Procurement Policy as dictated by the PPPFA simply does not allow for pre-qualification criteria as stipulated in Regulation 4 and Regulation 9 of the 2017 Regulations, and Respondent simply resorted to law-making in conflict with the PPPFA, by issuing the 2017 Regulations.

8.2 Where pre-qualification criteria are applied as envisaged in the 2017 Regulations, tenders may be awarded to firms that have failed to score the highest points on price and BBBE-status. This is in conflict with the PPPFA, Section 2(1)(a), which in so many words requires that a contract must be awarded to the tenderer with the highest points, unless objective criteria justify the award to another tenderer. Ironically Regulation 11(1) of the

2017 Regulations echoes the stipulation reflected in Section 2(1)(f) of the PPPFA, notwithstanding the fact that Regulations 4 and 9 are specifically in conflict with that stipulation.

8.3 Apart from the aforegoing the application of pre-qualification criteria as envisaged in Regulation 4 and Regulation 9, are in conflict with Section 217(1) of the Constitution which requires that contracts for goods or services by State Organs must be "competitive and *cost-effective*". Section 217(2)(b) does allow for the protection and advancement of persons or categories of persons, disadvantaged by unfair discrimination. The legislature, in the PPPFA, allowed for a procurement policy protecting and advancing the interests of persons previously disadvantaged by allowing 20 points or 10 points depending upon the value of contracts out of 100 to be awarded merely upon disadvantage, without price taken into account. The effect is that, depending upon the value of a contract, a BEE firm is able to charge 20 % or 10 % more than a non-BEE firm, and may still be awarded a tender. If pre-qualification criteria as envisaged in Regulations 4 and 9 are applied, a tender can for example stipulate that 90 % of the value of the contract must be sub-contracted to small black businesses, which might in fact have a limited capacity to produce the required goods and services, or a tender may stipulate that tenders may be submitted only by firms having a BEE recognition standing at level 1, which requires more than 100 points on the BEE score card. Similar stipulations will exclude many of the largest and most experienced and efficient firms, including companies listed on the Johannesburg Stock Exchange, from bidding for State contracts at all, irrespective of how cost- effective and competitive the disqualified firms may

render the required service or goods. Competitiveness and cost-effectiveness as objectives of State procurement prescribed by the Constitution will not play any role. Consequently Applicant contends that the 2017 Regulations are also *ultra vires* the stipulations of the Constitution.

8.4 In terms of Regulation 16, the Preferential Procurement Regulations 2011 were repealed. In terms of the 2011 Regulations bidders who did not submit B-BBEE status level verification certificates or are non-compliant contributors to B-BBEE did not qualify for preference points for B-BBEE, but were not disqualified from the bidding process. They merely scored points out of 90 or 80 for price only, and 0 points out of 10 or 20 for B-BBEE. I refer in this regard to the Implementation Guide issued by the National Treasury on the 2011 Regulations, attached hereto as **ANNEXURE "A9"**. This position will now in terms of the 2017 Regulations change, and bidders may be permanently disqualified from bidding for State contracts depending upon pre-qualification criteria set by State Organs. It is contended that Respondent was not authorised to promulgate Regulations with such effect in terms of the PPPFA or the Constitution, and in effect resorted to law-making, so contradicting the separation of powers underpinned by the Constitution. The Constitution vests the capacity to make new law in Parliament, not in the executive.

UNFAIR PROCEDURE

9.

9.1 Reasonable and meaningful public participation is a clear and peremptory requisite when considering the direct effect of the 2017 Regulations on the South African economy and business at large.

9.2 The making of Regulations by Respondent constitutes legislative administrative action, and therefore fall within the ambit of Section 33 of the Constitution, which determines that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The issue of Regulations is therefore subject to PAJA, and the Regulations as such, and the process of making the Regulations, are subject to review.

9.3 It is clear that the making of the Regulations in the present case was a decision of an administrative nature. The 2017 Regulations are made under an empowering provision. They have a direct, external legal effect; and they adversely affect the rights of the majority of persons and entities trading and doing business in the Republic of South Africa.

9.4 In consideration of the aforesaid, a period of 30 days for public comments simply does not provide a meaningful opportunity for public participation and involvement in the making of the Regulations, taking into account the extent and impact of the Regulations. The nature of the Regulations is far reaching and there appears to be no urgency in making the Regulations. In the circumstances a minimum period of 30 days for public comment was

completely inadequate. The extension of the period for public comment after the initial period lapsed, effectively providing for only a further 3 weeks for comment was similarly inadequate. It is conspicuous that in submitting its initial comment, the IRR complained about the short period for comment on the Regulations. The inference is overwhelming that when comments were submitted on 15 July 2016, the IRR did not have sufficient time to fully consider the effect of the Regulations and to submit comprehensive comments. It is further indicative that no further submission was made by the IRR, justifying the inference that the further period of 21 days granted was again inadequate.

9.5 Applicant does not know how many submissions were actually made subsequent to the invitation to comment on the 2017 Regulations. Respondent will surely be able to throw light on this question. Of importance is however the further submissions made after the extension of the initial period for comment. I humbly contend that, apart from Applicant's submission as reflected in **ANNEXURE "A8"**, a minimum further comments, if any, were submitted, simply because a period of a further 3 weeks was totally inadequate to compile comments of any significance. Parties involved in daily business were simply prohibited from making representations, initially within the 30 day period allowed, and thereafter within the extension for 3 weeks.

9.6 It is respectfully submitted that the initial 30 day period, and the extension of 21 days thereafter, were wilfully inadequate, when considering the scope and impact on the Regulations on the South African economy. These

periods can simply not be considered as opportunities of meaningful consultation. When considering the adoption of similar legislative instruments with far reaching effects, extensions of further periods for notice and commentary are generally provided. It is clear that the Respondent's decision to limit the period for the provision of commentary is severely restrictive under the circumstances, and negates the fundamental purpose for which public participation has been provided for in the Constitution. It can therefore not be doubted that the Respondent's decision in this regard was not rational. The period granted for comment amounts to cynical, callous and dishonest representation. It rendered completely nugatory the principle to which our Courts have always adhered and to which they have required administrative officials to adhere with regard to fair procedures and reasonableness.

NON-COMPLIANCE WITH SEIAS

10.

10.1 The Cabinet decided on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation and regulations in February 2007. To implement the Cabinet's 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 Socio-Economic Impact Assessment System Unit ("*SEIAS*"). Guidelines relating

to SEIAS are annexed hereto as **ANNEXURE "A10"**. SEIAS consists of a set of common procedures and support institution for assessing the socio-economic impact of new or to be amended policies, regulations and legislations. SEIAS include:

10.1.1 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.

10.1.2 the development of a final impact assessment that provides a detailed evaluation of the likely effects of, *in casu*, the 2017 Regulations in terms of implementation and compliance costs as well as the anticipated outcome.

10.1.3 publication of the 2017 Regulations for public comment and consultation with stakeholders, with a final assessment attached.

10.1.4 a revision of the draft and final assessment based on comment from the public and stakeholders, and the submission of the regulations for approval with the final assessment attached.

10.2 The guidelines reflected in **ANNEXURE "A10"** stress that SEIAS procedures apply to significant regulations and major amendments of existing regulations that have country coverage with high impacts. Because the PPPFA provides

an enabling framework for detailed regulations, the regulations should have been the main subject of the assessment process.

10.3 Serious socio-economic ramifications of the 2017 Regulations are beyond doubt. The 2017 Regulations will in all probability encourage inflated pricing in all State procurement. No SEIAS assessment of the 2017 Regulations has however been made available as required. An initial and final impact assessment should have been attached to the regulations when gazetted for public comment. This was not done when the 2017 Regulations were initially published for comment, and also not when the time period for comment was extended. It is uncertain whether the assessments were completed. Even if assessments were completed, there was no compliance with the SEIAS Guidelines and a mandatory and material procedure was not complied with.

IRRATIONAL, UNFAIR AND UNREASONABLE REGULATIONS

11.

11.1 "*Functionality*" is defined in Regulation 1 of the 2017 Regulations as *"the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents*". One would have expected that "*functionality*" as defined, should be the first requirement to qualify as a tenderer for a State contract. A conspicuous minor role is however allocated to functionality in the 2017 Regulations:

11.1.1 A proper interpretation of Regulation 5 reveals that State Organs, in terms of the 2017 Regulations, have a discretion to evaluate tenders on functionality, or not. The worrying implication is that firms who do not qualify on functionality to be awarded a State contract, may, if the State Organ decides not to evaluate the tender on functionality, be awarded a contract although the successful tenderer does not have the ability to provide the goods or services. The irrationality of the discretion granted speaks for itself.

11.1.2 It is submitted that no State contract should be awarded unless the tenderer is able to demonstrate a proper level of "*functionality*". As indicated, the Constitution requires a procurement system which is fair, equitable, competitive and cost effective. Functionality is the competitive edge which may elevate one supplier above its competitors. A State Organ which decides not to evaluate a tender on functionality can however simply ignore the ability of tenderers, and award tenders on price and BEE-status.

11.2 Authorities indicate that functionality, in contrast to race, gender and disability, does qualify as an objective criteria which may persuade a State Organ to award a tender not to the tenderer which scores the highest points in terms of the Preference System. A State Organ may therefore in terms

of Section 2(1)(f) of the PPPFA award a tender to the most able tenderer. Evaluation founded upon functionality however remains discretionary, and, notwithstanding the value of contracts, State Organs may simply decide not to take functionality into account at all.

11.3 In terms of Regulation 10 functionality, if a State Organ has decided to evaluate upon functionality, will be a deadlock braking mechanism wherever two or more tenderers score an equal total number of points according to the Preference System. In those instances where State Organs decide not to evaluate on functionality, the award, in case of two or more tenderers scoring equal total points, will be decided by the drawing of lots. It is submitted that it is simply non-scensical that a State Organ may revert to the drawing of lots, rather to determine the successful tenderer relating to ability.

12.

The threshold to distinguish between low value and high value contracts for purposes of the Preference Point System is increased from R1 million to R50 million. The implication is that the BEE-score of a tenderer can be used to circumvent the lowest price score in considerable more cases than previously. In this regard I refer to my submission reflected in **ANNEXURE "A8"**, where I illustrated that a tenderer may be awarded a State contract, regardless of a lack of experience to be able to deliver, and regardless of the fact that it is more expensive than other tenderers. I further refer to the submission by IRR reflected in **ANNEXURE "A3"**, indicating that the outrageous increase in the threshold poses a major threat to cost-effective tendering. Although the intended threshold when the regulations were published for comment was R100

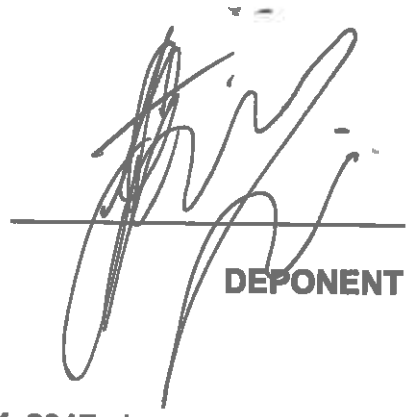
million, which was reduced in the 2017 Regulations to R50 million, the enormous increase in the threshold remains a substantive policy change with significant socio-economic implications. Tenderers for contracts up to R50 million, if allowed to tender in terms of pre-qualifying criteria, will have to outscore BEE-tenderers with 20 points. The increase in the threshold is with respect irrational, unfair and unreasonable, and will exclude a vast number of competitors, notwithstanding the ability of the competitors to supply the goods or services. This will with respect open the floodgates for State tenders to be awarded at inflated prices to inefficient suppliers. A procurement system founded upon the 2017 Regulations will not ensure an efficient, economic and effective use of resources as required by Section 195 of the Constitution.

CONCLUSION

13.

13.1 It is reiterated that the Respondent acted *ultra vires* of the powers conferred upon him in terms of the PPPFA when promulgating the 2017 Regulations. Mandatory procedures were not followed, and the regulations are irrational, unreasonable and unfair to an extent that they stand to be reviewed and set aside in terms of the Sections of PAJA already mentioned above.

13.2 The Court will accordingly be asked to grant the relief as set out in the Notice of Motion to Applicant.



DEPONENT

I hereby certify that on this the 19th day of **MAY 2017**, in my presence at Centurion the deponent signed this affidavit and declared that he knows and understands the contents hereof, had no objection to taking this oath and considers this as binding on his conscience and that the provisions contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

Full name: MELISSA SARVARI ERASMUS

Designation: Kommissaris van Ede/Commissioner of Oaths
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NATIONAL TREASURY

NO. R. 32

20 JANUARY 2017

PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000: PREFERENTIAL PROCUREMENT REGULATIONS, 2017

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 set out in the Schedule.

SCHEDULE

Preferential Procurement Regulations, 2017

Contents

1. Definitions
2. Application
3. Identification of preference point system, designated sector, pre-qualification criteria, objective criteria and subcontracting
4. Prequalification criteria for preferential procurement
5. Tenders to be evaluated on functionality
6. 80/20 preference point system for acquisition of goods or services for Rand value equal to or above R30 000 and up to R50 million
7. 90/10 preference point system for acquisition of goods or services with Rand value above R50 million
8. Local production and content
9. Subcontracting as condition of tender
10. Criteria for breaking deadlock in scoring
11. Award of contracts to tenderers not scoring highest points
12. Subcontracting after award of tender
13. Cancellation of tender
14. Remedies
15. Circulars and guidelines
16. Repeal of Regulations and saving
17. Short title and commencement

Definitions

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

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

"B-BBEE status level of contributor" means the B-BBEE status of an entity in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

"black designated groups" has the meaning assigned to it in the codes of good practice issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

"black people" has the meaning assigned to it in section 1 of the Broad-Based Black Economic Empowerment Act;

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

"co-operative" means a co-operative registered in terms of section 7 of the Co-operatives Act, 2005 (Act No. 14 of 2005);

"designated group" means-

(a) black designated groups;
(b) black people;
(c) women;
(d) people with disabilities; or
(e) small enterprises, as defined in section 1 of the National Small Enterprise Act, 1996 (Act No. 102 of 1996);

"designated sector" means a sector, sub-sector or industry or product designated in terms of regulation 8(1)(a);

"EME" means an exempted micro enterprise in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

"functionality" means the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents;

"military veteran" has the meaning assigned to it in section 1 of the Military Veterans Act, 2011 (Act No. 18 of 2011);

"National Treasury" has the meaning assigned to it in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"people with disabilities" has the meaning assigned to it in section 1 of the Employment Equity Act, 1998 (Act No. 55 of 1998);

"price" includes all applicable taxes less all unconditional discounts;

"proof of B-BBEE status level of contributor" means-

(a) the B-BBEE status level certificate issued by an authorised body or person;
(b) a sworn affidavit as prescribed by the B-BBEE Codes of Good Practice; or
(c) any other requirement prescribed in terms of the Broad-Based Black Economic Empowerment Act;

"QSE" means a qualifying small business enterprise in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

"Rand value" means the total estimated value of a contract in Rand, calculated at the time of the tender invitation;

"rural area" means-

(a) a sparsely populated area in which people farm or depend on natural resources, including villages and small towns that are dispersed through the area; or

(b) an area including a large settlement which depends on migratory labour and remittances and government social grants for survival, and may have a traditional land tenure system;

"stipulated minimum threshold" means the minimum threshold stipulated in terms of regulation 8(1)(b);

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

"township" means an urban living area that any time from the late 19th century until 27 April 1994, was reserved for black people, including areas developed for historically disadvantaged individuals post 27 April 1994;

"treasury" has the meaning assigned to it in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999); and

"youth" has the meaning assigned to it in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008).

Application

2. These Regulations apply to organs of state as envisaged in the definition of organ of state in section 1 of the Act.[1]

Identification of preference point system, designated sector, pre-qualification criteria, objective criteria and subcontracting

3. An organ of state must-

(a) determine and stipulate in the tender documents-

(i) the preference point system applicable to the tender as envisaged in regulation 6 or 7; or

[1] The definition of "organ of state" in section 1 of the Act in paragraph (a) to (e) includes-

- a national or provincial department as defined in the Public Finance Management Act, 1999;
- a municipality as contemplated in the Constitution;
- a constitutional institution as defined in the Public Finance Management Act;
- Parliament;
- a provincial legislature.

Paragraph (f) of the definition of organ of state in section 1 of the Act includes any other institution or category of institutions included in the definition of "organ of state" in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which the Act applies. Government Notice R. 501 of 8 June 2011 recognises, with effect from 7 December 2011, all public entities listed in Schedules 2 and 3 to the Public Finance Management Act, 1999, as institutions to which the Act applies. Note should be taken of notices issued from time to time in terms of paragraph (f) of this definition. The application of these Regulations is also subject to applicable exemptions approved in terms of section 3 of the Act.

(ii) if it is unclear which preference point system will be applicable, that either the 80/20 or 90/10 preference point system will apply and that the lowest acceptable tender will be used to determine the applicable preference point system;

(b) determine whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4;

(c) determine whether the goods or services for which a tender is to be invited, are in a designated sector for local production and content as envisaged in regulation 8;

(d) determine whether compulsory subcontracting is applicable to the tender as envisaged in regulation 9; and

(e) determine whether objective criteria are applicable to the tender as envisaged in regulation 11.

Pre-qualification criteria for preferential procurement

4.(1) If an organ of state decides to apply pre-qualifying criteria to advance certain designated groups, that organ of state must advertise the tender with a specific tendering condition that only one or more of the following tenderers may respond-

(a) a tenderer having a stipulated minimum B-BBEE status level of contributor;

(b) an EME or QSE;

(c) a tenderer subcontracting a minimum of 30% to-

(i) an EME or QSE which is at least 51% owned by black people;

(ii) an EME or QSE which is at least 51% owned by black people who are youth;

(iii) an EME or QSE which is at least 51% owned by black people who are women;

(iv) an EME or QSE which is at least 51% owned by black people with disabilities;

(v) an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;

(vi) a cooperative which is at least 51% owned by black people;

(vii) an EME or QSE which is at least 51% owned by black people who are military veterans;

(viii) an EME or QSE.

(2) A tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender.

Tenders to be evaluated on functionality

5.(1) An organ of state must state in the tender documents if the tender will be evaluated on functionality.

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

(3) The tender documents must specify-

(a) the evaluation criteria for measuring functionality;

(b) the points for each criteria and, if any, each sub-criterion; and

(c) the minimum qualifying score for functionality.

(4) The minimum qualifying score for functionality for a tender to be considered further-

(a) must be determined separately for each tender; and

(b) may not be so-

(i) low that it may jeopardise the quality of the required goods or services; or

(ii) high that it is unreasonably restrictive.

(5) Points scored for functionality must be rounded off to the nearest two decimal places.

(6) A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents is not an acceptable tender.

(7) Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point system and any objective criteria envisaged in regulation 11.

80/20 preference point system for acquisition of goods or services for Rand value equal to or above R30 000 and up to R50 million

6.(1) The following formula must be used to calculate the points out of 80 for price in respect of a tender with a Rand value equal to or above R30 000 and up to a Rand value of R50 million, inclusive of all applicable taxes:

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

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmin = Price of lowest acceptable tender.

(2) The following table must be used to calculate the score out of 20 for B-BBEE:

B-BBEE Status Level of Contributor	Number of Points
1	20
2	18
3	14
4	12
5	8
6	6

7	4
8	2
Non-compliant contributor	0

(3) A tenderer must submit proof of its B-BBEE status level of contributor.

(4) A tenderer failing to submit proof of B-BBEE status level of contributor or is a non-compliant contributor to B-BBEE may not be disqualified, but-

(a) may only score points out of 80 for price; and

(b) scores 0 points out of 20 for B-BBEE.

(5) A tenderer may not be awarded points for B-BBEE status level of contributor if the tender documents indicate that the tenderer intends subcontracting more than 25% of the value of the contract to any other person not qualifying for at least the points that the tenderer qualifies for, unless the intended subcontractor is an EME that has the capability to execute the subcontract.

(6) The points scored by a tenderer for B-BBEE in terms of subregulation (2) must be added to the points scored for price under subregulation (1).

(7) The points scored must be rounded off to the nearest two decimal places.

(8) Subject to subregulation (9) and regulation 11, the contract must be awarded to the tenderer scoring the highest points.

(9)(a) If the price offered by a tenderer scoring the highest points is not market-related, the organ of state may not award the contract to that tenderer.

(b) The organs of state may-

(i) negotiate a market-related price with the tenderer scoring the highest points or cancel the tender;

(ii) if the tenderer does not agree to a market-related price, negotiate a market-related price with the tenderer scoring the second highest points or cancel the tender;

(iii) if the tenderer scoring the second highest points does not agree to a market-related price, negotiate a market-related price with the tenderer scoring the third highest points or cancel the tender.

(c) If a market-related price is not agreed as envisaged in paragraph (b)(iii), the organ of state must cancel the tender.

90/10 preference point system for acquisition of goods or services with Rand value above R50 million

7.(1) The following formula must be used to calculate the points out of 90 for price in respect of a tender with a Rand value above R50 million, inclusive of all applicable taxes:

Where-

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

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmin = Price of lowest acceptable tender.

(2) The following table must be used to calculate the points out of 10 for B-BBEE:

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

(3) A tenderer must submit proof of its B-BBEE status level of contributor.

(4) A tenderer failing to submit proof of B-BBEE status level of contribution or is a non-compliant contributor to B-BBEE may not be disqualified, but-

(a) may only score points out of 90 for price; and

(b) scores 0 points out of 10 for B-BBEE.

(5) A tenderer may not be awarded points for B-BBEE status level of contributor if the tender documents indicate that the tenderer intends subcontracting more than 25% of the value of the contract to any other person not qualifying for at least the points that the tenderer qualifies for, unless the intended subcontractor is an EME that has the capability to execute the subcontract.

(6) The points scored by a tenderer for B-BBEE contribution in terms of subregulation (2) must be added to the points scored for price under subregulation (1).

(7) The points scored must be rounded off to the nearest two decimal places.

(8) Subject to subregulation (9) and regulation 11, the contract must be awarded to the tenderer scoring the highest points.

(9)(a) If the price offered by a tenderer scoring the highest points is not market-related, the organ of state may not award the contract to that tenderer.

(b) The organs of state may-

(i) negotiate a market-related price with the tenderer scoring the highest points or cancel the tender;

(ii) if the tenderer does not agree to a market-related price, negotiate a market-related price with the tenderer scoring the second highest points or cancel the tender;

(iii) if the tenderer scoring the second highest points does not agree to a market-related price, negotiate a market-related price with the tenderer scoring the third highest points or cancel the tender.

(c) If a market-related price is not agreed as envisaged in paragraph (b)(iii), the organ of state must cancel the tender.

Local production and content

8.(1) The Department of Trade and Industry may, in consultation with the National Treasury-

(a) designate a sector, sub-sector or industry or product in accordance with national development and industrial policies for local production and content, where only locally produced services or goods or locally manufactured goods meet the stipulated minimum threshold for local production and content, taking into account economic and other relevant factors; and

(b) stipulate a minimum threshold for local production and content.

(2) An organ of state must, in the case of a designated sector, advertise the invitation to tender with a specific condition that only locally produced goods or locally manufactured goods, meeting the stipulated minimum threshold for local production and content, will be considered.

(3) The National Treasury must inform organs of state of any designation made in terms of regulation 8(1) through a circular.

(4)(a) If there is no designated sector, an organ of state may include, as a specific condition of the tender, that only locally produced services or goods or locally manufactured goods with a stipulated minimum threshold for local production and content, will be considered.

(b) The threshold referred to in paragraph (a) must be in accordance with the standards determined by the Department of Trade and Industry in consultation with the National Treasury.

(5) A tender that fails to meet the minimum stipulated threshold for local production and content is an unacceptable tender.

Subcontracting as condition of tender

9.(1) If feasible to subcontract for a contract above R30 million, an organ of state must apply subcontracting to advance designated groups.

(2) If an organ of state applies subcontracting as contemplated in subregulation (1), the organ of state must advertise the tender with a specific tendering condition that the successful tenderer must subcontract a minimum of 30% of the value of the contract to-

(a) an EME or QSE;

(b) an EME or QSE which is at least 51% owned by black people;
(c) an EME or QSE which is at least 51% owned by black people who are youth;
(d) an EME or QSE which is at least 51% owned by black people who are women;
(e) an EME or QSE which is at least 51% owned by black people with disabilities;
(f) an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;
(g) a cooperative which is at least 51% owned by black people;
(h) an EME or QSE which is at least 51% owned by black people who are military veterans; or
(i) more than one of the categories referred to in paragraphs (a) to (h).

(3) The organ of state must make available the list of all suppliers registered on a database approved by the National Treasury to provide the required goods or services in respect of the applicable designated groups mentioned in subregulation (2) from which the tenderer must select a supplier.

Criteria for breaking deadlock in scoring

10.(1) If two or more tenderers score an equal total number of points, the contract must be awarded to the tenderer that scored the highest points for B-BBEE.

(2) If functionality is part of the evaluation process and two or more tenderers score equal total points and equal preference points for B-BBEE, the contract must be awarded to the tenderer that scored the highest points for functionality.

(3) If two or more tenderers score equal total points in all respects, the award must be decided by the drawing of lots.

Award of contracts to tenderers not scoring highest points

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

(2) If an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.

Subcontracting after award of tender

12.(1) A person awarded a contract may only enter into a subcontracting arrangement with the approval of the organ of state.

(2) A person awarded a contract in relation to a designated sector, may not subcontract 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.

(3) A person awarded a contract may not subcontract 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 of contributor than the person concerned, unless the contract is subcontracted to an EME that has the capability and ability to execute the subcontract.

Cancellation of tender

13. (1) An organ of state may, before the award of a tender, cancel a tender invitation if-

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

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

(c) no acceptable tender is received; or

(d) there is a material irregularity in the tender process.

(2) The decision to cancel a tender invitation in terms of subregulation (1) must be published in the same manner in which the original tender invitation was advertised.

(3) An organ of state may only with the prior approval of the relevant treasury cancel a tender invitation for the second time.

Remedies

14.(1) Upon detecting that a tenderer submitted false information regarding its B-BBEE status level of contributor, local production and content, or any other matter required in terms of these Regulations which will affect or has affected the evaluation of a tender, or where a tenderer has failed to declare any subcontracting arrangements, the organ of state must-

(a) inform the tenderer accordingly;

(b) give the tenderer an opportunity to make representations within 14 days as to why-

(i) the tender submitted should not be disqualified or, if the tender has already been awarded to the tenderer, the contract should not be terminated in whole or in part;

(ii) if the successful tenderer subcontracted a portion of the tender to another person without disclosing it, the tenderer should not be penalised up to 10 percent of the value of the contract; and

(iii) the tenderer should not be restricted by the National Treasury from conducting any business for a period not exceeding 10 years with any organ of state; and

(c) if it concludes, after considering the representations referred to in subregulation (1)(b), that-

(i) such false information was submitted by the tenderer-

(aa) disqualify the tenderer or terminate the contract in whole or in part; and

(bb) if applicable, claim damages from the tenderer; or

(ii) the successful tenderer subcontracted a portion of the tender to another person without disclosing, penalise the tenderer up to 10 percent of the value of the contract.

(2)(a) An organ of state must-

(i) inform the National Treasury, in writing, of any actions taken in terms of subregulation (1);

(ii) provide written submissions as to whether the tenderer should be restricted from conducting business with any organ of state; and

(iii) submit written representations from the tenderer as to why that tenderer should not be restricted from conducting business with any organ of state.

(b) The National Treasury may request an organ of state to submit further information pertaining to subregulation (1) within a specified period.

(3) The National Treasury must-

(a) after considering the representations of the tenderer and any other relevant information, decide whether to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years; and

(b) maintain and publish on its official website a list of restricted suppliers.

Circulars and guidelines

15. The National Treasury may issue-

(a) a circular to inform organs of state of any matter pertaining to these Regulations; or

(b) a guideline to assist organs of state with the implementation of any provision of these Regulations.

Repeal of Regulations and saving

16.(1) Subject to this regulation, the Preferential Procurement Regulations, 2011, published in Government Notice No R. 502 of 8 June 2011 (herein called "the 2011 Regulations), are hereby repealed with effect from the date referred to in regulation 17.

(2) Any sector designated and minimum threshold determined for local production and content for purposes of regulation 9 of the 2011 Regulations and in force immediately before the repeal of the 2011 Regulations, are regarded as having been done under regulation 8(1) of these Regulations.

(3) Any tender advertised before the date referred to in regulation 17 must be dealt with in terms of the 2011 Regulations.

Short title and commencement

17. These Regulations are called the Preferential Procurement Regulations, 2017 and take effect on 1 April 2017.

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

NATIONAL TREASURY

NO. 719

14 JUNE 2016

PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000: DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2016 PUBLISHED FOR PUBLIC COMMENT

In terms of section 5(2) of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), the draft regulations set out in the Schedule, is hereby published for public comment.

Any comment received by 15 July 2016 will be considered and should be emailed to pppfainputs@treasury.gov.za. Enquires may be directed to Leanda Kleinbool at phone no. 012 315 5715.

The draft regulations are also available at www.treasury.gov.za.

SCHEDULE

Draft Preferential Procurement Regulations, 2016

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12. Cancellation of tender
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16. Repeal of regulations
17. Short title and commencement

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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-

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

"B-BBEE status level of contributor" means the B-BBEE status of an entity in terms of a code of good practice on black economic empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

"black people" means black people as defined in section 1 of the Broad-Based Black Economic Empowerment Act;

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

"comparative price" means a price which is determined to be fair and reasonable after conducting market analysis utilising applicable price analysis techniques and taking into account the factors of a non-firm price and all unconditional discounts that may be utilised;

"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;

"co-operative" means a co-operative registered in terms of the Co-operatives Act, 2005 (Act No. 14 of 2005);

"designated group" means-

(a) black people

(b) women;

(c) people with disabilities; or

(d) small enterprises, as defined in the National Small Enterprise Act, 1996 (Act No. 102 of 1996);

"designated sector" means a sector, sub-sector or industry designated by the National Treasury, after consultation with the Department of Trade and Industry, taking into account-

(a) national development and industrial policies for local production and content; and

(b) competition and other economic factors,

and to which a stipulated minimum threshold applies;

"EME" means an exempted micro enterprise in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

"functionality" means the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents;

"goods" includes infrastructure;

"infrastructure" means-

(a) immovable assets which are acquired or constructed or which results from construction operations; or

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(b) moveable assets which cannot function independently from purpose built immovable assets;

"local production and content" means that portion of the tender excluding-

(a) the cost of components, parts or materials which have been or will be imported (whether by the supplier or a subcontractor);

(b) costs abroad; and

(c) freight and other direct importation costs, including landing costs, dock dues and any applicable taxes payable at the South African port of entry;

"National Treasury" has the meaning assigned to it in the Public Finance Management Act 1999 (Act No. 1 of 1999);

"non-firm price" means a price other than a price that is only subject to adjustments in accordance with the increase or decrease resulting from the amendment, imposition or abolition of any applicable tax which affects the price of the required goods or services;

"QSE" means a qualifying small business enterprise in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

"Rand value" means the total estimated value of a contract in Rand, calculated at the time of the tender invitation and includes all applicable taxes;

"rural area" means-

(a) a sparsely populated area in which people farm or depend on natural resources, including villages and small towns that are dispersed through the area; or

(b) an area including a large settlement which depends on migratory labour and remittances and government social grants for survival, and may have a traditional land tenure system;

"services" includes any services to build or maintain infrastructure;

"stipulated minimum threshold" means that portion of local production and content as determined by the National Treasury after consultation with the Department of Trade and Industry;

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

"township" means an urban living area that any time from the late 19th century until 27 April 1994, were reserved for black people, as defined in the Broad-Based Black Economic Empowerment Act;

'treasury' means treasury as defined in section 1 of the Public Finance Management Act 1999 (Act No. 1 of 1999).

Application

2. These Regulations applies to organs of state as envisaged in the definition of "organ of state" in section 1 of the Act.

Identification of preference point system

3. An organ of state must-

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(a) determine, and stipulate in the tender documents, the applicable preference point system applicable to the tender; and

(b) determine whether the goods or services for which a tender is to be invited, are in a designated sector for local production and content as envisaged in regulation 9.

Evaluation of tenders on functionality

4.(1) An organ of state must indicate in the tender documents if the tender will be evaluated on functionality.

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

(3) When evaluating a tender on functionality, the tender documents must specify-

(a) the evaluation criteria for measuring functionality;

(b) the points for each criteria and, if any, each sub-criteria; and

(c) the minimum qualifying score for functionality.

(4) The minimum qualifying score for functionality for a tender to be considered further-

(a) may not be generic;

(b) must be determined separately for each tender; and

(c) may not be so-

(i) low that it may jeopardise the quality of the required goods or services; or

(ii) high that it is unreasonably restrictive.

(5) A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents is not an acceptable tender.

(6) Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point systems in accordance with regulation 5 or 6, as the case may be.

80/20 preference point system for acquisition of goods or services for Rand value up to R100 million

5.(1) The following formula must be used to calculate the points out of 80 for price in respect of an invitation for a tender with a Rand value of up to R100 million:

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

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.

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(2) The following table must be used to calculate the score out of 20 for B-BBEE:

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 tenderer must submit proof of its B-BBEE status level of contributor.

(4) If a tenderer fails to submit proof of B-BBEE status level of contributor or is a non-compliant contributor to B-BBEE, the tenderer is not be disqualified but may only score points out of 80 for price and scores 0 points out of 20 for B-BBEE.

(5) A trust, consortium or joint venture qualifies for points for B-BBEE status level of contributor as if it is a legal entity, if it submits proof of its B-BBEE status level of contributor.

(6) The points scored by a tenderer for B-BBEE in terms of sub-regulation (2) must be added to the points scored for price under sub-regulation (1).

(7) The total number of points scored must be rounded off to the nearest 2 decimal places.

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

90/10 preference point system for acquisition of goods or services with Rand value above R100 million

6.(1) The following formula must be used to calculate the points out 90 for price in respect of an invitation for a tender with a Rand value above R100 million:

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

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.

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(2) The following table must be used to calculate the points out of 10 for B-BBEE:

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 tenderer must submit proof of its B-BBEE status level of contributor.

(4) If a tenderer fails to submit proof of B-BBEE status level of contribution or is a non-compliant contributor to B-BBEE, the tenderer is not disqualified but may only score points out of 90 for price and scores 0 points out of 10 for BBBEE.

(5) A trust, consortium or joint venture qualifies for points for B-BBEE status level of contributor as if it is a legal entity, if it submits proof of its B-BBEE status level of contributor.

(6) The points scored by a tenderer for B-BBEE contribution in terms of sub-regulation (2) must be added to the points scored for price under sub-regulation (1).

(7) The total number of points scored must be rounded off to the nearest 2 decimal places.

(8) 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 highest points

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

(2) If an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.

(3) The objective criteria stipulated in terms of sub-regulation (2). must be specific to the context of the required goods or services, must be objective and may include, but are not limited to-

(a) a tenderer sub-contracting a minimum of 30% of the value of the resulting contract to one or more:

(i) EMEs or QSEs owned by black people who are female;

(ii) EMEs or QSEs owned by black people who are from the ages of 14 to 35;

(iii) EMEs or QSEs owned by black people;

(iv) EMEs or QSEs owned by black people with disabilities;

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(v) co-operatives conducting business in the municipal area or province where the goods or services are required;

(vi) enterprises conducting business in a township or rural area in the municipal area or the province where the goods or services are required;

(b) economic or financial projections regarding the capacity of the tenderer to deliver on the required goods or services;

(c) a quantity surveyor's projection as to the time that it is likely to take to complete an infrastructure project;

(d) the anticipated lead-time to deliver the required goods or services.

(4) If an organ of state awards a contract to a tenderer that did not score the highest points, in terms of section 2(1)(f) of the Act, read with this regulation, that organ of state must, within 30 days of the award, report to the National Treasury the following information:

(a) The reasons for not awarding to the tenderer that scored the highest number of points;

(b) objective criteria, envisaged in section 2(1)(f) of the Act, used;

(c) the price of the tenderer awarded the contract and the price of the tenderer that scored the highest points;

(d) the duration of the contract; and

(e) type of goods or services procured.

Criteria for breaking deadlock in scoring

8.(1) If two or more tenderers score an equal total number of points, the contract must be awarded to the tenderer that scored the highest points for B-BBEE.

(2) If functionality is part of the evaluation process and two or more tenderers score equal total points and equal preference points for B-BBEE, the contract must be awarded to the tenderer that scored the highest points for functionality.

(3) If two or more tenderers score equal total points in all respects, the award must be decided by-

(a) In the case of two equal tenders, the tossing of a coin; or

(b) In the case of more than two equal tenders, the drawing of lots.

Local production and content

9.(1) An organ of state must, in the case of a designated sector, advertise the invitation to tender with a specific condition that only locally produced goods or locally manufactured goods, meeting the stipulated minimum threshold for local production and content, will be considered.

(2) When a determination is made in accordance with the definition of "designated sector" in regulation 1, the National Treasury must issue a circular, in terms of regulation 14, to inform organs of state of the determination.

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(3) An invitation to tender referred to in sub-regulation (1) may follow a two-stage process whereby the first stage involves functionality and minimum threshold for local production and content and the second stage involves price and B-BBEE.

Pre-qualification criteria for preferential procurement

10.(1) If an organ of state intends to apply pre-qualifying criteria in the evaluation of a tender, the criteria stated in the tender documents may include, but are not limited to-

(a) the tenderer having a stipulated minimum B-BBEE status level of contributor;

(b) the tenderer to sub-contract at a minimum of 30% of the value of the contract to one or more-

(I) EMEs or QSEs owned by black people who are female;

(II) EMEs or QSEs owned by black people from the ages 14 to 35;

(III) EMEs or QSEs owned by black people;

(VI) EMEs or QSEs owned by black people with disabilities.

(2) A tender that fails to obtain any pre-qualifying criteria stipulated in the tender documents is not an acceptable tender.

(3) If the tenderer is part of a joint venture, consortium or sub-contracting arrangement, such tenderer may not submit a separate tender for the same invitation to tender for which they are bidding as part of the joint venture, consortium or sub-contracting arrangement.

Disposal, sale and letting of property or assets

11.(1) Regulations 5 and 6 do not apply to the disposal, sale and letting of movable and immovable property.

(2) If an organ of state seeks to empower a designated group, the rate per square metre for the lease of immovable property must be fixed at such percentage of the market value, as the National Treasury determines.

(3)(a) The following formula must be used to calculate the points for price in respect of letting of property with a Rand value of up to a R100 million:

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

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 highest acceptable tender or offer.

(b) The following formula must be used to calculate the points for price in respect of letting of property with a Rand value or transaction value above R100 million:

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

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 highest acceptable tender or offer.

Cancellation of tender

12.(1) An organ of state may, before the award of a tender, cancel a tender invitation if-

(a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation; or
(b) funds are no longer available to cover the total envisaged expenditure; or
(c) no acceptable tenders are received.

(2) The decision to cancel a tender invitation in terms of sub-regulation (1) must be published in the same manner in which the original tender invitation was advertised.

(3) An organ of state may only with the prior approval of the treasury cancel a tender invitation for the second time.

Sub-contracting

13.(1) For contracts above R30 million, the tenderer must sub-contract a minimum of 30% of the value of the contract to-

(a) one or more of the categories referred to in regulation 10(1)(b);
(b) one or more EMEs or QSEs; or
(c) one or more small businesses, as defined in the National Small Business Act, 1996 (Act No. 102 of 1996).

(2) If a successful tenderer subcontracts to another person without disclosing it in its tender documents, the organ of state must penalise the tenderer 10% of the value of the contract, unless the tenderer submit a satisfactory reason for failing to make the disclosure.

Remedies

14.(1) When detecting that a tenderer has submitted false information regarding its B-BBEE status level of contributor or any other matter required in terms of these Regulations which will affect or has affected the evaluation of a tender, the organ of state must-

(a) inform the tenderer accordingly; and
(b) give the tenderer an opportunity to make submissions as to why-

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(i) the tender submitted should not be disqualified or, if the tender has already been awarded to the tenderer, the contract should not be terminated in whole or in part; and

(ii) the tenderer should not be restricted by the treasury from conducting any business for a period not exceeding 10 years with any organ of state;

(c) concludes, after considering submissions, that such false information was submitted by the tenderer-

(i) disqualify the tenderer or terminate the contract in whole or in part; and

(ii) if applicable, claim damages from the tenderer.

(2)(a) An organ of state must inform the treasury, in writing of any actions taken in terms of sub-regulation (1) and submissions of the tenderer as to whether the tenderer should be restricted to conduct business with any organ of state.

(b) The treasury may request further information from an organ of state pertaining to sub-regulation (1) to be submitted within a specified period.

(3) The treasury must, after considering the submissions of the tenderer and any other relevant information, decide whether to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years.

Circulars and guidelines

15. The National Treasury may issue-

(a) a circular to inform organs of state of any matter pertaining to these Regulations; or

(b) a guideline to assist organs of state with the implementation of any provision of these Regulations.

Repeal of Regulations

16. The Preferential Procurement Regulations, 2011, as published in Government Gazette No R. 502 of 08 June 2011, are hereby repealed with effect from the date referred to in regulation 17.

Short title and commencement

17. These Regulations are called the Preferential Procurement Regulations, 2016 and take effect on .....

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Full Submission on Preferential Procurement Regulations – 15 July 2016

IRR Full Submission on Preferential Procurement Regulations 15 July 2016.

South African Institute of Race Relations NPC
Submission to the Office of the Chief Procurement Officer,
National Treasury,
regarding the draft
Preferential Procurement Regulations, 2016
Johannesburg, 15th July 2016

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Introduction

The Office of the Chief Procurement Officer of the National Treasury (the Treasury) has invited public comment on the draft Preferential Procurement Regulations of 2016 (the regulations). These regulations were published in the Government Gazette on 14th June 2016, under the powers conferred on the Treasury by the Preferential Procurement Policy Framework Act of 2000 (the Act).

Public comment is due not later than 15th July 2016. However, this period is too short to meet the constitutional requirement for proper public consultation.

This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

In gazetting the regulations, the Treasury has failed to comply with the Guidelines for the government's new Socio-Economic Impact Assessment System (SEIAS), as adopted by the Department of Planning, Monitoring and Evaluation in May 2015 (the Guidelines). According to these Guidelines, socio-economic impact assessments are needed not only for primary legislation but also for 'significant regulations' of the kind in issue here. Hence, both initial and final impact assessments should have been attached to the regulations, as gazetted for public comment. Unless and until this has been done, the regulations cannot be adopted by the minister.

The urgent need to increase opportunities for the disadvantaged
Some 22 years after the political transition in 1994, it remains vitally important to increase opportunities for the poor and unemployed: the truly disadvantaged in the country. This cannot be done without overcoming key barriers to upward mobility, which include:

- a meagre economic growth rate, now less than 1% of gross domestic product (GDP) a year instead of the 6% or more required;
- one of the worst public education systems in the world, despite the massive tax revenues allocated to it;
- stubbornly high unemployment rates on a broad definition (35% among South Africans in general and 67% among young people), made worse by labour laws that encourage violent strikes, deter job creation, and price the unskilled out of work;
- pervasive family breakdown, as a result of which some 70% of black children grow up without the support and guidance of both parents;
- electricity shortages and costs, compounded by general government inefficiency in the management and maintenance of vital economic and social infrastructure;
- a limited and struggling small business sector, unable to thrive in an environment of low growth, poor skills, and suffocating red tape; and
- a mistaken reliance on affirmative action measures, which (like similar policies all around the world) generally benefit a relative elite while bypassing the poor.

Constantly ratcheting up black economic empowerment (BEE) and other "transformation" policies, as the African National Congress (ANC) has been doing in recent years, will not help to overcome these problems. On the contrary, any further erosion of property rights and business autonomy will raise these barriers still higher. So too will any further exclusion of scarce skills and established business experience from the already floundering economy.

Ever more onerous and damaging BEE requirements
In 1994, shortly before it came to power, the ANC put forward a compelling case for affirmative action in employment, business, and land ownership. It did so, however, by holding out a beguiling vision of these policies, which in practice has proved flawed and false. Not surprisingly, the gains that were promised have thus not materialised. Instead, it is the ANC's own warnings about the potential damage from affirmative action that have proved prophetic.

In arguing for black economic empowerment (BEE) policies in this document, the ANC said that BEE was needed to help remove "all the obstacles to the development of black entrepreneurial capacity" and "unleash the full potential of all South Africans to contribute to wealth creation". In practice, however, BEE policies are very far from achieving these goals.

Instead, black entrepreneurship is being crippled (in the words of political analyst Moeletsi Mbeki) by BEE rules. These have "generated an entitlement culture", in terms of which "black people...think they should acquire assets free and that somebody else is there to make them rich, rather than that they should build enterprises from the ground". In addition, far from contributing to wealth creation, BEE's major economic costs and ever shifting rules have also eroded business confidence, deterred investment, and helped reduce the economic growth rate to less than 1% of GDP a year.

At the same time, BEE benefits have gone mainly to a relatively small black elite, many of whom have used their political connections to garner great wealth through ownership deals and preferential procurement. Though BEE has thus helped to expand the black middle class, it has also fostered a toxic mix of inefficiency, waste, and corruption that frequently causes great harm to the 17 million poor black South Africans heavily dependent on the state for schools, hospitals, houses, water, sanitation, and other services. At the same time, these South Africans have little prospect of ever themselves benefiting from BEE ownership deals, management posts, procurement contracts, or new small businesses to run.

BEE requirements are nevertheless being constantly ratcheted up: mostly by the Department of Trade and Industry (DTI) but now also, via these regulations, by the Treasury. When the generic codes of good practice were gazetted in 2007 and made operative in 2008, business understood that BEE was to have a limited lifespan and would remain in place only until 2017. Yet, a mere five years after these codes took effect – and despite the fact that average compliance levels stood at around 70% in 2013 – sweeping changes were introduced via the revised generic codes brought into operation in May 2015.

Further major changes were effected under the BEE Amendment Act of 2013, which came into operation in October 2014 and now threatens firms with massive fines and prison terms for "indirectly" (that is, unintentionally) "undermining" BEE objectives. The BEE Amendment Act also includes a trumping provision which came into effect in October 2015. Under this provision, the BEE requirements set out in the Act and the revised generic codes are being given precedence over all other BEE rules, including those in the mining charter and other sector codes.

These are already very major policy shifts, which have fundamentally changed the BEE goalposts and greatly undermined business confidence. These shifts are now to be compounded by the regulations, which will enormously increase the scope for costly and often inefficient preferential procurement. This will damage the economy and make it still more difficult for businesses of any size or colour to thrive.

The often negative impact of existing preferential procurement rules

BEE preferential procurement in state tenders has often made for enormous wastefulness. Finance minister Pravin Gordhan lamented this in 2010, when he said that the government was paying more for everything, from pencils to building

materials, than a private business would: "R40 million for a school that should have cost R15m, R26 for a loaf of bread that should have cost R7."

In 2012 Gwede Mantashe, secretary general of the ANC, voiced a similar concern, saying that BEE companies must "stop using the state as their cash cow by providing poor quality goods at inflated prices". He also criticised officials for "prioritising the enrichment of BEE companies through public contracts at the expense of...quality services at affordable prices".

Later the same year, Mr Mantashe warned that the state would be ill advised to continue putting preferential procurement before service delivery. Said the ANC secretary general: "This thing of having a bottle of water that you can get for R7 procured by the government for R27 because you want to create a middle-class person who must have a business is not on. It must stop."

The examples cited by both Mr Gordhan and Mr Mantashe involve contract prices roughly four times greater than market ones. Yet these examples arose under the current preferential procurement rules, under which BEE weightings are supposed to be very much smaller.

Under the Preferential Procurement Policy Framework Act of 2000 (the Act), a 90:10 formula applies to tenders worth more than a specified threshold (currently R1m). According to this formula, 90 points are allocated on price and 10 points for the BEE status of the tendering firm. This means that BEE firms can charge 10% more than others and still be awarded a contract. Under the current rules, a 80:20 formula applies to contracts below the specified threshold, so allowing BEE firms to charge 20% more and still win the tender. These authorised BEE weightings, of 10% or 20%, have often failed to prevent the much higher price escalations cited by Mr Gordhan and by Mr Mantashe.

One of the factors making for BEE price escalation was explained in 2012 by an unnamed BEE contractor who told The Star that BEE businessmen seeking state contracts have little choice but to charge inflated prices to "recoup the costs of paying mandatory kickbacks" to corrupt officials and "regularly donating huge sums" to the ANC and its allies.

Said the businessman: "You pay to be introduced to the political principals, you pay to get a tender, you pay to be paid [for completed work], and you must also 'grease the machinery'. From time to time, you are called to make donations to the ANC. There are also donations to the youth league, the women's league, and the SACP." Those who failed to make the necessary payments either in cash or "in kind" – by giving sub-contracts to the relatives of public servants and politicians – would find themselves excluded from state contracts worth many millions of rands, he said.

Though few other businessmen have admitted to making payments of this kind, the comment is consistent with what both Mr Gordhan and Mr Mantashe have said. It also seems to provide insight into a wider pattern of corruption estimated to cost the state some R30bn a year.

Once the threshold for the 80:20 formula is raised to R100m under the regulations (see below), the scope for price escalation will greatly expand. This may bring additional benefits to a relatively small group of BEE businessmen, but it will also impose great costs on poor South Africans dependent on the government for vital

goods and services. For the more the government spends on preferential tenders, the less revenue it will have left over to spend on service delivery elsewhere.

The content of the regulations

As already noted, the Act authorises a 10% BEE weighting for contracts above a certain threshold, and a 20% BEE weighting for contracts below that threshold. The regulations go far beyond this. They not only increase the threshold a hundred-fold (by some 9 900%), but also introduce mandatory local content requirements, oblige tenderers to sub-contract between 30% and 100% of contracts to small black firms, and allow relevant organs of state to impose "pre-qualification" criteria that could exclude the country's most experienced companies from tendering for government contracts at all.

Ambit of the regulations

The organs of state covered by the Act – and hence also by the regulations – include all national and provincial departments, all municipalities, Parliament, and the nine provincial legislatures. Also included are all "constitutional institutions" identified in the Public Finance Management Act of 1999. These range from the Commission for Gender Equality and the Human Rights Commission to the Independent Electoral Commission, the Municipal Demarcation Board, and the Public Protector. This is a comprehensive list.

However, the Act (and the regulations) also apply to any other institution which falls within the definition of "organ of state" in Section 239 of the Constitution, and is also "recognised by the minister of finance as an institution to which the Act applies". [Section 1, Act]. Section 239 of the Constitution defines an organ of state as including any institution which "exercises a public power or performs a public function in terms of any legislation". This definition is wide enough to cover Eskom, Transnet, Postnet, and various other state-owned enterprises performing public functions. The finance minister must first recognise them as covered by the Act, but such recognition could of course be provided to a range of such entities.

The "goods" to which the regulations apply are expressly defined as including 'infrastructure". This in turn is defined as including both immovable assets "acquired through construction operations", and "moveable assets which cannot function independently from purpose built immovable assets". The "services" to which the regulations apply are similarly defined as "including any services to build or maintain infrastructure". [Clause 1, Regulations]

The goal of the regulations is clearly to give BEE firms much of the benefit of the government's proposed roll-out of infrastructure projects worth R1 trillion or more. However, these set asides are likely to be costly. They could also often see large contracts awarded to firms with less experience and know-how than others. This could undermine quality and make for delays in delivery. It could also contribute to wastefulness in the use of scarce revenues and make it harder still to attract investment, expand the economy, and generate jobs for the 8.9 million now unemployed.

An almost [redacted]ncrease in a key threshold

As earlier described, the Act authorises a 10% BEE weighting for contracts above a certain threshold and a 20% BEE weighting for contracts below that threshold. That threshold was initially set at R500 000, which limited the contracts to which the 20%

preference would apply. That threshold was doubled to R1m in 2011, which was itself a major change.

According to the regulations, the threshold is now to be increased by 9 900%, so as to raise it from R1m to R100m. This means that a 20% BEE preference will apply to all the procurement contracts entered into by all the organs of state earlier described, provided that these are worth less than R100m. A 10% BEE preference will apply to contracts valued above R100m. [Clause 5, Regulations] This will vastly increase the number of government contracts in which BEE firms will be able to charge 20% more and still be awarded the tenders. Based on previous experience, actual price escalations will often be significantly higher than this.

The change poses a major threat to cost-effective tendering. It also provides still more scope for a relatively small elite to benefit at the expense of the poor. Inevitably, the regulations will result in more public revenue flowing to this small group, while less public money will be left available to meet the needs of the truly disadvantaged.

This enormous increase in the threshold below which the 80/20 formula will apply is a very substantive policy change. It thus needs to be debated and approved by Parliament, not introduced via regulation.

Local content requirements

According to the regulations, minimum local production and content requirements will apply wherever the Treasury has "designated" a sector for interventions of this kind. [Clause 9, regulations] In such sectors, any invitation to tender must be made subject to "a specific condition that only locally produced [or] manufactured goods, meeting the stipulated minimum threshold for local production and content, will be considered". [Clause 9, regulations]

The DTI has already designated various sectors as ones in which local procurement is obligatory. These include buses, rail rolling stock, steel power pylons, electrical and telecommunications cables, and components for solar water heaters, along with canned vegetables, clothing, and footwear. Often the minimum local content required in these spheres varies from 70% to 90%, and sometimes it goes as high as 100%. [DTI sectors and minimum thresholds for local content, 7 December 2011]

According to the DTI, the aim of these requirements is to boost the manufacturing sector and counter the de-industrialisation of South Africa. However, the department has yet to acknowledge how much the government itself has undermined the competitiveness of domestic manufacturing through its coercive labour laws and unrealistic BEE requirements, along with its failures to improve education, curb crime, or expand essential infrastructure quickly enough. The DTI's "solution" has simply added to the bureaucratic burden of doing business in the country. It is also likely to increase procurement costs where imported goods are cheaper or better than locally made ones.

The Treasury will not necessarily follow the DTI's lead in deciding what sectors should be designated for local content requirements. The Treasury must, however, make its decisions "after consulting" the DTI and bearing in mind the country's "national development and industrial policies", along with "competition and other economic factors". The sectors designated by the Treasury could thus differ from

those already identified by the DTI, which would extend the scope of local content obligations and add to the complexity of doing business in South Africa.

Moreover, the most pressing need is for the government to identify and overcome the policy and other problems undermining the manufacturing sector. The regulations instead seek to give an artificial and costly boost to the manufacturing sector by insisting on a percentage of local procurement within all Treasury-designated spheres. Again, this is likely to benefit a relatively small number of firms, while driving up procurement costs and leaving less revenue available for service delivery to the poor.

In addition, as Tebogo Makube, chief director for industrial procurement at the DTI, has pointed out, international trade law developed under the auspices of the World Trade Organisation (WTO) precludes the government from forcing local procurement on the private sector. This is why a 2011 local procurement accord had to be negotiated between the government and its social partners at the National Economic Development and Labour Council (Nedlac). [Legalbrief 26 June 2016] The regulations overlook this prohibition in insisting that companies wanting to do business with the state in designated sectors must meet specified local content quotas.

No obligation to consider "functionality"

The regulations define "functionality" as meaning "the ability of a tenderer to provide goods or services in accordance with specifications set out in the tender documents". [Clause 1, Regulations] A tenderer which cannot comply with such basic requirements should not, of course, be considered for any state contract at all. Worryingly, however, the regulations do not require that tenderers be evaluated for functionality. Instead, they make it clear that organs of state may choose whether to embark on such an evaluation or not.

According to the regulations, "if" an organ of state decides to evaluate a tender on functionality, then it must do so on the basis of "objective" evaluation criteria that are clearly specified in the invitation to bid. [Clause 4, Regulations] However, as this conditional wording makes clear, there is no obligation on any organ of state to include an evaluation of functionality in any tender, no matter how big the price or how important the project may be.

Under the regulations, organs of state also have a choice as what "minimum score for functionality" they decide to set. This should not be set "so low that it jeopardises the quality of the required goods or services", but it must also not be "so high that it is unreasonably restrictive". These criteria are vague enough to give organs of state enormous discretion in how they apply them. This, of course, increases the scope for bureaucratic abuse and even for corruption.

So long as functionality remains an optional criterion, performance on BEE tenders is likely to be poor. Shoddy performance has also been identified as a major problem in many instances in the past. In 2007, for example, the premier of Mpumalanga, Thabang Makwetla, warned that many of the black-owned companies benefiting from state contracts were "letting the government down" through bad workmanship, cutting corners, or walking off contracts before they were finished.

Shoddy performance has been particularly evident in state contracts for the building of "RDP" (Reconstruction and Development) or "BNG" (Breaking New Ground) houses. In 2011 the National Home Builders Registration Council (a body responsible for ensuring compliance with building standards in the construction of new homes) thus warned that no less than 87% of the houses built by the state since 1994 were "high risk". By then, moreover, the bill for fixing these houses – some of which would have to be knocked down and rebuilt from scratch – was estimated at some R59bn.

This was an enormous sum, amounting to more than twice the budget for housing development that year and to 7% of the government's entire infrastructure budget for the next three years. Not all these badly built houses had been constructed by black contractors, of course. However, as the then minister of human settlements, Tokyo Sexwale, commented in 2012, many had indeed been built by BEE "chance-takers [who] thought their blackness would help them get into the money very quickly".

Against this background, no state contract should be awarded unless the tenderer is first able to demonstrate a proper level of "functionality". That this is seen as an optional extra under the regulations is extraordinary. It is also contrary to the Constitution, as further described below.

Tie-breaker provisions

According to the regulations, "if two or more tenderers score an equal number of points", the contract must generally be awarded to "the tenderer that scores the highest points for BEE". It is only "if functionality is part of the evaluation process" that the contract must go to the tenderer that "scores the highest points for functionality". [Clause 8, Regulations]

This wording will give organs of state which prefer to put BEE above other considerations yet more reason to exclude functionality as a factor in the evaluation of tenders. Yet functionality – which, as earlier noted, means the tenderer's "ability to provide" the specified goods and services – is vital in public procurement. The more it is left out of consideration, the greater the harm that is likely to result, especially to the poor and disadvantaged who depend on state delivery.

Sub-contracts for BEE firms

According to the regulations, a significant level of sub-contracting for the benefit of small black firms – those with annual turnover below R50m – may be required in three sets of circumstances.

Sub-contracting where objective criteria are specified

Under Section 2(1)(f) of the Act, a contract "must be awarded to a tenderer who scores the highest points, [on price and BEE status] unless objective criteria [in addition to those aimed at benefiting historically disadvantaged South Africans or implementing the RDP] justify the award to another tenderer". [Section 2(1)(f), Act] The Act does not define what "objective criteria" it has in mind. The regulations seek to fill this gap by giving various meanings to "objective criteria", which may be very different from what the drafters of the Act intended.

According to the regulations, objective criteria may include a sub-contracting requirement, under which a tenderer must sub-contract a minimum of 30% of the value of the contract to one or more EMEs or QSEs [which are] owned by black people", or by black people who are also female, young (aged 14 to 35) or disabled.

EMEs are defined (as in the revised BEE generic codes of good practice of October 2013) as "exempted micro enterprises" with annual turnover of less than R10m. QSEs are defined, again as in these generic codes, as "qualifying small enterprises" with an annual turnover of between R10m and R50m. [BEE Codes of Good Practice, gazetted 11th October 2013] The regulations add that the required sub-contracts may also be awarded to local co-operatives, or to "enterprises conducting business in a township or rural area...where the goods or services are required". [Clause 7, Regulations]

These provisions greatly increase the scope for uncompetitive tender awards especially as the 30% sub-contracting requirement is a "minimum" which may in practice be significantly exceeded. A tender could thus stipulate, for example, that 90% of the value of the contract must be sub-contracted to small black businesses, which might in fact have a limited capacity to produce the required goods and services at cost-effective prices. In addition, where such a sub-contracting requirement is included, a tenderer will be able to win the contract even if it does not score the highest number of points on price and BEE status. This will further encourage wastefulness and undermine efficiency in state procurement.

According to the regulations, if an organ of state awards a tender on this additionally preferential basis, it must report this to the Treasury within 30 days. In so reporting, the organ of state must state, among other things, the difference between "the price of the tenderer awarded the contract and the price of the tenderer that scored the highest points". [Clause 7(4), Regulations] However, the Treasury's consent for the higher-priced tender is not required. Nor do the regulations empower the Treasury to set aside an uncompetitive tender, no matter how large its price inflation may be.

Sub-contracting according to pre-qualification criteria

According to the regulations, an organ of state may also "apply pre-qualifying criteria in the evaluation of a tender". These criteria must be stated in the tender documents and may include a requirement that the tenderer must sub-contract "a minimum of the value of the contract to one or more EMEs or QSEs [which are] owned by black people", or by black people who are female, young (aged 14 to 35), or disabled. [Clause 10, Regulations]

A tender which "fails to obtain any pre-qualifying criteria" (sic) – presumably, one that does not comply with the stipulated criteria – "is not an acceptable tender" and may not be considered at all. [Clause 10(2), Regulations]

Again, these rules will greatly increase the scope for sub-contracting in state tenders – and could often see between 30% and 100% of a given contract being passed on to small black firms with limited capacity to supply the requisite goods and services in a cost-effective way.

Mandatory sub-contracting for all contracts above R30m

The regulations also make sub-contracts for BEE firms mandatory in all "contracts above R30m". In all such instances, the tenderer "must sub-contract a minimum of 30% of the value of the contract" to EMEs or QSEs which (again) are either "owned by black people", or by black people who are female, young (aged 14 to 35), or disabled. [Clause 13, Regulations]

Since very many state contracts are worth more than R30m, this will greatly increase the scope for sub-contracting to small black firms with limited capacity. Again,

moreover, the 30% sub-contracting requirement is a minimum proportion, which could be greatly exceeded in practice. This could severely undermine the quality of delivery – especially on major infrastructure projects – but also in a host of other spheres.

'Objective criteria' defined in other ways as well
The regulations also define "objective criteria" in other ways. This is particularly important because, where objective criteria apply, tenders may be awarded to firms that have failed to score the highest points on price and BEE status.

According to the regulations, objective criteria may include "economic and financial projections regarding the capacity of the tenderer to deliver on the required goods and services". What this clause means – and how it would be applied in practice – is entirely unclear.

Under the regulations, objective criteria may also include:

- "a quantity surveyor's projection as to the time it is likely to take to complete an infrastructure project"; and
- "the anticipated lead-time to deliver the required goods or services".

These criteria are easier to understand, but their salience is questionable. Why should a contract – say, for the construction of a new dug-out port in Durban – be awarded to a tenderer who has failed to muster the highest points (on price and BEE status) simply because "the anticipated lead-time to deliver the required goods and services" has been inserted into the invitation to bid as an "objective criterion"?

Other pre-qualification criteria
As earlier noted, the regulations allow an organ of state to stipulate a minimum 30% sub-contracting requirement as a "pre-qualification criterion" which must be met if a tender is to be considered at all. The regulations also make it clear that various other pre-qualification criteria may be stipulated as well.

Stipulated BEE status
According to the regulations, pre-qualification criteria may include "a stipulated B-BBEE status level as a contributor". [Clause 10(1)(a), Regulations] An organ of state will thus be allowed to specify that it will contract solely with firms having a "level of BEE recognition" standing at "level 1" (which requires more than 100 points on the BEE scorecard), or "level 2" (which requires 95 to 100 points).

If such onerous requirements are imposed as pre-qualification criteria, this would exclude many of the country's largest and most experienced firms – including almost all of the top 100 companies listed on the JSE – from bidding for state contracts at all. [2016 South Africa Survey, IRR, Johannesburg, 2016, pp350-353]

A possible 51% BEE ownership requirement
The regulations make it clear that the two examples provided are not exclusive. Hence, various other pre-qualification criteria could also be laid down. Organs of state could thus stipulate, for instance, that they will contract only with firms that have 51% BEE ownership. (This is also not an idle possibility, for Eskom already insists on 51% black ownership for its coal suppliers, even though the mining charter lays down a 26% BEE ownership requirement.)

If 51% BEE ownership is indeed identified by an organ of state as a "pre-qualification" criterion, then a tender from a firm with BEE ownership at a level less than this would not qualify for consideration at all, irrespective of how cost-effective that tender might be. That the firm in question had met the 25% BEE ownership requirement laid down in the generic codes (or the varying ownership targets laid down in other sector codes) would also be irrelevant.

These provisions are similar to rules earlier proposed in the draft BEE regulations that were gazetted in January 2016 by the minister of trade and industry, Rob Davies, under the Broad-Based Black Economic Empowerment Act of 2003, as amended in 2013. Under that initial draft, organs of state wanting to stipulate additional pre-qualification BEE criteria in procurement (and other spheres) would have had to apply to Dr Davies, motivate for the increase, and obtain his consent. [Clause 19(1), Draft Broad-Based Black Economic Empowerment Regulations, Government Gazette on 17th February 2016] All organs of state would also have been obliged to "give more consideration" in procurement (and also in licensing and other decisions) to firms with 51% BEE ownership. [Clause 20(1)(a), DTI Regulations]

These clauses have been deleted from the DTI's regulations, as gazetted by Dr Davies in their final form in June 2016. However, the Treasury's regulations now suggest that similar ownership demands are being introduced in a roundabout way and without any explicit mention of a 51% BEE ownership requirement.

If the regulations are adopted in their current form, many organs of state will be able to impose a 51% BEE ownership criterion in all their procurement decisions (and without any reuirement to obtain ministerial consent). Yet the more organs of state start insisting on 51% BEE ownership in procurement, the greater the accompanying costs and overall damage to the economy will be.

Unconstitutionality of the regulations

Section 217 of the Constitution states that, "when an organ of state...contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective". As an exception to this general rule, the Constitution allows an organ of state to implement a procurement policy that provides for "categories of preference in the award of contracts", and for "the protection or advancement of persons...disadvantaged by unfair discrimination". [Section 217 (1) and (2), Constitution]

However, any measure aimed at "protecting" or "advancing" the unfairly disadvantaged must be rationally and reasonably connected to that objective. Whether the Act itself meets these tests is uncertain, for it is simply a framework law which provides little of the detail needed for such an assessment. At the same time, the Act's vague terms undermine its constitutionality on other grounds. This is because the Constitution identifies the 'supremacy of the rule of law' as one of its founding values – and the rule of law requires that legislation be certain and clear.

The Act also opens the way for law-making by the executive, so contradicting another core principle underpinning the Constitution: the separation of powers. Executive law-making inconsistent with the Constitution is particularly evident in the regulations, which (among other things):

- raise the threshold at which the 90:10 formula kicks in by 10 000%, from R1m to R100m;
- introduce mandatory local content requirements in all sectors designated by the Treasury;
- demand that between 30% and 100% of all contracts above R30m be sub-contracted to small black-owned firms;
- introduce similar sub-contracting requirements in a host of other spheres, and
- allow very many organs of state to set pre-qualification criteria – including a possible 51% BEE ownership requirement – in all the tenders they issue.

The regulations thus aim to bring about radical changes in the state's preferential procurement system. At present, all that the Act allows is a 10% or 20% price advantage – for contracts worth more or less than R1m – for the historically disadvantaged. Major changes of the kind envisaged in the regulations cannot be made by ministerial fiat without infringing on the separation of powers. The Constitution vests the capacity to make new law in parliament, not the executive. Hence, if the state's preferential procurement rules are to be changed so comprehensively, this must be done via statute, not subordinate regulation.

However, even if Parliament were to adopt new legislation incorporating all the changes proposed in the regulations, the problem of unconstitutionality would still remain. As noted, the Constitution lays down a general requirement that state procurement must be "fair, equitable, transparent, competitive, and cost-effective". [Section 217, Constitution] It also demands the "efficient, economic, and effective use of [public] resources". [Section 195, Constitution] These are binding requirements, which the proposals in the regulations comprehensively contradict.

The Constitution does allow some derogation from its general procurement rules where that derogation will "protect" or "advance" the disadvantaged. But the derogation in issue must be rationally and reasonably connected to that objective. The proposed rules do not meet this test. They will allow a relatively small number of black businesses to gain state tenders at inflated prices and irrespective of how inefficient they might be. However, in allowing this, the new rules will greatly prejudice the great majority of disadvantaged South Africans, who depend on the state for vital goods and services. Such goods and services should always be provided in the most cost-effective and efficient way, so as to husband scarce public resources and ensure that these are spread as broadly as possible. The proposed new system is so damaging to the truly disadvantaged that it cannot be accepted as a rational or reasonable way of overcoming apartheid injustices.

No socio-economic impact assessment conducted

Since 1st September 2015 (as President Jacob Zuma told the World Economic Forum in Davos in January 2016) all legislation and regulation must be subjected to a "socio-economic impact assessment" before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy" are fully understood before new rules are introduced. [SEIAS Guidelines, p3, May 2015]

According to the May 2015 Guidelines (the Guidelines), SEIAS is also intended to ensure that "government policies do more to support [four] core national priorities",

which are "social cohesion, economic inclusion, economic growth, and environmental sustainability". [Guidelines, p6] Add the Guidelines: "A common risk is that policy/law makers focus on achieving one priority without assessing the impact on other national ones." Moreover, as the document goes on to stress: "A balance has to be struck between protecting the vulnerable and supporting a growing economy that will ultimately provide them with more opportunities." [Guidelines, p6]

The Guidelines deal specifically with proposed new rules that aim to 'achieve a more equitable and inclusive society", but which "inevitably impose some burdens on those who benefited from the pre-existing laws and structures". The document notes that "relatively small sacrifices on the part [of past beneficiaries] can lead to a significant improvement in the conditions of the majority". However, "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". [Guidelines, p11] It is, of course, precisely such major economic risks that the regulations raise.

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new regulations (or other rules) have been proposed, "an initial assessment" must be conducted to identify different "options for addressing the problem" and making "a rough evaluation" of their respective costs and benefits. Thereafter, "appropriate consultation" is needed, along with "a continual review of the impact assessment as the proposals evolve". [Guidelines, p7]

A "final impact assessment" must then be developed that "provides a detailed evaluation of the likely effects of the [regulation] in terms of implementation and compliance costs as well as the anticipated outcome". When the regulation is published "for public comment and consultation with stakeholders", the final assessment must be attached to it. Both the draft regulation and the final assessment must then be revised as required, based on the comments obtained from the public and other stakeholders. Thereafter, when the draft regulation is submitted for approval (in this case to the minister of finance), the final assessment, as thus amended, must be attached to it. [Guidelines, p7]

The Guidelines stress that SEIAS must be applied not only to legislation, but also to "significant regulations" and any "major amendments of existing regulations...that have country coverage with high impacts". In addition, where "legislation provides an enabling framework for more detailed regulations", as does the Act, then "the subordinate regulations should be the main subject of the assessment process". [Guidelines, p8]

However, no SEIAS assessment of the regulations has been made available, as the Guidelines require. The regulations thus cannot be approved by the minister until this step has been taken.

Socio-economic ramifications of the regulations

The regulations will have many damaging socio-economic ramifications. They will further encourage inflated pricing in virtually all state procurement. They will introduce mandatory local content requirements, which will push up costs still more whenever imported products are cheaper and better. They will require or promote the sub-contracting of between 30% and 100% of state contracts to black firms with limited experience and capacity. They could also push many of the most

experienced companies right out of state procurement – especially if pre-qualification criteria are used to require 51% BEE ownership or high levels of BEE compliance which the new generic (and sector) codes make difficult to attain.

Any insistence on 51% BEE ownership as a pre-qualification criterion will be particularly damaging, as the costs of compliance will be high and the damage to investor confidence enormous. The mere possibility of this is particularly worrying at a time when foreign direct investment (FDI) into South Africa has dropped to its lowest level in ten years ($1.8bn), according to the United Nations Conference on Trade and Development's World Investment Report for 2016. [News24 13 July 2016] If FDI diminishes still further, then economic growth – which is already unlikely to exceed 0.1% of GDP in 2016, according to the International Monetary Fund – could well turn negative, pushing South Africa into a damaging recession.

Tax revenues would then diminish, while the cost of government spending on procurement would increase under the impact of the regulations. Public debt, which has already increased very rapidly, from R805bn in 2009 to around R2 trillion now, would then rise even faster. In such circumstances, downgrades of the country's sovereign debt rating to sub-investment or "junk" status would become increasingly difficult to avoid. Yet any such downgrades would further increase borrowing costs, accelerate capital outflows, and push the economy into an even more damaging downward spiral.

Mr Gordhan is already under great pressure to stave off damaging downgrades of this kind. If this is to be achieved, as international ratings agencies have made clear, the government must hold public spending in check. It must also implement reforms to ramp up economic growth. The regulations put both these key requirements at risk.

Raising the growth rate critically depends on the government's success in boosting business confidence and implementing key reforms. This in turns means that the regulatory shackles weighing on the private sector must be reduced, not made heavier still. Hence, instead of constantly increasing the BEE burden, it is time for the Treasury (and all other government departments) to call a halt.

As earlier noted, when the ruling party urged the introduction of BEE in 1994, it said this was aimed at 'removing all the obstacles to the development of black entrepreneurial capacity and 'unleashing the full potential of all South Africans to contribute to wealth creation'. BEE was never supposed to put a stranglehold on the economy, exclude the most experienced companies from participating in state procurement, or threaten property rights. Nor was it intended to keep ever more South Africans mired in poverty for the benefit of a relatively small and politically connected elite.

In addition, what "black" business most needs for increased success is not the damaging set-asides mooted in the regulations but rather a rapid rate of economic growth (ideally, 7% of GDP a year). This would see the economy doubling in size every ten years. This in turn would generate millions more jobs, and vastly increase domestic consumer demand.

At the same time, the quality of schooling must be greatly improved. Some 80% of public schools are dysfunctional, while roughly half the pupils who start school in Grade 1 drop out without ever reaching Grade 12. Mainly because their schooling

has left them so poorly prepared, only 20% of the black South Africans who manage to enroll at universities are able to graduate in regulation time, while 40% drop out and never graduate at all.

The often dismal public education system, coupled with the country's unemployment crisis, puts black entrepreneurs at a particular disadvantage. As research by the FinMark Trust has shown, the people most likely to succeed in business are those who come from stable two-parent families, have the benefit of solid schooling, obtain university degrees, work for a number of years in existing firms, have a strong entrepreneurial spirit – and branch out on their own when they already significant skills and experience on which to draw. If such entrepreneurs are to build up their businesses, they must also have the benefit of a rapidly expanding economy with low unemployment rates and growing consumer markets.

This is a proven formula for success. In South Africa, however, only 30% of black youngsters grow up in two-parent homes, while the great majority attend dysfunctional public schools which often fail to equip them even with the most basic skills. Not surprisingly, many then battle to find jobs. This is partly because South Africa's growth rate has long been too low. Also relevant, however, are labour laws which raise entry level wages so high as to price the poorly skilled and inexperienced out of the jobs market.

These factors – coupled with a crippling burden of red tape, high crime rates, often poor infrastructure, and limited access to venture capital – combine to put black entrepreneurs at a severe disadvantage. These fundamental obstacles to their success cannot be overcome through a simplistic reliance on preferential state procurement. Moreover, what the regulations propose is particularly damaging as it will clearly inflate prices, erode quality, reduce growth, and decrease jobs – all of which will leave the truly disadvantaged even worse off than before. Such outcomes will also widen inequality and undermine social cohesion.

The regulations contradict at least three of the country's four national priorities, as set out in the SEIAS Guidelines. These are "social cohesion, economic inclusion, and economic growth". (The fourth priority, of environmental sustainability, is likely to be put at risk as well as poorer countries have less capacity to address environmental challenges.) The regulations should thus be abandoned in favour of far more effective ways of promoting inclusive growth, stimulating job creation, and empowering the disadvantaged.

A new system of "economic empowerment for the disadvantaged"
Instead of adopting the regulations (and otherwise ratcheting up BEE requirements), the country needs to embrace a new system of "economic empowerment for the disadvantaged" or "EED".

EED differs from BEE in two key ways. First, it no longer uses race as a proxy for disadvantage. Instead, it cuts to the heart of the matter by focusing directly on disadvantage and using income and other indicators of socio-economic status to identify those most in need of help. This allows racial classification and racial preferences to fall away, instead of becoming permanent features of policy. This in turn will reduce racial awareness and potential racial polarisation, helping South Africa to attain and uphold the principle of 'non-racialism' embedded in the Constitution.

Second, EED focuses not on outputs in the form of numerical quotas, but rather on providing the inputs necessary to empower poor people. Far from overlooking the key barriers to upward mobility, it seeks to overcome these by focusing on all the right "Es". In essence, it aims at rapid economic growth, excellent education, very much more employment, and the promotion of vibrant and successful entrepreneurship.

EED policies aimed at achieving these crucial objectives should be accompanied by a new EED scorecard, to replace the current BEE one. Under this revised scorecard, businesses would earn (voluntary) EED points for:

- any direct investment within the country;
- maintaining and, in particular, expanding jobs;
- contributing to tax revenues;
- helping to generate export earnings;
- appointing staff on a 'wide' definition of merit which takes into account the extent to which people have succeeded in overcoming poor schooling and other disadvantage;
- providing intensified training and mentoring for personnel appointed on this basis;
- entering into employee share ownership programmes with all staff;
- topping up the state-funded vouchers provided to the disadvantaged to enable them to meet their needs for good education, health care, and housing within a competitive and cost-effective environment; and
- entering into public-private partnerships to improve the delivery of essential services, ranging from electricity to clean water and efficient transport logistics.

After decades of damaging BEE policies, it is time to call a halt. South Africa cannot hope to expand opportunities for the disadvantaged unless it raises the annual growth rate to 6% of GDP or more. A shift to EED will help achieve this. By contrast, the regulations (and other stepped up BEE policies) are likely to push the economy into persistent and destructive recession.

In a speech earlier this year, the deputy president, Cyril Ramaphosa, said that the government is "obsessed with empowering black South Africans" and is sometimes "fanatical" about it. If that is so, the ruling party cannot do better than endorse the EED idea. Unlike the regulations (and other BEE policies), EED will be effective in empowering the many and putting the country on the path to inclusive growth and rising prosperity for all.

South African Institute of Race Relations NPC 15th July 2016

AfriBusiness
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23 August 2016

TO: **THE NATIONAL TREASURY**
OFFICE OF THE CHIEF PROCUREMENT OFFICER

ATTENTION: **MR. KENNETH BROWN**
MS. LEANDA KLEINBOOI

DELIVERED: **VIA EMAIL**
ppfainputs@treasury.gov.za

COMMENTS ON PUBLIC PARTICIPATION OF THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2016, AS PROMULGATED IN THE GOVERNMENT GAZETTE NO. 719 ON 14 JUNE 2016

Dear Sir/Madam,

Please be advised that we have been informed by the Institute of Race Relations (IRR) that the above mentioned regulations were promulgated and subject to comments within only 30 days after promulgation and we therefore wish to bring the following matters of concern under your attention for further investigation and proposed amendment or revision of the period set aside for public participation and possible extension, as the case may be. ***Please note that we are aware that we are aware that the time for comments have lapsed, however the content of this document pertains to the period allowed for public comment***:

PREAMBLE: WHO IS AFRIBUSINESS?

AfriBusiness is a non-profit business rights watchdog that was established in 2011 by senior business people. This organisation was established to appeal to the Afrikaans community in the business world to take part in the public debate and to act as spokesperson for the Afrikaans business community.

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AfriSake, is a non-profit company registration number: 2012/043725/08

www.afribusiness.co.za

AfriBusiness
Invest in the future

It is an affiliate of the Solidarity Movement. Our members are business people who increasingly play a role as entrepreneurs, financiers and job creators. Business conditions detrimental to our members therefore do not only affect them, but manifest itself in job losses and economic hardship for a much wider community. To be successful, our members need a steady, fair and predictable environment for business to flourish. They have to be able to price their products and services fairly and make a reasonable return.

By making the submission we aim to contribute to the establishment and maintenance of a favourable environment for business. ***It is our humble submission that the period allowed for public participation in this matter was too short, and we shall continue to explain as to why.***

1) IMPORATANCE OF MEANINGFUL PUBLIC PARTICIPATION:

The Constitution[1] makes express provision not only for representative and direct democracy but also for participatory democracy, particularly with regard to original lawmaking.[2] Section 59(1) and 72(1) of the Constitution place a duty on the National Assembly and the National Council of Provinces respectively to facilitate public involvement in their legislative and other processes, while section 118(1) does the same in respect of provincial legislatures. For ease of reference the above sections are quoted as follows:

59(1): The National Assembly must-

(a) Facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
(b) Conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-

(i) To regulate public access, including access of the media, to the Assembly and its committees; and
(ii) To provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

72(1): The National Council of Provinces must-

(a) Facilitate public involvement in the legislative and other processes of the Council and its committees; and

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1 *Constitution of the Republic of South Africa*, 1996.
2 C. Hoexter: *Administrative Law in South Africa* (2nd Edition, Juta) p.78

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(b) Conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-

(i) To regulate public access, including access of the media, to the Council and its committees; and
(ii) To provide for the searching of any person and, where appropriate, the refusal of entry to, or removal of, any person.

116(1): A provincial legislature must-

(a) Facilitate public involvement in the legislative and other processes of the legislature and its committees; and
(b) Conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-

(i) To regulate public access, including access of the media, to the legislature and its committees; and
(ii) To provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

The above sections are enforceable duties and not mere constitutional flourishes, and same has been demonstrated by the Constitutional Court[3] in the cases *Doctors for Life International v Speaker of the National Assembly*[4] and *Matatiele Municipality v President of the Republic of South Africa*.[5]

Ngcobo J explained for the majority in *Doctors for Life*, that the duty to facilitate public involvement "will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them". The legislature has considerable leeway in deciding how public participation will best be facilitated, **while the question for the court is whether what has been done is reasonable in all circumstances.**[6]

In *Matatiele*, the same majority affirmed the obligation on a provincial legislature to consult with people affected by the redrawing of provincial boundaries. **The court rejected the view that** the Constitution intended to cover merely the participation of elected representatives in the legislative process, as well as the argument that **it was sufficient for the legislature merely to "create space for the public to be involved".** It concluded that the failure of one of the affected provinces to hold public hearings or invite written representations was

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3 *Ibid* p79.
4 2006 (6) SA 416 (CC).
5 2007 (6) SA 477 (CC).
6 C. Hoexter: *Administrative Law in South Africa* (2nd Edition, Juta) p.79

unreasonable and a "plain, clear and unmistakable violation of section 118(1)(a) of the Constitution.[7]

2) HOW IS THIS APPLICABLE TO THE PUBLIC PARTICIPATION OF THE REGULATIONS?

The period allowed for commentary and representations on the Draft Preferential Procurement Regulations was a mere 30-days as promulgated in the Government Gazette. There are two questions which therefore need to be answered with regards to the public participation allowed by the National Treasury:

1. Is the period allowed for public participation reasonable; and
2. Did the National Treasury merely create a space for the public to be involved?

If one has reference to the White Paper on National Health Insurance (NHI) which was promulgated in the Government Gazette[8] on 11 December 2015, the Minister of Health allowed for comments thereon within 3 months from the date of publication thereof. (A copy of the Gazette is annexed hereto as Annexure "A"). On 11 February 2016 however, the Minister of Health revised the period of public participation in the Government Gazette[9] and allowed for further public participation up until 31 May 2016. (A copy of the Gazette is annexed hereto as Annexure "B").

The NHI has far reaching effects on the entire medical profession of South Africa and therefore requires a lot of public participation to raise concerns and make recommendations. The proposed Regulations arguably also fall within the same ambit as it will have far reaching effects on the entirety of business and business transactions taking place within South Africa. With reference to the first question, a period of only 30 days allowing for comments and representations surely could not be considered reasonable, especially considering the far reaching implications of the proposed Regulations. This would suggest that on the last question, the National Treasury merely allowed a 30-day period to create a space for the public to be involved.

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7 *Ibid* p79.
8 Gazette No. 1230.
9 Gazette No. 165.

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A crucial consideration is whether the participation will be meaningful and whether it is likely to have an impact on policy, decision or legislation finally being adopted.[10] Our argument in this regard would be that a further allowance in the period for comments and representations will indeed be both meaningful and will have an impact on the final adaptation of the regulations.

We therefore propose that the National Treasury revise the period allowed for public participation because of the far reaching implications of the Regulations, and to allow for further comments and representations to be made for a period of between 60 and 90 days.

CONCLUSION

We trust that you will consider the abovementioned carefully and will provide our office with your decision and reasons for such in each respective regard as soon as time permits.

Yours truly,

Armand Greyling
Law and Policy Analyst: AfriBusiness

10 C. Hoexter: *Administrative Law in South Africa* (2nd Edition, Juta) p.83

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Directors: SJ Booysen, B du Preez, DJ de Villiers, MB Pretorius, A Bester, N Pretorius
AfriSake is a non profit company, registration number 2012/043725/08

Armand Greyling

From: Leanda Pietersen <Leanda.Pietersen@treasury.gov.za> on behalf of pppfainputs <pppfainputs@treasury.gov.za>
Sent: 12 September 2016 02:28 PM
To: Stefan Pieterse; pppfainputs; Armand Greyling
Cc: Cindy August; Thembekile Plaatje; Schalk Human
Subject: RE: Preferential Procurement Regulations 2016
Attachments: PPPFA Draft Regs National Gazette Extension 2-9-2016.pdf

Good afternoon Stefan

Please be advised that the due date for comment has been extended to 23 September 2016, as per the attached notice in the National Government Gazette.

Kind regards

PPPFA team

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

From: Stefan Pieterse [mailto:stefan@afrisake.co.za]
Sent: Monday, 12 September 2016 7:05 AM
To: pppfainputs; Armand Greyling
Cc: Cindy August; Thembekile Plaatje; Schalk Human
Subject: Preferential Procurement Regulations 2016

Dear Sir/Madam
With reference to your e-mail below, we still have not received your answer.
Our submission is done and ready, but we represent close to 7000 members, some of them which may take some time.
Regards,
Stefan Pieterse
Spokesperson
AfriSake / AfriBusiness
Tel: 012 644 3945
Cell: 076 424 1400
E-pos / E-mail: stefan@afrisake.co.za

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From: Leanda Pietersen [mailto:Leanda.Pietersen@treasury.gov.za] **On Behalf Of** pppfainputs
Sent: 29 August 2016 06:22 PM
To: Armand Greyling <armand@afrisake.co.za>; pppfainputs <pppfainputs@treasury.gov.za>
Cc: Stefan Pieterse <stefan@afrisake.co.za>; Cindy August <Cindy.August@treasury.gov.za>; Thembekile Plaatje <Thembekile.Plaatjie@treasury.gov.za>; Schalk Human <Schalk.Human@treasury.gov.za>
Subject: RE: Preferential Procurement Regulations 2016

Good day

Receipt of your submission is hereby acknowledged.

Please be advised that the office is in the process of considering providing an extension for comments. You will be advised within a week if or when such an extension has been issued.

Kind regards
PPPFA team

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

From: Armand Greyling [mailto:armand@afrisake.co.za]
Sent: 23 August 2016 10:13 AM
To: pppfainputs
Subject: Preferential Procurement Regulations 2016

Good day,

Please find attached a letter of commentary for your attention pertaining to the public participation process relating to the promulgated Preferential Procurement Regulations of 2016. It is our humble submission that the time afforded for public participation in the amount of 30 days was too short, and we wish to draw your attention to our reasoning to that effect as set out in our letter to you. If the time for public participation was to be revised, we would like to have the opportunity, with the rest of interested parties within South Africa, to deliver our commentary on said Regulations.

We trust you will find the above mentioned in order.

Kind Regards

ARMAND GREYLING
Law- and Policy Analyst
AfriBusiness
Tel: (012) 644-3958
Cell: 071 684 5687
E-mail: armand@afrisake.co.za

DEPARTEMENT VAN LANDBOU, BOSBOU EN VISSERYE

KENNISGEWING 515 VAN 2016

WET OF LANDBOUPRODUKSTANDAARDE, 1990 (WET No. 119 VAN 1990)

STANDAARDE EN VEREISTES BETREFFENDE BEHEER OOR DIE UITVOER VAN PERSKES EN NEKTARINE: WYSIGING

Ek, Billy Makhafola, ingevolge artikel 2(1) van die Wet op Landbouprodukstandaarde, 1990 (Wet No. 119 van 1990), as Uitvoerende Beampte aangewys, gee hiermee kragtens artikel 4(3) (c) van die vermelde Wet, kennis dat –

(a) standaarde en vereistes betreffende beheer oor die uitvoer van Perskes en Nektariene soos gestipuleer in Goewermentskennisgewing No. R 1983 van 23 Augustus 1991 en afgekondig in Goewermentkennisgewing No. 1265 van 9 Oktober 1998, wysiging in Goewermentskennisgewing No. 19873 van 1 April 1999, No. 1244 van 22 Oktober 1999, No. 4214 van 10 November 2000, No. 2052 van 21 September 2001, No. 1716 van 13 September 2002, No. 1753 van 27 Junie 2003, No. 2235 van 15 Oktober 2004, No. 1975 van 4 November 2005, No. 1494 van 27 Oktober 2006, No. 1001 van 17 Agustus 2007, No. 1071 van 5 September 2008, No. 1004 van 1 Oktober 2009, No. 833 van 3 September 2010, No. 587 van 2 September 2011, No. 770 van 28 September 2012 en No. 1012 van 11 October 2013 hiermee verder gewysig word; en

(b) die standaarde en vereistes in paragraaf (a) vermeld –

(i) ter insae beskikbaar is by die kantoor van die Uitvoerende Beampte: Landbouprodukstandaarde, Harvest house, Hamiltonstraat 30, Arcadia, Pretoria;

(ii) teen betaling van die voorgeskrewe bedrag vanaf die Uitvoerende Beampte Landbouprodukstandaarde, Department van Landbou, Bosbou en Visserye, Privaatsak X343, Pretoria, 0001, Tel. (012) 319 6070 of Faks (012) 319 6265 of e-pos TshoseC@daff.gov.za of vanaf verkrygbaar is; en

(iii) sewe dae na publikasie van hierdie kennisgewing in werking tree.

BILLY MAKHAFOLA
Uitvoerende Beampte: Landbouprodukstandaarde

NATIONAL TREASURY

NOTICE 516 OF 2016

PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000: EXTENSION OF DUE DATE FOR COMMENT ON DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2016

The due date for comment on the draft regulations published in Government Notice No. 719 of 14 June 2016, in terms of section 5(2) of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), is extended to 23 September 2016.

Armand Greyling

From: Leanda Pietersen <Leanda.Pietersen@treasury.gov.za> on behalf of pppfainputs <pppfainputs@treasury.gov.za>
Sent: 15 September 2016 05:34 PM
To: Armand Greyling; pppfainputs; Cindy August; Thembekile Plaatje; Schalk Human
Cc: Stefan Pieterse; pppfainputs
Subject: RE: Comments on PPR 2016 - AfriBusiness

Good day

Receipt of your submission is hereby acknowledged.

Please be advised that National Treasury is in the process of considering and collating all inputs received with the view to promulgating a final version for implementation as soon as possible.

Kind regards

Office of the Chief Procurement Officer

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

From: Armand Greyling [mailto:armand@afrisake.co.za]
Sent: Thursday, 15 September 2016 4:17 PM
To: pppfainputs; Leanda Pietersen; Cindy August; Thembekile Plaatje; Schalk Human
Cc: Stefan Pieterse
Subject: Comments on PPR 2016 - AfriBusiness

Good day,

Please find attached our submissions pertaining to the draft Preferential Procurement Regulations, 2016. We wish to thank you for the extension in time to do so, however we wish to bring it under your attention and submit that we were able to draft our comments within the extension time provided as we have the capacity to do the necessary research in time. We submit that 10 working days would prove a difficult task for affected individuals such as our members to utilise the time provided and submit substantive comments on these regulations.

We stand firm in the belief that an extension as per our previous correspondence to you, in the amount of between 60 and 90 days would've sufficed and gave meaning to the public participation process.

We trust you will find the above in order.

Kind Regards

ARMAND GREYLING
Law- and Policy Analyst
AfriBusiness
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Cell: 071 684 5687
E-mail: armand@afrisake.co.za

"A8"

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12 September 2016

TO: **THE NATIONAL TREASURY**
OFFICE OF THE CHIEF PROCUREMENT OFFICER

ATTENTION: **MINISTER PRAVIN GORDHAN**
MR. KENNETH BROWN
MS. LEANDA KLEINBOOI

DELIVERED: **VIA EMAIL**
pppfainputs@treasury.gov.za
Leanda.Pietersen@treasury.gov.za
Cindy.August@treasury.gov.za
Thembekile.Plaatjie@treasury.gov.za
Schalk.Human@treasury.gov.za

COMMENT ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2016 AS PUBLISHED IN THE GOVERNMENT GAZETTE 40067, NOTICE NO. 719 ON 14 JUNE 2016

PURPOSE AND OVERVIEW:

This document contains the public comment from the business rights watchdog AfriBusiness, pertaining to the Draft Preferential Procurement Regulations, 2016. The purpose of this submission is to focus your attention on some constitutional challenges that we believe will arise when implementing the proposed regulations, and we appeal to you to revise same based on the grounds set out below.

Upon invitation we will be honoured to discuss the contents of this submission in person should you wish for us to do so.

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Directors: S.F. Booysen, B. du Plessis, D.J. de Villiers, M.B. Pretorius, A. Brink, N. Pretorius
AfriSake is a non-profit company registration number: 2012/043725/08

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PREAMBLE: WHO IS AFRIBUSINESS?

AfriBusiness is an inclusive non-profit business rights watchdog that was established in 2011 by senior business individuals to act on behalf of the Afrikaans business community. We currently have 6934 paying members, as of the date of these comments.

Our members increasingly play a role as entrepreneurs, financiers and job creators in South Africa and who have given us the mandate to protect and promote the values enshrined in the Constitution,[1] to fight corruption, and to create a sound business platform for all to prosper in South Africa.

It is against this background that we raise the following concern pertaining to the Preferential Procurement Policy Regulations, 2016:

DISCRETION ON FUNCTIONALITY:

Section 4 of the proposed regulations state the following:

> "4(1) An organ of state must indicate in the tender documents <u>if</u> the tender will be evaluated on functionality."[2]

This places a strange discretion at the disposal of any state organ to decide whether or not functionality should be a considering factor when determining preferential procurement. The easiest route in any event for an organ of state would simply be to ignore functionality and stay with the criteria of lowest price and BEE-status, effectively rendering section 4(1) redundant. In our opinion this is *ultra vires* the Constitution because organs of state, as creatures of statute, do not have the prerogative to choose whether they want to apply section 217 of the Constitution or not.

Section 217 of the Constitution might be an obstacle to this discretion by stating the following:

---

1 *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as "the Constitution").

2 Own emphasis added.

> "217(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, **it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.**"[3]

When the abovementioned is considered in light of the discretion on functionality, it can be argued that there should in fact be no discretion as to functionality, instead it should be a compulsory consideration when considering any tender contract. It is argued that functionality falls within the ambit of *'competitive and cost effective'* as set out in the Constitution. This is because functionality can be described as a competitive edge that one supplier has above its competitors, thus having it form part of what is to be considered when evaluating and calculating a preference point.

It is trite that the regulations already acknowledge the need for functionality to be considered, otherwise it would've been left out. The problem is with the discretion provided to a state organ to either consider functionality or not, without giving comprehensive criteria on how to apply this discretion. In other words, when is an organ of state within the ambit of the law correct in not recognising 'functionality' as a factor to be considered? The correct approach should be that functionality should always be considered, as a contributing calculation when considering the remaining criteria of price and BEE-status. Section 4 of the regulations should set out evaluation criteria which is compulsory to be considered, and should also allow state organs to extend further criteria should they deem same necessary.

The requirements of section 4(4)(c)(i) and (ii) which states that the qualifying score my not be so low as to jeopardise the quality of the required goods or services, and not so high so as to be unreasonably restrictive, allow for too much room for subjective evaluation of the criteria. This contrasts with section 4(2) which states that the criteria for measuring functionality must be objective, and therefore the regulations should stipulate, at the very least, a minimum objective list of criteria which should be considered when determining functionality. It may then also allow for any further criteria to be added, but not less than what is placed on the list of criteria without written consent to that effect from the applicable government official who presides over that particular organ of state.

---

3 Own emphasis added.

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INCREASE IN THRESHOLD:

The increase of the threshold from R1 million to R100 million for the preference point of 80/20 amounts to a 9900% increase. Any state contract above R100 million will be subject to a preference point of 90/10. This contradicts what the Constitution envisions in section 217(1) of the Constitution in that this turn of events does not place **equitability** nor **cost effectiveness** at the center point of contract negotiations.

Furthermore, it is argued that the increase of the threshold is so grossly exaggerated that it boils down to deliberate sabotage and manipulation of the procurement system, not to promote equitable and cost effective tender processes, but to benefit a handful of companies at the expense of diligent state tender procurement processes.

The BEE-score can be abused to circumvent the lowest price score up to a certain percentage, eliminating perhaps other well established businesses who have the expertise and functionality to provide a given product cheaper, quicker and better but who will fall out of the run, due to a lower BEE-score. This can be illustrated on the hand of the following example:

***Company A** is a well-established firm of engineers with over 30-years of experience in the specific field of civil-engineering with over 200 successful projects completed for both organs of state and private clients. **SOE** is a state owned enterprise which requires that a section of tarmac be re-engineered and tarred to allow for the uninterrupted flow of ship freights from and towards warehouses for shipment and storage. **SOE** is willing to contract for this project in the amount of R1 million and advertises a tender for the project.*

***Company A** is a level 7 BEE company, offering to do the work for R1 million and has a preference point which amounts to the following as per the current regulations:*

$$PS = 80\left(1 - \frac{Pt - Pmin}{Pmin}\right)$$

$$PS = 80\left(1 - \frac{R\,1\,000\,000 - R\,1\,000\,000}{R\,1\,000\,000}\right)$$

$$PS = 80\left(1 - \frac{0}{R\,1\,000\,000}\right)$$

$$PS = 80\,(1)$$

$$PS = 80$$

*Therefore, **Company A** scores a full 80 points for the lowest price and 4 points for its BEE-score with reference to the table provided for in the regulations, amounting to a grand total of **84 points** as its procurement score.*

***Company B**, on the other hand also shows interest in the tender and submits its details to SOE. **Company B** is a newly formed level 1 BEE company consisting of a few new engineers who completed their studies with 3 years post graduate experience each. They have never worked on a large project like this before and are willing to do the work for the current project in the amount of R1.2 million. Their preference point is calculated as follows:*

$$PS = 80\left(1 - \frac{Pt - Pmin}{Pmin}\right)$$

$$PS = 80\left(1 - \frac{R\,1\,200\,000 - R\,1\,000\,000}{R\,1\,000\,000}\right)$$

$$PS = 80\left(1 - \frac{200\,000}{R\,1\,000\,000}\right)$$

$$PS = 80\,(1 - 0.2)$$

$$PS = 80\,(0.8)$$

$$PS = 64$$

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*Therefore, **Company B** scores 64 points for the lowest price and 20 points for its BEE-score with reference to the table provided for in the regulations, amounting into a grand total of **84 points** as its procurement score.*

According to section 8(1) of the regulations, Company B must be awarded the contract regardless of experience to be able to deliver on the contract, and regardless of the fact that it was more expensive than Company A. This is because according to the relevant section in the regulations, the contract must be awarded to the company with the highest BEE-score. As stated previously, functionality should make out a permanent part of the criteria to be considered when awarding contracts.

That is why it is argued that the correct approach would be to always consider functionality when awarding contracts. Section 8(2) almost falls within the ambit, by making functionality the deciding factor, but this is subject to both entities scoring the same for lowest price as well as BEE-status, and scoring equally in the general sense. The current model makes massive headway for misuse and exploitation of the process without duly making functionality a meaningful consideration. If Company B for instance was only able to finalise the project 6 months later than expected due to capacity issues, then such a contract would cost more than tendered for, resulting in a breach of section 217(1) of the Constitution as the contract would not have been cost effective. If functionality is the determining factor, then organs of state would better be able to adhere to the Constitution.

Merit should be given to a company being able to deliver on goods and services, and not because of a politically motivated system dressed under the vail of discrimination and being previously disadvantaged. Of course merit should be given to such individuals to be able to enter the market, but it honestly can't be considered the deciding factor when keeping in mind the Constitutional requirements of section 217(1). When it comes to delivering on state promises of infrastructure etc. the main focus should be on how to utilise tax funds diligently and responsibility to provide the maximum success for the most equitable and cost effective measures.

This standpoint regarding functionality was confirmed in the case of ***Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others***[4] where it was held that:

> "[T]o my mind it is self-evident that it is not cost effective to award a tender to a party who ticks the right boxes as regards price and preference, but is unable to get the job done properly – whether through lack of experience, adequate personnel or financial resources."[5]

This standing of the court is of paramount importance because it sets the bar that when tender contracts are to be awarded for instance as in the example above, that functionality should be the deciding factor as to whom the tender contract should be awarded to. The court further held that:

> "[T]he point is simply that functionality should not be ignored in the final adjudication between competing tenders, and should be taken into account within the parameters of the Procurement Act. I therefore agree...that functionality or capacity is a relevant consideration and an objective criterion for the purposes of section 2(1)(f) of the Procurement Act. It therefore falls to be taken into account in deciding whether or not a tender should be awarded to a tenderer other than the one with the highest score for price and preference."[6]

It is clear that there should also be some guidance given as to what qualifies as objective criteria for the purposes of functionality. In ***Simunye Developers CC v Lovedale Public FET College and Another***[7] it was held that:

> "If one considers the scheme provided for in the PPFA, it seems inevitable that these objective criteria would invariably relate to the **ability of a tenderer to perform the work in accordance with the tender specifications.** They would **often relate to the track record of a prospective tenderer in other related projects, its infrastructure and available financial resources and equipment.** It goes without saying that when an organ of state considers the allocation of substantial public funds for such a project, it

4 (21158/2012) [2013] ZAWCHC 3 (6 February 2013).
5 *Ibid* par 109.
6 *Ibid* par 110.
7 (3059/2010) [2010] ZAECGHC 121 (9 December 2010).

> **has a duty to ensure that the decision to appoint a particular tenderer will result in value for money. A decision to award a tender in the face of such objective criteria which put serious doubts on a tenderer's ability to complete the work satisfactorily and in accordance with the tender specification, may well constitute wasteful expenditure.** In this regard the organ of state will obviously have to **consider the extent of the difference in the tender prices of the highest scoring tenderer and the tenderer which it is considering for the award.** It goes without saying that the bigger the difference the more onerous it becomes for objective criteria to justify a decision not to award to the highest scoring tenderer."[8]

This emphasises the duty organs of state have in ensuring that when awarding a tender contract, they need to ensure that the decision to appoint a particular tenderer will result in **value for money**. If there is doubt on a tenderer's ability to perform the work required, then that will constitute wasteful expenditure

CONCLUSION:

It is our submission that functionality should form an intricate part of the preferential procurement process, and that the regulations should outline specific objective criteria for organs of state to utilise in light of section 217(1) of the Constitution. Government should be wary of the possibility that the current model and calculation of points for preferential procurement could be abused in order to inflate prices if companies know they are stronger than their competitors in the BEE-segment.

Where to companies score the same score, regardless of BEE-status, our submission is that the determining factor of who should be awarded the contracts, is the entity with the highest functionality score. This must be done whilst having regard to section 9 and 36 of the Constitution, but we submit that any regulation of law which undermines the aims of the Constitution should be declared invalid.

We trust that you will consider our submissions favourably and kindly request that you will inform us of the outcome of your decision, once same has been made.

---

8 *Ibid* par 34 (own emphasis added).

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Yours truly,

Armand Greyling
Law and Policy Analyst: AfriBusiness

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AfriSake is a non-profit company registration number: 2012/043725/08

"A9"



national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

IMPLEMENTATION GUIDE

PREFERENTIAL PROCUREMENT REGULATIONS, 2011 PERTAINING TO THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, ACT NO 5 OF 2000

1 December 2011

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PART ONE

GENERAL

1. ACRONYMS AND ABBREVIATIONS

AO /AA	Accounting Officer / Accounting Authority
B-BBEEA	Broad Based Black Economic Empowerment Act, Act No 53 of 2003
BVA	BEE Verification Agency
CCA	Closed Corporations Act, Act No 69 of 1984
EMEs	Exempted Micro Enterprises
IRBA	Independent Regulatory Board of Auditors
MFMA	Municipal Finance Management Act, Act No 56 of 2003
PFMA	Public Finance Management Act, Act No. 1 of 1999 (as amended by Act 29 of 1999)
PPPFA	Preferential Procurement Policy Framework Act, No 5 of 2000
QSE	Qualifying Small Enterprise
SANAS	South African National Accreditation System
SARB	South African Reserve Bank
SARS	South African Revenue Services
SASAE	South African Standard on Assurance Engagements
SCM	Supply Chain Management

2. PURPOSE

This Guide is intended to assist Accounting Officers and Accounting Authorities with the implementation of the Preferential Procurement Regulations, 2011 issued in terms of section 5 of the Preferential Procurement Policy Framework Act, Act Number 5 of 2000 (PPPFA).

The Guide should be read and utilized in conjunction with other relevant SCM related prescripts, instructions, circulars and guidelines.

3. APPLICABILITY

3.1 Institutions

3.1.1 The Preferential Procurement Regulations, 2011 are applicable to organs of state as contemplated in section 1 (iii) of the PPPFA and all public entities listed in Schedules 2, 3A, 3B, 3C and 3D to the PFMA and municipal entities.

3.1.2 These organs of state and entities are hereafter referred to as institutions in this Guide.

3.2 Preference point systems

3.2.1 The 80/20 preference point system is applicable to bids* with a Rand value equal to, or above R30 000 and up to a Rand value of R1 million (all applicable taxes included). Institutions may apply the 80/20 preference point system to price quotations with a value less than R30 000 if and when appropriate.

3.2.2 The 90/10 preference point system is applicable to bids with a Rand value above R1 million (all applicable taxes included).

3.2.3 The value referred to in paragraphs 3.2.1 and 3.2.2 distinguishing the 80/20 and 90/10 preference point systems has been increased from R500 000 to R1 million.

3.2.4 It must be pointed out that the prescribed threshold values within which AOs /AAs may procure services, works or goods by means of petty cash, verbal / written price quotations or advertised competitive bids are not affected by the Preferential Procurement Regulations, 2011.

* which is referred to as tenders in the PPPFA and the Preferential Procurement Regulations, 2011 include advertised competitive bids, written price quotations or proposals.

4. BROAD-BASED BLACK ECONOMIC EMPOWERMENT (B-BBEE) STATUS LEVEL CERTIFICATES

4.1 Bidders are required to submit original and valid B-BBEE Status Level Verification Certificates or certified copies thereof together with their bids, to substantiate their B-BBEE rating claims.

4.2 Bidders who do not submit B-BBEE Status Level Verification Certificates or are non-compliant contributors to B-BBEE do not qualify for preference points for B-BBEE but should not be disqualified from the bidding process. They will score points out of 90 or 80 for price only and zero (0) points out of 10 or 20 for B-BBEE.

4.3 A trust, consortium or joint venture must submit a consolidated B-BBEE Status Level Verification Certificate for every separate bid.

4.4 Public entities and tertiary institutions must also submit B-BBEE Status Level Verification Certificates together with their bids.

4.5 If an institution is already in possession of a valid and original or certified copy of a bidder's B-BBEE Status Level Verification Certificate that was obtained for the purpose of establishing the database of possible suppliers for price quotations or that was submitted together with another bid, it is not necessary to obtain a new B-BBEE Status Level Verification Certificate each time a bid is submitted from the specific bidder.

Such a certificate may be used to substantiate B-BBEE rating claims provided that the closing date of the bid falls within the expiry date of the certificate that is in the institution's possession.

Each time this provision is applied, cross-reference must be made to the B-BBEE Status Level Verification Certificate already in possession for audit purposes.

4.6 AOs / AAs must ensure that the B-BBEE Status Level Verification Certificates submitted are issued by the following agencies:

4.6.1 **Bidders other than EMEs**

(a) Verification agencies accredited by SANAS; or
(b) Registered auditors approved by IRBA.

4.6.2 **Bidders who qualify as EMEs**

(a) Accounting officers as contemplated in the CCA; or
(b) Verification agencies accredited by SANAS; or
(c) Registered auditors. (Registered auditors do not need to meet the prerequisite for IRBA's approval for the purpose of conducting verification and issuing EMEs with B-BBEE Status Level Certificates).

4.7 VALIDITY OF B-BBEE STATUS LEVEL VERIFICATION CERTIFICATES

4.7.1 Verification agencies accredited by SANAS

4.7.1.1 These certificates are identifiable by a SANAS logo and a unique BVA number.

4.7.1.2 Confirmation of the validity of a B-BBEE Status Level Verification Certificate can be done by tracing the name of the issuing Verification Agency to the list of all SANAS accredited agencies. The list is accessible on **http://www.sanas.co.za/directory/bbee_default.php**.

The relevant BVA may be contacted to confirm whether such a certificate was issued.

4.7.1.3 As a minimum requirement, all valid B-BBEE Status Level Verification Certificates should have the following information detailed on the face of the certificate:

- The name and physical location of the measured entity;
- The registration number and, where applicable, the VAT number of the measured entity;
- The date of issue and date of expiry;
- The certificate number for identification and reference;
- The scorecard that was used (for example EME, QSE or Generic);
- The name and / or logo of the Verification Agency;
- The SANAS logo;
- The certificate must be signed by the authorized person from the Verification Agency; and
- The B-BBEE Status Level of Contribution obtained by the measured entity.

4.7.2 Registered auditors approved by IRBA

4.7.2.1 The format and content of B-BBEE Status Level Verification Certificates issued by registered auditors approved by IRBA must -

- Clearly identify the B-BBEE approved registered auditor by the auditor's individual registration number with IRBA and the auditor's logo;
- Clearly record an approved B-BBEE Verification Certificate identification reference in the format required by the SASAE;
- Reflect relevant information regarding the identity and location of the measured entity;
- Identify the Codes of Good Practice or relevant Sector Codes applied in the determination of the scores;

- Record the weighting points (scores) attained by the measured entity for each scorecard element, where applicable, and the measured entity's overall B-BBEE Status Level of Contribution; and
- Reflect that the B-BBEE Verification Certificate and accompanying assurance report issued to the measured entity is valid for 12 months from the date of issuance and reflect both the issuance and expiry date.

4.7.2.2 Confirmation of the validity of a B-BBEE Status Level Verification Certificate can be done by tracing the name of the issuing B-BBEE approved registered auditor to the list of all approved registered auditors. The list is accessible on **http://www.thedti.gov.za** and / **http://www.irba.co.za.**

The relevant approved registered auditor may be contacted to confirm whether such a certificate was issued.

4.7.3 Accounting officers as contemplated in section 60(4) of the CCA:

4.7.3.1 These certificates will be issued in the accounting officer's letterhead with the accounting officer's practice number and contact number clearly specified on the face of the certificates.

4.7.3.2 The content of B-BBEE Status Level Verification Certificates issued by accounting officers as contemplated in the CCA is detailed in paragraph 4.8.5 below.

4.8 VERIFICATION CERTIFICATES IN RESPECT OF EMEs

4.8.1 In terms of the Generic Codes of Good Practice, an enterprise including a sole propriety with an annual total revenue of R5 million or less qualifies as an EME.

4.8.2 In instances where Sector Charters are developed to address the transformation challenges of specific sectors or industries, the threshold for qualification as an EME may be different from the generic threshold of R5 million. The relevant Sector Charter thresholds will therefore be used as a basis for a potential bidder to qualify as an EME. For example the approved thresholds for EMEs for the Tourism and Construction Sector Charters are R2.5 million and R1.5 respectively.

4.8.3 EMEs are deemed to have a B-BBEE status of "level four (4) contributor". In instances where EMEs are more than 50% owned by black people, such EMEs qualify as "B-BBEE status level three (3) contributors".

4.8.4 Sufficient evidence to confirm a qualifying EME is a certificate issued by an Accounting Officer (as contemplated in the CCA), a similar certificate issued by a Registered Auditor or a Verification Agency.

4.8.5 When confirming the validity of a certificate in respect of an EME, the following should be detailed on the face of the certificate:

- The Accounting Officer's or Registered Auditor's letter head with full contact details;
- The Accounting Officer's or Registered Auditor's practice numbers;
- The name and the physical location of the measured entity;
- The registration number and, where applicable, the VAT number of the measured entity;
- The date of issue and date of expiry;
- The B-BBEE Status Level of Contribution obtained by the measured entity; and
- The total black shareholding and total black female shareholding.

4.9 Any enquiries in respect of B-BBEE Status Level Verification Certificates may be directed to the Department of Trade and Industry (dti) as follows:

Ms Makhosazana Seate
Director: Empowerment and Enterprise Development Division (EEDD)
Tel: (012) 394 1694
Fax: (012) 394 2694
E-mail: MSeate@thedti.gov.za

PART TWO

INVITATION OF BIDS

5. PLANNING, STIPULATION OF PREFERENCE POINT SYSTEM TO BE UTILISED AND THE DETERMINATION OF DESIGNATED SECTORS

Prior to the invitation of bids, AOs/AAs are required to:

5.1. Properly plan for the provision of services, works or goods in order to ensure that the resources that are required to fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price, place and that the quantity and quality will satisfy those needs.

5.2. As far as possible, accurately estimate the costs for the provision of the required services, works or goods. This is in order to determine and stipulate the appropriate preference point system to be utilised in the evaluation and adjudication of the bids and to ensure that the prices paid for the services, works and goods are market related.

Estimated costs can be determined by conducting an industry and commodity analysis whereby prospective suppliers may be approached to obtain indicative market related prices that may be utilised for benchmarking purposes. Based on the findings, the relevant preference point system (80/20 or 90/10) to be utilised for the evaluation of the bid must be stipulated in the bid documents; and

5.3. Determine whether the services, works or goods for which an invitation is to be made has been designated for local production and content in terms of Regulation 9 of the Preferential Procurement Regulations. This will entail the inclusion of a specific condition in the bid documents 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. This will subsequently have a direct impact on the evaluation of the bid.

6. BIDS BASED ON FUNCTIONALITY AS A CRITERION

6.1 In general, not all bids should be invited on the basis of functionality as a criterion. The need to invite bids on the basis of functionality as a criterion depends on the nature of the required commodity or service taking into account quality, reliability, viability and durability of a service and the bidders technical capacity and ability to execute a contract.

6.2 When an institution invites a bid that will also be evaluated on the basis of functionality as a criterion, the AO/ AA must clearly specify the following aspects in the bid documents:

(a) *Evaluation criteria for measuring functionality*

The evaluation criteria may include criteria such as the consultant's relevant experience for the assignment, the quality of the methodology; the qualifications of key personnel; transfer of knowledge etc.

(b) *Weight of each criterion*

The weight that is allocated to each criterion should not be generic but should be determined separately for each bid on a case by case basis.

(c) *Applicable value*

The applicable values that will be utilised when scoring each criterion should be objective. As a guide, values ranging from 1 being poor, 2 being average, 3 being good, 4 being very good and 5 being excellent, may be utilised.

(d) *Minimum qualifying score for functionality.*

The minimum qualifying score that must be obtained for functionality in order for a bid to be considered further should not be generic. It should be determined separately for each bid on a case by case basis. The minimum qualifying score must not be prescribed so low that it may jeopardise the quality of the service required nor so high that it may be restrictive to the extent that it jeopardizes the fairness of the SCM system.

7. LOCAL PRODUCTION AND CONTENT

7.1 Designated Sectors

7.1.1 Bids in respect of services, works or goods that have been designated for local production and content, **must** contain a specific bidding 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.

7.1.2 AOs / AAs must stipulate in bid invitations that the exchange rate to be used for the calculation of local content (local content and local production are used interchangeably) must be the exchange rate published by the SARB at 12:00 on the date, one week (7 calendar days) prior to the closing date of the bid.

7.1.3 Only the South African Bureau of Standards (SABS) approved technical specification number SATS 1286:201x must be used to calculate local content. The following formula to calculate local content must be disclosed in the bid documentation:

The local content (LC) as a percentage of the bid price must be calculated in accordance with the SABS approved technical specification number SATS 1286: 201x as follows:

$$LC = 1 - \left[\frac{x}{y}\right] \times 100$$

Where
x imported content
y bid price excluding value added tax (VAT)

Prices referred to in the determination of x must be converted to Rand (ZAR) by using the exchange rate published by the SARB at 12:00 on the date, one week (7 calendar days) prior to the closing date of the bid.

7.1.4 For the purpose of paragraphs 7.1.1, 7.1.2 and 7.1.3 above, the SBD / MBD 6.2 (Declaration Certificate for Local Content) must form part of the bid documentation.

7.1.5 The Declaration Certificate for Local Content (SBD / MBD 6.2) must be completed and duly signed. AOs / AAs are required to verify the accuracy of the rates of exchange quoted by the bidder in paragraph 4.1 of this Certificate.

7.2 Non-Designated Sectors

7.2.1 Where there is no designated sector, AOs / AAs may decide to include a specific bidding 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, 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 dti.

7.2.2 AOs / AAs must stipulate in bid invitations that the exchange rate to be used for the calculation of local content must be the exchange rate published by the SARB at 12:00 on the date, one week (7 calendar days) prior to the date of closure of the bid.

7.2.3 Only the South African Bureau of Standards approved technical specification number SATS 1286:201x as indicated in paragraph 7.1.3 above must be used to calculate local content.

7.2.4 For the purpose of paragraphs 7.2.1, 7.2.2 and 7.2.3 above, the SBD / MBD 6.2 (Declaration Certificate for Local Content) must form part of the bid documentation.

7.2.5 The Declaration Certificate for Local Content (SBD / MBD 6.2) must be completed and duly signed. AOs / AAs are required to verify the accuracy of the rate(s) of exchange quoted by the bidder in paragraph 4.1 of this Certificate.

7.2.6 Any enquiries in respect of Local Production and Content may be directed to the Department of Trade and Industry (dti) as follows:

Ms Basani Baloyi
Director: Industrial Development Division (IDD)
Tel: (012) 394 3851
Fax: (012) 394 2851
E-mail: BBaloyi@thedti.gov.za

8. SERVICES RENDERED BY TERTIARY INSTITUTIONS AND PUBLIC ENTITIES

8.1 Based on thorough analysis of the market, institutions may invite written price quotations for services that can only be provided by tertiary institutions from the identified tertiary institutions.

8.2 Where the required service can be provided by tertiary institutions, public entities and enterprises from the private sector, institutions must invite competitive bids.

PART THREE

EVALUATION OF BIDS

9. DISCOUNTS

9.1 When calculating comparative prices:

9.2 Unconditional discounts must be taken into account for evaluation purposes; and

9.3 Conditional discounts must not be taken into account for evaluation purposes but should be implemented when payment is effected.

10 SUB-CONTRACTING

10.1. A bidder must not be awarded the points claimed for B-BBEE status level of contribution if it is indicated in the bid documents that such a bidder intends sub-contracting more that 25% of the contract value to any other enterprise that does not qualify for at least the same number of points that the bidder qualifies for, unless the intended sub-contractor is an EME that has the capability and ability to execute the sub-contract.

10.2 A contractor is not allowed to sub-contract more than 25% of the contract value to another enterprise that does not have equal or higher B-BBEE status level, unless the intended sub-contractor is an EME that has the capability and ability to execute the sub-contract.

10.3 In relation to a designated sector, a contractor must not be allowed to 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 EVALUATION OF BIDS BASED ON FUNCTIONALITY AS A CRITERION

Bids invited on the basis of functionality as a criterion must be evaluated in two stages – first functionality must be assessed and then in accordance with the 80/20 or 90/10 preference point systems prescribed in Preferential Procurement Regulations 5 and 6. The evaluation must be done as follows:

11.1 First stage – Evaluation of functionality

11.1.1 Bids must be evaluated in terms of the evaluation criteria embodied in the bid documents. The amendment of evaluation criteria, weights, applicable values

and/or the minimum qualifying score for functionality after the closure of bids is not allowed as this may jeopardise the fairness of the process.

11.1.2 A bid will be considered further if it achieves the prescribed minimum qualifying score for functionality.

11.1.3 Bids that fail to achieve the minimum qualifying score for functionality must be disqualified.

11.1.4 Score sheets should be prepared and provided to panel members to evaluate the bids.

11.1.5 The score sheet should contain all the criteria and the weight for each criterion as well as the values to be applied for evaluation as indicated in the bid documents.

11.1.6 Each panel member should after thorough evaluation independently award his / her own value to each individual criterion.

11.1.7 Score sheets should be signed by panel members and if necessary, written motivation may be requested from panel members where vast discrepancies in the values awarded for each criterion exist.

11.1.8 If the minimum qualifying score for functionality is indicated as a percentage in the bid documents, the percentage scored for functionality may be calculated as follows:

a. The value awarded for each criterion should be multiplied by the weight for the relevant criterion to obtain the score for the various criteria;
b. The scores for each criterion should be added to obtain the total score; and
c. The following formula should be used to convert the total score to percentage for functionality:

$$Ps = \frac{So}{Ms} X\ 100$$

where:

Ps = percentage scored for functionality by bid under consideration

So = total score of bid under consideration

Ms = maximum possible score

11.1.9 The percentage of each panel member should be added and divided by the number of panel members to establish the average percentage obtained by each bidder for functionality.

11.2 **Second stage – Evaluation in terms of the 80/20 or 90/10 preference point systems**

11.2.1 Only bids that achieve the minimum qualifying score / percentage for functionality must be evaluated further in accordance with the 80/20 or 90/10 preference point systems prescribed in Preferential Procurement Regulations 5 and 6. [Guidance on the evaluation of bids in terms of the 80/20 or 90/10 preference points systems is provided in paragraph 13 of this Guide].

12. EVALUATION OF BIDS BASED ON A STIPULATED MINIMUM THRESHOLD FOR LOCAL PRODUCTION AND CONTENT

Bids that were invited on the basis of local production and content should be evaluated by following a two-stage bidding process:

12.1 **First stage – Evaluation in terms of the stipulated minimum threshold for local production and content**

12.1.1 Bids must be evaluated in terms of the evaluation criteria stipulated in the bid documents. The amendment of the stipulated minimum threshold for local production and content after the closure of bids is not allowed as this may jeopardise the fairness of the process.

12.1.2 A bid will be disqualified if:

- the bidder fails to achieve the stipulated minimum threshold for local production and content; and.
- the Declaration Certificate for Local Content (SBD / MBD 6.2) referred to in paragraphs 7.1.4 and 7.2.4 is not submitted as part of the bid documentation.

12.1.3. Calculation of Local Content

12.1.3.1 The local content (LC) as a percentage of the bid price must be calculated in accordance with the SABS approved technical specification number SATS 1286: 201x as indicated in paragraph 7.1.3 above.

12.1.3.2 AOs / AAs must verify the accuracy of the rates of exchange quoted by the bidder in paragraph 4.1 of the Declaration Certificate for Local Content (SBD / MBD 6.2)

12.2 Second stage - Evaluation in terms of the 80/20 or 90/10 preference point systems

12.2.1 Only bids that achieve the minimum stipulated threshold for local production and content must be evaluated further in accordance with the 80/20 or 90/10 preference point systems prescribed in Preferential Procurement Regulations 5 and 6. [Guidance on the evaluation of bids in terms of the 80/20 or 90/10 preference points systems is provided in paragraph 13 of this Guide].

12.2.2 Where appropriate, prices may be negotiated only with short listed or preferred bidders. Such negotiations must not prejudice any other bidders.

13. THE PREFERENCE POINT SYSTEMS

13.1 Step 1: Calculation of points for price

13.1.1 The PPPFA prescribes that the lowest acceptable bid will score 80 or 90 points for price. Bidders that quoted higher prices will score lower points for price on a pro-rata basis.

13.1.2 The formulae to be utilised in calculating points scored for price are as follows:

80/20 Preference point system [(for acquisition of services, works or goods up to a Rand value of R1million) (all applicable taxes included)]

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

Where
Ps = Points scored for comparative price of bid or offer under consideration
Pt = Comparative price of bid or offer under consideration
Pmin = Comparative price of lowest acceptable bid or offer.

90/10 Preference point system [(for acquisition of services, works or goods with a Rand value above R1million) (all applicable taxes included)]

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

Where
Ps = Points scored for comparative price of bid or offer under consideration
Pt = Comparative price of bid or offer under consideration
Pmin = Comparative price of lowest acceptable bid or offer.

13.1.3 Points scored must be rounded off to the nearest 2 decimal places.

13.2 Step 2: Calculation of points for B-BBEE status level of contributor

13.2.1 Points must be awarded to a bidder for attaining the B-BBEE status level of contribution in accordance with the table below:

B-BBEE Status Level of Contributor	Number of points (90/10 system)	Number of points (80/20 system)
1	10	20
2	9	18
3	8	16
4	5	12
5	4	8
6	3	6
7	2	4
8	1	2
Non-compliant contributor	0	0

13.3 Calculation of total points scored for price and B-BBEE status level of contribution

13.3.1 The points scored for price must be added to the points scored for B-BBEE status level of contribution to obtain the bidder's total points scored out of 100.

14. EVALUATION OF BIDS THAT SCORED EQUAL POINTS

14.1 In the event that two or more bids have scored equal total points, the successful bid must be the one that scored the highest points for B-BBEE.

14.2 If two or more bids have equal points, including equal preference points for B-BBEE, the successful bid must be the one scoring the highest score for functionality, if functionality is part of the evaluation process.

14.3 In the event that two or more bids are equal in all respects, the award must be decided by the drawing of lots.

15. CANCELLATION AND RE-INVITATION OF BIDS

15.1 In the application of the 80/20 preference point system, if **all** bids received exceed R1 000 000, the bid must be cancelled. If one or more of the acceptable bid(s) received are within the R1 000 000 threshold, all bids received must be evaluated on the 80/20 preference point system.

15.2 In the application of the 90/10 preference point system, if **all** bids received are equal to or below R1 000 000, the bid must be cancelled. If one or more of the acceptable bid(s) received are above the R1 000 000 threshold, all bids received must be evaluated on the 90/10 preference point system.

15.3 If a bid was cancelled in terms of paragraph 15.1 or 15.2, the correct preference point system must be stipulated in the bid documents of the re-invited bid.

15.4 An AO / AA may, prior to the award of a bid, cancel the bid if:

15.4.1 Due to changed circumstances, there is no longer a need for the services, works or goods requested. [AOs / AAs must ensure that only goods, services or works that are required to fulfil the needs of the institution are procured]; or

15.4.2 Funds are no longer available to cover the total envisaged expenditure. [AOs / AAs must ensure that the budgetary provisions exist]; or

15.4.3 No acceptable bids are received. [If all bids received are rejected, the institution must review the reasons justifying the rejection and consider making revisions to the specific conditions of contract, design and specifications, scope of the contract, or a combination of these, before inviting new bids].

PART FOUR

AWARD OF CONTRACTS

16. AWARD OF CONTRACTS

16.1 A contract must be awarded to the bidder who scored the highest total number of points in terms of the preference point systems.

16.2 In exceptional circumstances a contract may, on reasonable and justifiable grounds, be awarded to a bidder that did not score the highest number of points. The reasons for such a decision must be approved and recorded for audit purposes and must be defendable in a court of law.

PART FIVE

REMEDIES, TAX CLEARANCE, BIDDING DOCUMENTS, SALE AND LETTING OF ASSETS AND TRANSITIONAL ARRANGEMENTS

17. REMEDIES

17.1 AOs / AAs must act against the bidder or person awarded the contract upon detecting that the B-BBEE status level of contribution has been claimed or obtained on a fraudulent basis or any of the contract conditions have not been fulfilled.

17.2 The institution may, in addition to any other remedy that it may have against the bidder or person:

17.2.1 Disqualify the bidder or person from the bidding process;

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

17.2.3 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;

17.2.4 Restrict the bidder 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 applying the *audi alteram partem* (hear the other side) rule; and

17.2.5 Forward the matter for criminal prosecution.

17.3 Institution's should involve their legal services when any of the remedies are applied.

17.4 The details of any restrictions imposed on bidders, persons or contractors must be forwarded to the National Treasury for inclusion on the central Database of Restricted Suppliers.

18 TAX CLEARANCE

No bid may be awarded to any bidder whose tax matters have not been declared by the SARS to be in order.

19 BIDDING DOCUMENTS

19.1 The following bidding documents, which have been amended where necessary in accordance with the prescripts of the Preferential Procurement Regulations, 2011, are attached for use:

- **Standard Bidding Documents (SBDs)** for use by all national and provincial departments, constitutional institutions and public entities listed in schedules 3A and 3C to the PFMA; and
- **Municipal Bidding Documents (MBDs)** for use by all municipalities and municipal entities to which the MFMA apply.

	SBD / MBD Description	Document Number
(i)	Invitation to Bid	SBD / MBD 1
(ii)	Application for Tax Clearance Certificate	SBD /MBD 2
(iii)	Pricing Schedules	SBD / MBD 3.1,3.2 and 3.3
(iv)	Declaration of Interest	SBD / MBD 4
(v)	National Industrial Participation Programme	SBD 5
(vi)	Declaration for Procurement above R10 000 000	MBD 5
(vii)	Preference claims in terms of the Preferential Procurement Regulations, 2011	SBD / MBD 6.1
(v	Declaration Certificate for Local Content	SBD / MBD 6.2
(ix)	Formal contracts	SBD / MBD 7.1, 7.2 and 7.3
(x)	Declaration of Bidder's past SCM practices	SBD / MBD 8
(xi)	Certificate of Independent Bid Determination	SBD / MBD 9

NB: (The above SBDs / MBDs replace those that were previously issued by the National Treasury)

19.2 AOs / AAs should customize and utilize the bidding documents (SBDs or MBDs) by incorporating the institutions name, logo and contact details.

19.3 Other changes to the SBDs or MBDs, such as variations necessary to address specific contract and project issues, should be kept to a minimum. The standard wording for the Application for Tax Clearance Certificates (SBD / MBD 2) and the National Industrial Participation Programme (SBD 5) should not be amended. The formal contract document (SBD / MBD 7.1 to 7.3) should not form part of the bidding documents issued to every prospective bidder, but should be made applicable only to the successful bidder after adjudication and award of the bid.

19.4 The relevant SBDs or MBDs must be utilized for procurement by means of written price quotations, advertised competitive bids or proposals.

19.5 Although these SBDs or MBDs have not been formally issued to Public Entities listed in Schedules 2, 3B and 3D to the PFMA, nothing prohibits these institutions from customizing and utilizing these bidding documents as well.

20 SALE AND LETTING OF ASSETS

20.1 The preference point systems prescribed in the PPPFA and the Preferential Procurement Regulations, 2011 are not applicable to the sale and letting of assets.

20.2.1 In instances where assets are sold or leased by means of advertised competitive bids or written price quotations or by auctions the award must be made to the highest bidder.

20.2.2 The tax clearance requirements referred to in paragraph 18 above applies to the sale and letting of assets as well.

21 TRANSITIONAL ARRANGEMENTS

21.1 If a bid was advertised / invited in terms of the evaluation criteria prescribed in the Preferential Procurement Regulations, 2001 (prior to the date of coming into effect of the Preferential Procurement Regulations, 2011) but will only be evaluated and awarded after the date of coming into effect of the Preferential Procurement Regulations, 2011, the bid must be evaluated and awarded in terms of the evaluation criteria prescribed in the Preferential Procurement Regulations, 2001 and in terms of the conditions contained in the bid documents.

21.2 Such a bid must be evaluated and awarded as soon as possible but not later than the initial expiry of the validity period of the bid. The extension of the validity period of such a bid must not be allowed.

CONTACT PERSON

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