

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO.: CCT103/25**

**CCT144/25**

The matter between:

**CASE NO.: CCT 103/25**

**PREMIER OF THE WESTERN CAPE GOVERNMENT**

First Applicant

**AMABHUNGANE CENTRE FOR  
INVESTIGATIVE JOURNALISM**

Second Applicant

and

**SPEAKER OF THE NATIONAL ASSEMBLY**

First Respondent

**CHAIRPERSON OF THE  
NATIONAL COUNCIL OF PROVINCES**

Second Respondent

**MINISTER OF FINANCE**

Third Respondent

And the matter between

**CASE NO.: CCT 144/25**

**THE CITY OF CAPE TOWN**

Applicant

**AMABHUNGANE CENTRE FOR  
INVESTIGATIVE JOURNALISM**

Second Applicant

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**SPEAKER OF THE NORTHERN CAPE  
PROVINCIAL LEGISLATURE**

Eleventh Respondent

**SPEAKER OF THE NORTH WEST  
PROVINCIAL LEGISLATURE**

Twelfth Respondent

**SPEAKER OF THE WESTERN CAPE  
PROVINCIAL LEGISLATURE**

Thirteenth Respondent

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**CONSOLIDATED REPLYING AFFIDAVIT**

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**TABLE OF CONTENTS**

INTRODUCTION AND OVERVIEW .....	5
ADOPTION OF REASONABLE TIMEFRAMES FOR PUBLIC PARTICIPATION .....	9
ALLEGED ADEQUATE ENGAGEMENT WITH THE REVISED CHAPTER 4.....	12
The content of the revised Chapter 4 was not adequately foreshadowed by clause 17.....	12
Material similarities between the revised Chapter 4 and the regulations under the PPPFA.....	16
Opportunity to engage with the revised Chapter 4.....	23
PARLIAMENT FAILED TO GIVE DUE CONSIDERATION TO ALL PUBLIC COMMENTS .....	24
Lack of evidence of transmission and accounting of submissions.....	24
Clear evidence of Parliament's failure to take account of public comments .....	25
ALLEGED IRRELEVANCE OF STATEMENTS MADE DURING ENGAGEMENTS	26

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Alleged application of parliamentary privilege.....	27
Evidence of idiosyncratic views of individual committee members .....	28
Alleged failure to illustrate the quality of public participation.....	31
PARAGRAPH-BY-PARAGRAPH RESPONSES.....	33
The First Answering Affidavit.....	33
Second Answering Affidavit.....	40
CONCLUSION .....	45

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I, the undersigned,

**CAROLINE JAMES**

do hereby make oath and state as follows:

1. I am the Advocacy Coordinator of amaBhungane Centre for Investigative Journalism ("**amaBhungane**"). I am duly authorised to depose to this affidavit on behalf of amaBhungane.
2. The facts contained in this affidavit are true and correct and are, save where otherwise indicated, within my personal knowledge or derived from documentation under my possession and control. Where I make legal submissions, I do so on the advice of amaBhungane's legal representatives, which advice I accept.
3. Where convenient, I utilise terms and abbreviations as they are defined in amaBhungane's founding affidavit and consolidated founding affidavit.

**INTRODUCTION AND OVERVIEW**

4. As set out in the founding papers, this application concerns Parliament's failure to facilitate meaningful public participation in the passing of the Public Procurement Act 28 of 2024 ("Act"), which impugns the constitutionality of the Act as a whole.
5. In response to this consolidated application, the respondents have filed two answering affidavits.

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- 5.1. The first answering affidavit, deposed to by the Speaker of the National Assembly Ms Angela Thokozile Didiza, was filed on behalf of the first, second, fifth, sixth, tenth, eleventh and twelfth respondents in the application brought by the City of Cape Town under the case number CCT 144/25 ("**City's application**") in response to the City ("**First Answering Affidavit**"); and;
- 5.2. The second answering affidavit, also deposed to by the Speaker of the National Assembly Ms Angela Thokozile Didiza, was filed on behalf of the first to third respondents in the application brought by the Premier of the Western Cape Government under the case number CCT 103/25 ("**Premier's application**") and the first, second, third, fifth, sixth, tenth, eleventh and twelfth respondents in the City's application in response to amaBhungane ("**Second Answering Affidavit**").
6. No answering affidavit has been filed by any of the respondents in response to the Premier (the first applicant) in the Premier's application.
7. The purpose of this replying affidavit is to respond to certain allegations contained in both the first and second answering affidavits insofar as they may be relevant to amaBhungane's submissions.
8. If any respondent files an answering affidavit to the Premier, we reserve our right to seek leave to file a supplementary replying affidavit to address relevant allegations or submissions.
9. In this replying affidavit, I respond to the respondents' opposition and reaffirm the four submissions advanced in amaBhungane's founding affidavit that Parliament

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failed to facilitate meaningful public participation. Considering the nature and importance of the Act, and the intensity of its impact, Parliament:<sup>1</sup>

- 9.1. adopted inadequate timeframes for public comment that unduly constrained its engagement with the public;
- 9.2. failed to consider the majority of public comments submitted to the National Assembly;
- 9.3. failed to remedy the constitutional inadequacies when the Bill was before the National Council of Provinces (“**NCOP**”); and
- 9.4. failed to consider all the public comments submitted to the NCOP.

10. The respondents make four broad contentions in their answering affidavits:

10.1. First, that Parliament adopted reasonable timeframes for public participation;

10.2. Second, that the public was afforded an adequate opportunity to engage with the revised Chapter 4 on the alleged basis that:

10.2.1. the content of the revised Chapter 4 was foreshadowed by clause 17 in the original B18-2023 Bill;

10.2.2. the content of the revised Chapter 4 was materially similar to the existing regulations promulgated under the Preferential Procurement Policy Framework Act 5 of 2000 (“**PPPFA**”) which had been subject to extensive public participation; and

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<sup>1</sup> Founding Affidavit paras 90 – 139.

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10.2.3. the public was afforded the opportunity to comment on the revised Chapter 4 after it was introduced.

10.3. Third, that both the NA and the NCOP gave due consideration to all the public comments received on the Act; and

10.4. Fourth, my reliance on the statements by committee members, which I rely on to demonstrate the inadequacy of Parliament's engagement with public comments, is irrelevant on the alleged basis that the statements:

10.4.1. are protected by parliamentary privilege;

10.4.2. do not evidence the quality of the Standing and Select Committee's engagement with public comments; and

10.4.3. merely demonstrate the idiosyncratic views of committee members and is not representative of the views of Parliament as a whole.

11. The first answering affidavit contains further allegations, relevant to the City's case against them. Where these averments do not relate to amaBhungane's case, we do not respond.

12. In the remainder of this affidavit, I proceed as follows:

12.1. First, I respond thematically to Parliament's four grounds of opposition as is relevant to amaBhungane's case; and

12.2. Second, I respond to both answering affidavits on a paragraph-by-paragraph basis to the extent necessary.

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## ADOPTION OF REASONABLE TIMEFRAMES FOR PUBLIC PARTICIPATION

13. In the first and second answering affidavits, the respondents advance mutually exclusive positions. On the one hand, they seek to justify the need to process the Act with great haste. On the other hand, they deny that the legislative process was rushed. Both propositions cannot be true at the same time.
14. In the first answering affidavit, the respondents allege that the extraordinarily truncated timeframes were necessary because of the upcoming 2024 general election (otherwise, upon the dissolution of Parliament, new Committees would have required capacity-building training to ensure that they were able to consider and report on the Act).
15. The respondents allege that this would have had "*a substantial impact on the state's financial and other resources*" which needed to be avoided. Moreover, it was allegedly important to avoid "*significantly delaying the creation of a necessary unified procurement process.*"<sup>2</sup>
16. Despite this concession, in their second answering affidavit the respondents offer a bare denial of hasty process and seek to "*deny the allegations of a rushed process*" altogether.<sup>3</sup>
17. This contradiction notwithstanding, the respondents' contention that the timeframes for processing the Bill were reasonable is flawed for three reasons.

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<sup>2</sup> First Answering Affidavit para 41.3.

<sup>3</sup> Second Answering Affidavit para 52.

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18. First, the concession that the Bill *had to be* processed prior to the 2024 national election demonstrates that the public participation process was indeed rushed.

18.1. The first version of the Bill was first tabled before Parliament on 30 June 2023. A call for the submission of public comments, initiating the public participation process, was first published on 18 August 2023.

18.2. In terms of section 49(2) of the Constitution, Parliament's term expired at midnight on 21 May 2024. This left approximately nine months for the Bill to pass through the NA and NCOP before returning to the NA and then being sent to the President for assent. Completing the legislative process within this period necessarily required significant haste.

18.3. As set out in our consolidated founding affidavit,<sup>4</sup> key officials responsible for guiding stages of the public participation process, repeatedly emphasised the significant time constraints on the process.

19. Second, the respondents do not offer a convincing reason why the Bill had to pass before the dissolution of Parliament, save to suggest that delay would strain the state's resources and defer a unified approach to public procurement.

19.1. The respondents provide no evidence of this alleged strain or the costs they claim are unaffordable.

19.2. The respondents also ignore that the Bill was, in fact, the product of a process that they concede began almost a decade earlier.<sup>5</sup> That process spanned multiple iterations of Parliament and the Executive without issue.

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<sup>4</sup> See paras 58, 72, and 78.

<sup>5</sup> First Answering Affidavit para 41.3.

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The respondents also ignore that it is common to revive legislation upon the creation of a new Parliament.<sup>6</sup>

- 19.3. There was no urgent need to unify the public procurement system. The respondents provide no evidence of any change that 2023 requiring such unification prior to the 2024 election.
20. Third, even if there was an objective need to pass the Bill before the dissolution of Parliament, it remains incumbent on the respondents to demonstrate the reasonableness of the timeframes provided for public participation. They have made no attempt to do so.
21. In fact, the evidence before this Court demonstrates that the time frames were entirely unreasonable and resulted in:
- 21.1. National Treasury failing to provide the Standing Committee with a full summary of and comments on all the public comments received on the Bill;<sup>7</sup>
- 21.2. A curtailing of Parliament's ability to familiarise themselves with all public comments received as a result of both the National Treasury's failure to summarise the comments<sup>8</sup> and the scheduling of public hearings a matter of days after the call for comments closed; and
- 21.3. Limiting the time given to external stakeholders and Parliament to consider and respond to proposed amendments to the Bill.<sup>9</sup>

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<sup>6</sup> Founding Affidavit para 110.

<sup>7</sup> Consolidated Founding Affidavit paras 33 – 34; 45 – 46; and 48.

<sup>8</sup> Consolidated Founding Affidavit para 39.

<sup>9</sup> Consolidated Founding Affidavit paras 38 – 43; 50 – 51.

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22. The Act was rushed through Parliament, undermining the reasonableness of the opportunities for public participation. These impacts were both built into the process from the outset and compounded by developments along the way.
23. This prevented Parliament from considering all the submissions. Instead Parliament engaged with submissions superficially because of time constraints it imposed on itself. This deprived the public, on numerous occasions, of the ability to meaningfully contribute to the legislative process.

#### **ALLEGED ADEQUATE ENGAGEMENT WITH THE REVISED CHAPTER 4**

24. The respondents allege that, through previous engagement and further opportunities for participation, the public was afforded an adequate opportunity to engage with the revised Chapter 4.
25. The respondents underplay the significance of the changes introduced through the revised Chapter 4 and overstate the public's prior engagement with its contents. The decision to introduce material changes *after* public comments closed a meaningful opportunity for engagement.

#### The content of the revised Chapter 4 was not adequately foreshadowed by clause 17

26. The revised Chapter 4 replaced clause 17 in the original B18-2023 Bill. The respondents allege that the revised Chapter 4 was foreshadowed by clause 17 and therefore did not materially change the content of the Bill and "*did not introduce materially new subject matter.*" This is incorrect for two reasons.

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27. First, there are significant differences between clause 17 and the revised Chapter 4.
28. Clause 17 was a broad empowering provision. It afforded organs of state wide discretion to determine and implement preferential procurement policies that gave preference to certain bidders. It identified general categories of persons to be preferred, required the inclusion of monetary thresholds for triggering such preferences, and contemplated that detailed methods, targets and thresholds would be prescribed in regulations.
29. Clause 17 further provided that a procurement policy “must include” specified measures designed to advance these preferred categories. These measures included the setting aside of bids for particular classes of bidders, and the imposition of mandatory sub-contracting requirements to promote designated groups.
30. Clause 17 did not prescribe how set-asides or sub-contracting were to be implemented, nor did it specify the circumstances in which either measure should be used, whether generally or in relation to one another. The application of these measures therefore remained within the discretion of the relevant organ of state, unless or until regulations were promulgated to guide the exercise of that discretion.
31. In comparison, the revised Chapter 4 contained eight clauses, each prescribing in substantial detail the methods that organs of state were required to adopt when preferring specified categories of bidders. These provisions were materially more detailed than clause 17 and significantly altered the manner in which the stipulated measures would be implemented.

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32. The revised Chapter 4 also introduced pre-qualification as a further mandatory mechanism of preferential procurement a measure not contemplated in clause 17. It required that an institution must, within the thresholds and conditions prescribed by the Minister, use certain BB-BEE scoring bidders and bidders who will subcontract a minimum percentage of the work to a list of 10 categories of bidders as prequalification criteria for each bid. The effect is that if a bidder fails to meet any of these requirements, their bid constitutes an unacceptable bid, and the bidder will be disqualified before the bidding process even begins. The statutory consequences that flowed from section 18 therefore had no counterpart in clause 17.
33. The introduction of prequalification criteria by section 18 of the Act alone refutes the respondents' allegation that the revised Chapter 4 introduced no new concepts.
34. Clause 17(2) required an institution's policy to include preference point systems, thresholds and measures for preferring categories of persons, goods and services, as well as set-asides and subcontracting. Clause 17(3) required regulations on the application of point systems, thresholds and measures for goods and services, but was silent on regulations governing how institutions should apply preferences for categories of persons or implement set-asides and subcontracting. Institutions therefore retained discretion to determine which persons to prefer and how set-asides and subcontracting would operate in their own policies.
35. By contrast, the revised Chapter 4 required organs of state to use either pre-qualification criteria or set-asides in all bid conditions and fixed specific targets

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for each. It further prescribed the hierarchy of thresholds: those for pre-qualification had to exceed those for set-asides, and those for subcontracting had to exceed pre-qualification thresholds. The power to set further thresholds and conditions now lay with the Minister of Finance. This represented a material shift in how these measures would be implemented.

36. Comparing set-asides, the impact of this prescriptive detail is clear.

36.1. Clause 17(2)(c)(i) required an institution's policy to include measures for setting aside bids to promote specified categories of persons, enterprises, goods or services. Clause 17(3) did not require regulations on the use of set-asides. Institutions were therefore obliged to include set-asides as a measure, but retained full discretion on when and how to apply them and for what objectives.

36.2. Section 17 of the Act as introduced in the revised Chapter 4, was materially different. It required institutions to set aside bids for categories of persons listed in subsection (3) in accordance with prescribed thresholds and conditions. Unlike clause 17, section 17 itself fixed the targets for set-asides, and the Minister was now obliged to prescribe the applicable thresholds and conditions. This represented a clear and substantial change in the creation and implementation of set-asides.

37. The revised Chapter 4 introduced a level of prescriptive detail that significantly constrained organs of state's discretion to design and implement preferential procurement policies, constraints that did not exist under clause 17. Although some mechanisms had been mentioned in clause 17, they were neither defined nor applied in the manner later prescribed.

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38. The respondents conceded the material difference by stating that the purpose of the revision was to “unpack and elaborate upon” clause 17. The need for elaboration demonstrated that clause 17 left substantive gaps, and the added detail necessarily altered and narrowed the discretion previously afforded to organs of state. This is confirmed by the revised Chapter 4, which now fixed thresholds, defined categories of bidders and prescribed when particular methods of preference must be used.
39. Importantly, under clause 17, such detail could only have been introduced through regulations subject to a further public participation process under clause 58(3). By inserting this substantive detail directly into the amended Chapter 4 after the primary public participation process before the National Assembly had closed, National Treasury effectively bypassed that requirement.

Material similarities between the revised Chapter 4 and the regulations under the PPPFA

40. The respondents also contended that the revised Chapter 4 was “conceptually similar” to the PPPFA regulations and suggested that the public comment process for those regulations constituted adequate engagement for the revised Chapter 4. This contention is legally untenable in the context of public participation in the legislative process, and is flawed for various reasons.
41. First, it is incompatible with a plain reading of the revised Chapter 4 together with the PPPFA regulations.
42. The PPPFA regulations never provided for set-asides. These were first introduced in clause 17 and, to my knowledge, appear nowhere else in

  
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procurement legislation or regulations. Set-asides were therefore a new concept at the level of national legislation. While they may have been mentioned in a Treasury Instruction Note, such notes do not constitute "legislation or regulations" and, to the best of my knowledge, were not subject to any public participation process.

43. It may be suggested that "pre-qualification" under regulation 4 of the 2017 PPPFA Regulations has the same legal effect as "set-asides" under section 17 of the Act. If so, this would create a material anomaly in Chapter 4, as both set-asides (section 17) and pre-qualification (section 18) are separately provided for. They are therefore conceptually distinct, and set-asides as defined in the Act were not addressed in prior regulations.
44. The treatment of other measures, including pre-qualification, subcontracting and local content, is materially different in the Act from how they were articulated in the PPPFA Regulations. I therefore deny that any prior public participation in relation to these measures can excuse Parliament from conducting a participation process for their current articulation in Chapter 4.
45. The other measures provided for in the revised Chapter 4, namely subcontracting, pre-qualification and local content, did appear in the PPPFA regulations. However, this does not support the respondents' conclusion, as their implementation under the PPPFA regulations was materially and substantially different from how they were implemented under the revised Chapter 4.
  - 45.1. The 2001 PPPFA Regulations, attached hereto as **CJA1** provided for preferential procurement in terms of an 80/20 or 90/10 preference points system for goods and services and for the sale and letting of assets. The

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80 or 90 percentage points to be allocated for price and the 20 or 10 percentage points to be allocated for any of the following:

- 45.1.1. being a historically disadvantaged individual,
- 45.1.2. subcontracting with a historically disadvantaged individual,
- 45.1.3. promotion of South African owned enterprises,
- 45.1.4. promotion of export oriented production to create jobs,
- 45.1.5. promotion of SMME's;
- 45.1.6. the creation of new jobs or the intensification of labour absorption;
- 45.1.7. the promotion of enterprises located in a specific province for work done or services rendered in that province;
- 45.1.8. the promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
- 45.1.9. the promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
- 45.1.10. the promotion of enterprises located in rural areas;
- 45.1.11. the empowerment of the work force by standardising the level of skill and knowledge of workers;
- 45.1.12. the development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators

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such as percentage of wage bill spent on education and training and improvement of management skills; and

- 45.1.13. the upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.
- 45.2. All these goals under the 2001 PPPFA Regulations could only account for 10 or 20 points out of 100 in evaluating a bidder's eligibility, with preference based on other factors outside price assigned a portion of the overall points. Equity-based criteria, such as HDI and other specific goals, were therefore applied only at this points-based stage. By contrast, the revised Chapter 4 materially changed this approach. Sections 21 and 22 now empower procuring institutions to advance sustainable development, beneficiation, innovation, job creation, labour absorption and the development of small enterprises within specified geographical areas, and allow these criteria to exclude bidders from participating entirely if they do not meet them. Under the revised Chapter 4, unlike the 2001 PPPFA Regulations, these criteria can invalidate bids, representing a substantial and material change.
- 45.3. The 2011 PPPFA Regulations, attached hereto as **CJA2** provided for preferential procurement using the same points system as the 2001 Regulations. The main difference for present purposes is that the 10 or 20 points were allocated in terms of the B-BBEE status level contribution of the bidder.
- 45.4. Therefore, the HDI and specific goals criteria was replaced with the B-BBEE criteria as means to measure the 10 or 20 points. Again, it is at this stage that equity-based criteria (now in terms of the B-BBEE) were used as

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a basis to evaluate the awarding of contracts. Local production and content was separated from the 10 or 20 points calculation, allowing it, in certain designated sectors, to qualify or disqualify bidders outright. Only after this stage were remaining bidders allocated up to 10 or 20 points based on their B-BBEE contributor status. In effect, local content became an additional equity-based criterion for evaluating contract awards.

45.5. Significantly, under the 2011 PPPFA regulations, there was no basis to pre-qualify (and pre-disqualify) bidders based on the categories set out in Chapter 4.

45.6. The 2017 PPPFA Regulations, attached hereto as **CJA3**, provided for a much more complex preferential procurement system, but one which still differed from that provided for in the revised Chapter 4:

45.6.1. First, it provided for a similar points system as prescribed under the previous regulations.

45.6.2. Second, in regulation 4, it introduced pre-qualification as bidders could now be excluded from participating in bids if they did not meet the criteria set out in bids within the framework of regulation 4. However, the use of prequalification was discretionary.

45.6.3. If an institution were to use prequalification, they were required to set it out as a condition of the bid, and that condition must state that only a defined category of bidders must respond.

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- 45.6.4. This provision had multiple legal effects, including that if the category placed in the prequalification condition was not one of the bidders stated in regulation 4(1)(a) to (c), then the condition would be invalid.
- 45.6.5. The discretionary nature of prequalification under the regulations differs significantly from the prescriptive use under the revised Chapter 4. This changes how prequalification will be implemented under the Act in comparison to how it was implemented under regulation 4.
- 45.6.6. Third, it included similar provisions for local production or content as the 2011 PPPFA Regulations.
- 45.6.7. Fourth, it provided for subcontracting, requiring, among other things, institutions to subcontract for contracts above R30 million to a defined category of bidders (the same category of bidders for which prequalification applies), where feasible.
- 45.6.8. On 16 February 2022, this Court set aside the 2017 Regulations because, by introducing measures such as pre-qualification, and stating how it should be implemented, the Minister made policy on how institutions would do preferential procurement when he was not empowered to do so in terms of section 2(1) of the PPPFA, which only empowered the Minister to create regulations to help institutions implement *their own* preferential procurement policies. Parliament has sought to cure this problem by incorporating the essence of the 2017 Regulations into the revised Chapter 4 itself. If regard is had to the fact that Parliament did *not* seek to do this in clause 17, its attempt to do this in the revised Chapter 4, and in light of this Court's judgment in

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*Afribusiness*, it is clear that these were matters of substance that had been forgotten in clause 17 that had to now be included in the revised Chapter 4. Therefore, the revised Chapter 4 is not simply an “expansion” or “unpacking”.

- 45.7. The 2022 PPPFA Regulations, attached hereto as **CJA4**, cured the lacuna that was left by the setting aside of the 2017 PPPFA Regulations. It essentially reverted back to its 2001 form. It provided for a preference points system wherein 80 or 90 points would be allocated for price and 20 or 10 points would be allocated for “specific goals” as set out in section 2(1)(d) of the PPPFA. These *may* include, contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender and disability. Notably, no other equity measures which could be used as a basis to pre-qualify or pre-disqualify bidders are included. Additional equity (and other) measures are thus left entirely for institutions to determine themselves in their policies (subject, of course, to the proviso that they comply with section 217(1) of the Constitution).
- 45.8. The respondents’ allegation that the contents of the revised Chapter 4 had “*been through a process of public participation*” and that “*the Procurement Act was drafted with the benefit of public input already solicited and received*” is mistaken.
46. Second, the public comment process followed in the adoption of the regulations under the PPPFA is markedly different to public participation process followed when processing national legislation. Significantly, the respondents do not tender

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any evidence demonstrating the nature of the public comment process that accompanied the adoption of regulations under the PPPFA.

47. In any event, even if they had tendered such evidence, the process leading to the adoption of delegated legislation in the form of regulations could never discharge Parliament's duty to consult on national legislation.
48. Parliament's obligations under sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution are specific to each piece of legislation placed before it. The contextually specific nature of public participation means that previous public participation can never be attributed to new and different pieces of draft legislation.

#### Opportunity to engage with the revised Chapter 4

49. The respondents say that the public had an opportunity to engage with the revised Chapter 4 after its introduction. They, however, do not demonstrate that this was reasonable or adequate. The test for reasonable public participation requires consideration of Parliament's views on what was appropriate, given the nature of the Act and its impact. Parliament merely asserts that the process was reasonable, failing to show a key factor necessary for this Court to evaluate its adequacy.
50. In both our founding and consolidated founding affidavits,<sup>10</sup> we demonstrate, at length that the opportunity afforded to the public was patently unreasonable. Parliament failed to meet a key requirement set out by this Court that it must afford

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<sup>10</sup> Founding Affidavit paras 52 – 53 and Consolidated Founding Affidavit paras 36 – 43.

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members of the public and all interested parties a reasonable opportunity to know about the issues and have an adequate say.

## **PARLIAMENT FAILED TO GIVE DUE CONSIDERATION TO ALL PUBLIC COMMENTS**

51. The respondents accept that they did not respond to all the public comments received, however, they say that they did give due consideration to all comments received from the public. They contend that the process was nevertheless reasonable because, through National Treasury, Parliament considered the comments by bunching them up in thematic areas and then responding to those themes.

52. We accept that the standard of reasonable public participation does not necessitate the integration of every public comment into legislation. Regardless, in order to ensure that the public is given a real opportunity to influence legislative outcomes, as this Court has stated, comments must be transmitted or accurately transmitted to Parliament and it must take account the public's views. The respondents have failed to demonstrate that this requirement was met.

### Lack of evidence of transmission and accounting of submissions

53. The respondents do not provide actual evidence of the fact that they duly considered all the public comments received. Instead, they describe the approach National Treasury is alleged to have adopted, which entailed reviewing all the comments to identify the thematic issues emanating from all the comments and responding to the broader themes that emerged from the public comments.

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54. They do not offer any evidence of the implementation of this approach, demonstrating how each comment received was reviewed and categorised according to the relevant themes. If the respondents had implemented the approach described above, at the very least, they should be able to provide evidence of how each comment was categorised. However, no such information is before this court.

Clear evidence of Parliament's failure to take account of public comments

55. National Treasury's engagement with public comments during the legislative process in fact demonstrates a failure to consider all comments and does not support the respondents' allegation that all comments were at least considered thematically.

55.1. First, when National Treasury first addressed the Standing Committee during the 17 November 2023 virtual meeting, National Treasury acknowledged that it had only considered 25 of the 112 public comments received on the Bill.<sup>11</sup> During the 23 November 2024 virtual meeting, National Treasury stated that it had responded to a further 16 comments.<sup>12</sup>

55.2. Second, the updated comment matrix presented by National Treasury at the meeting of 23 November shows that the comments responded to by National Treasury were the first 41 that featured in the matrix.

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<sup>11</sup> Founding Affidavit para 51 and Consolidated Founding Affidavit paras 33 – 34.

<sup>12</sup> Founding Affidavit para 54 and Consolidated Founding Affidavit para 45.

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56. This shows that National Treasury addressed the comments sequentially, as they appeared in the comment matrix, rather than thematically as the respondents allege.

57. Furthermore, National Treasury only presented to the Standing Committee in response to the comments made by stakeholders during the public hearings.<sup>13</sup> They did not present on the written comments received from the public.

58. Were the respondents to have implemented the approach they allege to have adopted, their feedback would have reflected a thematic engagement with all submissions. Instead, what was presented before the Standing Committee demonstrated a siloed engagement with written comments on the one hand and comments presented during public hearings on the other. With regards to the former, National Treasury appeared to engage sequentially with such comments.

#### **ALLEGED IRRELEVANCE OF STATEMENTS MADE DURING ENGAGEMENTS**

59. Finally, the respondents say that the statements relied upon by amaBhungane to demonstrate Parliament's conduct during the public participation process are irrelevant.

60. Parliament's obligation to facilitate meaningful public participation extends to the entire process, including hearings, sessions, and meetings with stakeholders and their submissions. This requires Parliament to demonstrate a genuine willingness to engage with and consider stakeholders' views.

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<sup>13</sup> First Founding Affidavit para 56.

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61. Parliament's conduct towards stakeholders affects the quality of engagement during hearings, sessions, and meetings. The comments I rely on show that some stakeholders were met with hostility and resistance, and that committee meetings were conducted in a manner that undermined meaningful engagement. Such hostility diminishes stakeholders' ability to persuade members, both because they feel personally undermined and because it suggests that members' minds may be closed to being persuaded.

62. This is the antithesis of what the standard of reasonable public participation requires.

63. We accept that reasonable public participation does not require the incorporation of all stakeholder views, and that parliamentary meetings naturally involve diverse viewpoints. However, there is a threshold between constructive disagreement, which allows room for persuasion, and dismissiveness, which closes the door to it. The statements relied upon in our founding affidavit illustrate such dismissiveness throughout the process.

64. Meaningful engagement requires Parliament to act in a manner that demonstrates all stakeholders are taken seriously throughout the public participation process.

Alleged application of parliamentary privilege

65. Parliamentary privilege is not applicable. This is an issue for legal argument which will be made at the appropriate time.

  
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Evidence of idiosyncratic views of individual committee members

66. The respondents say that my reliance on the individual views expressed by committee members is misplaced. They say that Parliament encapsulates a diversity of views and as such, we cannot attribute comments made by individual members to the entirety of Parliament as these views "*will never be an accurate representation of the attitude adopted by Parliament as a whole.*"<sup>14</sup>

67. Instead, they suggest that "*the best reflection of Parliament's attitude and approach is the legislation that is ultimately enacted after public comments have been given due consideration.*"<sup>15</sup>

68. However, the respondents overlook certain aspects of what the statements we refer to demonstrate.

68.1. First, these statements illustrate how Parliament engaged with the public during hearings and engagements. We do not rely on them to show that individual members disagreed with stakeholders, but to demonstrate that the manner in which members of the Standing and Select Committees engaged was at times dismissive and indicative of an unwillingness to listen or engage meaningfully. My own experience was one of frustration and disappointment. For example, reviewing the comment matrix provided by National Treasury revealed that amaBhungane's submissions, including

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<sup>14</sup> Second Answering Affidavit para 19.

<sup>15</sup> Second Answering Affidavit para 21.

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references to the UNCITRAL model law on transparency and integrity in procurement, had not been substantively engaged with, despite their relevance to mandatory mechanisms such as the publication of contract awards.

- 68.2. In the comment matrix, National Treasury responded that “the issues that are covered in some of the comments referencing procurement procedures from other jurisdictions, such as UNCITRAL law, including ‘Open Contracting’, are technical procurement issues that would be covered through regulations as provided for in clauses 18 and 58 of the Bill” [National Treasury Stakeholder Comment Matrix, 23 November 2023, F3329]. This was surprising, since Chapter 4 of the Act itself includes technical preferential procurement elements. It indicated that the points we sought to raise, discussed at length in our founding affidavit, had not been taken into account at all.
- 68.3. Given the extremely short 2 minute period of time we were given to speak, much of the time was taken up having to respond to issues that were not related to our concerns about the Bill’s content. For example, in the 17 April 2024 meeting in the NCOP, we had to explain that we had only received the Treasury report under discussion the day before and so could not prepare a detailed response. Another example was having to respond to the questions about amaBhungane’s own commitment to transparency in the 13 September 2023 meeting. These were not simply “idiosyncratic views”. Those views being expressed in a public hearing undermined our legitimacy as stakeholders. We had important and constructive

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contributions to make but that we were constantly on the back foot and not able to contribute with the rigour we expect from ourselves, this is exacerbated by the extraordinarily limited time we were given to make oral submissions.

- 68.4. We were left with a feeling of disappointment at the level of political grandstanding and attempts to delegitimise the credibility of civil society participants. The comments we highlighted in our Consolidated Founding Affidavit where members of the committee questioned the commitment of civil society groups to transformation in the 13 September 2023 meeting created an atmosphere of distrust. As civil society it felt that the detailed analysis, research and submissions we had done would not be taken seriously by the parliamentarians because of perceived political differences and, certainly in amaBhugane's case, an incorrect interpretation of our position on transformation.
- 68.5. In any event, a group's position on a political topic should not disqualify them from having their views – particularly on issues unrelated to that topic – meaningfully considered.
- 68.6. In addition, the focus of the parliamentarians on the question of transformation was disproportionate: while transformation may be relevant to questions of preferential procurement, that is only one section of an important technical Bill. However, preferential procurement and its attendant link to economic transformation is a popular topic. It was disappointing that, instead of seeking to understand the technical aspects of procurement, the parliamentarians sought an opportunity to divert the

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attention and criticise civil society. The reference to the comments in my founding affidavit serves simply to illustrate this.

68.7. Second, the comments relied upon also demonstrated how public engagements were facilitated. Here, the respondents overlook the fact that many of the comments referenced were comments made from the chairperson of the respective committees or key figures from National Treasury. These were all individuals tasked with guiding and facilitating the public participation process.

68.8. Their comments reflect how the public participation process overall was facilitated and how members of Parliament were guided in their interactions with stakeholders, their consideration of stakeholders' comments, and in their deliberative process. This comments thus also evidence how the process of engagement was run.

69. The respondents' assertion that the quality of Parliament's engagement can be assessed solely through the legislation enacted after public comments is incorrect. The legislative product may show which submissions were accepted, but it does not reveal whether members of Parliament were open to persuasion or whether the process itself was reasonable and meaningful.

Alleged failure to illustrate the quality of public participation

70. Finally, the respondents suggest that the comments we rely on have little probative value.

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71. First, they suggest that the statements "*which are recorded as having been made by individual members within a parliamentary context cannot stand as proof of the truth of the content of those statements.*"<sup>16</sup> The statements are all drawn from the public reports of the respective parliamentary hearings and meetings and the respondents do not go further to dispute the accuracy of any of the comments.

72. Second, they allege that reliance on such comments indicates an impermissible inductive mode of reasoning as these comments cannot demonstrate the attitude of Parliament as a whole or speak to the adequacy of the Act's overall public participation process.

73. However, this negates the fact that the public participation process, and public engagements in particular, are comprised of individual members of Parliament's engagement with the public. When Parliament is required to demonstrate meaningful engagement with stakeholders' comments, this requires individual members of Parliament to conduct themselves in a way that illustrates this engagement.

74. Parliament does not engage with the public as a standalone entity, rather it is through individual committee members that engagement ultimately takes place. The conduct of members must be considered to determine whether Parliament did meaningfully engage with the public. If committee members react dismissively towards stakeholders, it cannot be said that Parliament meaningfully engaged with those stakeholders.

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<sup>16</sup> Second Answering Affidavit para 9.1.

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## PARAGRAPH-BY-PARAGRAPH RESPONSES

75. I now turn to respond to both answering affidavits on a paragraph-by-paragraph basis and address those specific aspects that require a response not already given in the preceding sections of this replying affidavit.

76. Where I do not specifically address a legal or factual allegation, to the extent that it is inconsistent with amaBhungane's founding affidavit in our intervention application, our consolidated founding affidavit and what is stated above in this replying affidavit, such allegation is denied.

### The First Answering Affidavit

#### Ad para 10.1

77. We admit the contents of this paragraph.

#### Ad para 10.2

78. We deny the contents of this paragraph.

79. We deny that the revised Chapter 4 was subject to a "*comprehensive consultation process*", as I have detailed above.

#### Ad para 10.3.

80. We admit the contents of this paragraph.

81. We admit, in particular the respondents concession that stakeholders must be afforded a reasonable opportunity to participate in the legislative process in a manner capable of influencing the legislative outcome of the process.

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Ad para 42

82. We deny the contents of this paragraph.

83. We specifically deny the respondents' allegation that the public participation process preceding the adoption of the Act met and exceeded the standard of reasonableness.

Ad para 50

84. We deny the contents of this paragraph.

85. The respondents provide no supporting evidence of the extension of the deadline for public comments they allege to have granted to those who requested such an extension. No mention is made of requests of such an extension, until when an extension was granted, how many further comments were received and whether those comments were considered by the respondents.

Ad para 51

86. We admit the contents of this paragraph.

87. We admit, in particular, the absence of any mention of pre-qualification criteria in the original Clause 17.

Ad paras 52 - 53

88. We deny the contents of this paragraph.

89. The respondents' indication that the Chairperson of the Standing Committee decided that stakeholders would still be permitted to make written submissions of the Bill does not provide any detail of the adequacy of this indulgence. Moreover,

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it was an indulgence granted on to the select number of stakeholders present during the public hearings.

Ad paras 54 - 55

90. We deny the contents of this paragraph.

91. We deny, in particular the respondents' averment that the introduction of amendments to Chapter 4 was intended to "*unpack and elaborate upon the provisions that had originally been included in Clause 17*". As discussed above, the revisions introduced material changes to Chapter 4.

Ad para 56

92. We admit the contents of this paragraph.

93. We admit, in particular the respondents' concession that National Treasury only provided responses to the Standing Committee on the submissions made to the Committee during the public hearings is noted. Therefore, the Standing Committee did not respond to the written submissions received which indicates that National Treasury did not in fact use a broad thematic approach to respond to submissions.

Ad para 72

94. We deny the contents of this paragraph.

95. As highlighted in our consolidated founding affidavit, at the start of the public participation process it was incorrectly impressed upon the Select Committee that they were bound by the eight-week cycle to process the Act.<sup>17</sup> The Committee

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<sup>17</sup> Consolidated Founding Affidavit para 58.

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would have acted under the assumption that they *had* to process the Bill in such a short time when the participation process thus first started. The respondents provide no evidence of how the impact of this incorrect understanding was subsequently addressed.

Ad paras 83 - 84

96. We deny the content of these paragraphs.

97. As detailed at length above, The opportunity to comment on the revised Chapter 4 was patently inadequate. I am advised that as the revised Chapter 4 introduced material changes to the Bill, it should have been subjected to a further public comment process.

Ad paras 85 - 87

98. We deny the content of these paragraphs.

99. For the reasons outlined in detail above, I deny the respondents' averment that the revised Chapter 4 did not contain provisions that had not been adequately foreshadowed in Clause 17.

100. Significantly, no mention of pre-qualification criteria can be found in the original clause 17(2)(c)(ii) and (iii) as averred by the respondents. These clauses only refer to subcontracting.

101. For the reasons outlined above, I also deny that stakeholders were provided with an adequate opportunity to comment on the content of the revised Chapter 4. It differed materially from other legislative instruments referred to by the respondents. Moreover, such instruments were not subject to robust public

participation and even if they were, such engagement cannot be imputed to a separate legislative instrument.

Ad paras 88 - 89

102. We deny the content of these paragraphs.

103. The fact that Parliament did not consider the changes introduced through the revisions to Chapter 4 to be material and thus failed to seek permission from the National Assembly to introduce such changes does not prove that the changes were not material. That is an objective inquiry, to which Parliament's subjective views on the matter are not relevant.

Ad paras 90 - 91

104. We deny the contents of this paragraph.

105. We deny that the content of the revised Chapter 4 was materially similar to the regulations under the PPPFA. As detailed above, I also deny that those regulations were subject to a public participation process that is reasonable in the context of primary legislation, and which can be imputed to an entirely separate legislative instrument.

Ad para 92

106. We deny the contents of this paragraph.

107. We deny the allegation that the revised Chapter 4 was subject to an extensive and adequate public participation process.

Ad paras 93 - 94

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108. We deny the content of these paragraphs.

109. The respondents fail to evidence their averment that it was not practical to provide adequate responses to the submissions. As detailed previously, National Treasury explained that it was time constraints which prevented their engagement with all the comments received.

Ad para 95

110. We deny the contents of this paragraph.

111. The respondents do not offer any proof of the implementation of the approach they aver National Treasury adopted when responding to public comments.

112. As discussed above, both National Treasury's responses and their use of the comment matrix demonstrates that comments were considered sequentially, and not thematically.

Ad para 96

113. We deny the contents of this paragraph.

114. We are advised that it is ultimately Parliament that bears the obligation to demonstrate the reasonableness of their public participation process. The respondents' reliance on the principle of *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* in the absence of evidence demonstrating the reasonableness of the public participation process they facilitated is thus misplaced.

Ad para 97

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115. We deny the contents of this paragraph.

116. We specifically deny that there is no basis on which to conclude that the comments and submissions received from the public were not properly considered.

Ad paras 103 - 104

117. We deny the content of these paragraphs.

118. While the respondents have conceded to the rationale behind the timeframes for public participation, they notably did not demonstrate the adequacy thereof.

119. The fact that the regulations that are to be promulgated under the Act will be subject to further public participation does not and cannot remedy deficiencies in the public participation process that accompanied the Act itself.

Ad para 120

120. I deny the contents of these paragraphs.

121. As stated above, the respondents provided no evidence of National Treasury having considered all the public comments received. Moreover, National Treasury's own feedback demonstrates otherwise.

Ad para 121

122. We deny the contents of this paragraph.

123. I have extensively demonstrated that the revised Chapter 4 did not go through a proper public participation process, the contents of this paragraph are therefore denied.

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Ad para 122

124. We deny the contents of this paragraph.

125. We specifically deny that the public was afforded sufficient time to participate in the public participation process preceding the Act.

Ad para 155

126. We deny the contents of this paragraph.

127. As explained above, the revisions to Chapter 4 were material and necessitated a further opportunity for public comment.

Second Answering Affidavit

Ad para 9

128. We deny the contents of this paragraph.

129. As explained above, the conduct of the members of Parliament involved in the public participation process is a relevant factor in assessing whether Parliament meaningfully engaged with the public. Their conduct is critical to establishing whether stakeholders were met with open minds capable of persuasion or resistance or dismissiveness. The latter would render the public participation process meaningless.

Ad paras 10 -16

130. We deny the content of these paragraphs.

131. We specifically deny that parliamentary privilege finds application here.

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132. As discussed above, we do not seek to impose civil or criminal liability on any member of Parliament. We merely seek to establish if Parliament, including the members thereof, discharged their constitutional obligation to facilitate reasonable public participation.

133. The comments referred to were also, in fact, not indicative of a "*rigorous and robust debate*" as alleged by the respondents. They demonstrate how engagement with stakeholders during the public participation process was stilted and dismissive.

Ad paras 24 - 27

134. We deny the contents of this paragraph.

135. The Powers and Privileges Act is entirely irrelevant in this matter.

Ad para 33

136. We deny the contents of this paragraph.

137. As the revisions to Chapter 4 introduced material changes to the content of the Bill, I deny the respondents' allegation that the Bill did not need to be subjected to further public comment.

Ad paras 34 - 35

138. We deny the contents of these paragraphs.

139. We are informed that Parliament bears the onus of demonstrating the reasonableness of their chosen methods of public participation. Moreover, as

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highlighted above, National Treasury and Parliament failed to take all public comments into account.

Ad paras 38 - 39

140. We deny the contents of these paragraphs.

141. The disposition of members during public hearings is a relevant factor in establishing whether Parliament meaningfully engaged with all stakeholders and took their submissions into account and with an open mind.

Ad para 40

142. We deny the contents of this paragraph.

143. We deny the respondents' averment that National Treasury and Parliament did not fail to adequately take all the public comments into account. As detailed above, no evidence is provided in support of this allegation and the evidence on record indicates that they did not.

Ad paras 43

144. We deny the contents of this paragraph.

145. We deny that parliamentary privilege shields members of Parliament from an assessment of whether they discharged their constitutional obligations to facilitate meaning for public participation.

Ad paras 47

146. We deny the contents of this paragraph.

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147. We do not suggest that stakeholders have a right to have their comments reflected in legislation. However, their comments must be taken into account. If not, those comments have no ability to influence the final legislative product.

Ad para 48

148. We deny the contents of this paragraph.

149. We deny that parliamentary privilege shields members of Parliament from an assessment of whether they discharged their constitutional obligations to facilitate meaning for public participation.

Ad paras 49 - 50

150. We deny the contents of this paragraph.

151. As stated, elsewhere throughout our affidavits, the fact that we opted not to make oral submissions but elected merely to make written comments would not render us any less worthy of the opportunity to engage further with the Select Committee.

152. The respondents' reliance on the fact that the meetings were public is also denied. Access to the Zoom platform on which the meeting was held was not publicly available.

Ad para 51

153. We deny the contents of this paragraph.

154. The reasonableness of the method adopted for further participation should be established with reference to its adequacy to communicate the views of the

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relevant stakeholders. The respondents do not attempt to establish how this could be done in bullet form in two pages.

Ad para 52

155. We deny the contents of this paragraph.

156. The public participation process was rushed, and is the product of self-created urgency.

157. The respondents contentions to the contrary contradicts the stance adopted in the first answering affidavit where the respondents admit that they were operating on a limited timeframe to ensure the passage of the Act before the 2024 general election.

158. I again reiterate that parliamentary privilege is irrelevant to the assessment of whether Parliament discharged its constitutional obligations.

Ad paras 57 - 65

159. We deny the contents of this paragraph.

160. The respondents fail to address the fact that instructions given to the Select Committee by Mr Carrim as the Committee Chairperson as well as other comments made by him on the nature of the participation process and stakeholder engagement frame and guide the Committee's engagement with stakeholders.

161. Moreover, his conduct, as with the conduct of any other member of Parliament, is relevant to demonstrating Parliament's willingness or lack thereof to engage with stakeholders.

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**CONCLUSION**

162. For the reasons set out in this replying affidavit amaBhungane persists in the relief sought in the notices of motion in the consolidated application.

James

**CAROLINE JAMES**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct.

This affidavit was signed and sworn to before me at ROSEBANK on this the 2<sup>nd</sup> day of DECEMBER 2025, and that the Regulations contained in Government Notice R. 1258 of 21 July 1972, as amended by R. 1648 of 19 August 1977, and as further amended by R 1428 of 11 July 1989, having been complied with.

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77845789  
NIP# [unclear] [unclear]  
**COMMISSIONER OF OATHS**

15 SUNDICE AVENUE  
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SOUTH AFRICAN POLICE SERVICE
VISPOL COMMANDER
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**GOVERNMENT NOTICES  
GOEWERMENTSKENNISGEWINGS**

**DEPARTMENT OF FINANCE  
DEPARTEMENT VAN FINANSIES**

No. R. 725

10 August 2001

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

**Contents**

**PART ONE DEFINITIONS AND APPLICATION**

- 1 Definitions
- 2 Application

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

- 3 The 80/20 preference point system
- 4 The 90/10 preference point system
- 5 The 80/20 preference point system for the sale and letting of assets
- 6 The 90/10 preference point system for the sale and letting of assets
- 7 Stipulation of preference point system to be used
- 8 Evaluation of tenders on functionality and price
- 9 Award of contract to tender not scoring the highest number of points
- 10 Cancellation and re-invitation of tenders

**PART THREE DUTY TO PLAN, GENERAL CONDITIONS, PRINCIPLES,  
DECLARATIONS, PENALTIES, TAX CLEARANCES AND  
TENDER GOALS**

- 11 Duty to plan for invitation of tenders
- 12 General conditions
- 13 Principles
- 14 Declarations
- 15 Penalties
- 16 Tax clearance certificate
- 17 Specific goals
- 18 Short Title

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## REGULATIONS

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

### SCHEDULE

#### PART ONE

#### DEFINITIONS AND APPLICATION

##### Definitions

1. In these regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act bears the same meaning, and-
  - (a) **"Act"** means the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000);
  - (b) **"Agent"** means a person mandated by another person ("the principal") to do business for and on behalf of, or to represent in a business transaction, the principal, and thereby acquire rights for the principal against an organ of state and incur obligations binding the principal in favour of an organ of state;
  - (c) **"Comparative price"** means the price after the factors of a non-firm price and all unconditional discounts that can be utilised have been taken into consideration;
  - (d) **"Consortium or Joint Venture"** means an association of persons for the purpose of combining their expertise, property, capital, efforts, skill and knowledge in an activity for the execution of a contract;
  - (e) **"Contract"** means the agreement that results from the acceptance of a tender by an organ of state;
  - (f) **"Disability"** means, in respect of a person, a permanent impairment of a physical, intellectual, or sensory function, which results in restricted, or lack of, ability to perform an activity in the manner, or within the range, considered normal for a human being;

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- (g) **"Firm price"** is the price that is only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax which, in terms of a law or regulation is binding on the contractor and demonstrably has an influence on the price of any supplies, or the rendering costs of any service, for the execution of the contract;
- (h) **"Historically Disadvantaged Individual (HDI)"** means a South African citizen –
- (1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) ("the Interim Constitution"); and / or
  - (2) who is a female; and / or
  - (3) who has a disability:
- Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI;
- (i) **"Management"** in relation to an enterprise or business, means an activity inclusive of control and performed on a daily basis, by any person who is a principal executive officer of the company, by whatever name that person may be designated, and whether or not that person is a director;
- (j) **Non-firm prices"** means all prices other than "firm" prices;
- (k) **"Person"** includes reference to a juristic person;
- (l) **"Rand value"** means the total estimated value of a contract in Rand denomination which is calculated at the time of tender invitations and includes all applicable taxes and excise duties;

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- (m) **"Small, Medium and Micro Enterprises (SMMEs)"** bears the same meaning assigned to this expression in the National Small Business Act, 1996 (Act No102 of 1996);
- (n) **"Sub-Contracting"** means the primary contractor's assigning or leasing or making out work to, or employing, another person to support such primary contractor in the execution of part of a project in terms of the contract;
- (o) **"Tender"** means a written offer or bid in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services or goods;
- (p) **"Trust"** means the arrangement through which the property of one person is made over or bequeathed to a trustee to administer such property for the benefit of another person;
- (q) **"Trustee"** means any person, including the founder of a trust, to whom property is bequeathed in order for such property to be administered for the benefit of another person.

#### Application

- 2.(1) Despite anything to the contrary contained in any law, these regulations apply to organs of state as contemplated in section 1 (iii) of the Act.
- (2) An organ of state contemplated in sub-regulation (1) must, unless the Minister of Finance has directed otherwise, only apply a preferential procurement system which is in accordance with the Act and these regulations.
- (3) An organ of state may deviate from the framework contemplated in section 2 of the Act in respect of a pre-determined tariff based professional appointments.

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**PART TWO****PREFERENCE POINT SYSTEM, EVALUATION OF TENDERS, AWARDING OF TENDERS NOT SCORING HIGHEST POINTS, CANCELLATION AND RE-INVITATION OF TENDERS****The 80/20 preference point system**

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

$$P_s = 80 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where

$P_s$  = Points scored for price of tender under consideration

$P_t$  = Rand value of offer tender consideration

$P_{\min}$  = Rand value of lowest acceptable tender

- (2) A maximum of 20 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.
- (3) The points scored by a tenderer in respect of the goals contemplated in sub-regulation (2) must be added to the points scored for price.
- (4) Only the tender with the highest number of points scored may be selected.

**The 90/10 preference point system**

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

$$P_s = 90 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

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Where

$P_s$  = Points scored for price of tender under consideration

$P_t$  = Rand value of tender under consideration

$P_{min}$  = Rand value of lowest acceptable tender

- (2) A maximum of 10 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.
- (3) The points scored by a tenderer in respect of the goals contemplated in sub-regulation (2) must be added to the points scored for price.
- (4) Only the tender with the highest number of points scored may be selected.

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

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

$$P_s = 80 \left( 1 + \frac{P_t - P_h}{P_h} \right)$$

Where

$P_s$  = Points scored for price of tender under consideration

$P_t$  = Rand value of tender under consideration

$P_h$  = Rand value of highest acceptable tender

- (2) A maximum of 20 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.
- (3) The points scored by a tenderer in respect of the goals contemplated in sub-regulation (2) must be added to the points scored for price.
- (4) Only the tender with the highest number of points scored may be selected.

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

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

$$P_s = 90 \left( 1 + \frac{P_t - P_h}{P_h} \right)$$

Where

- $P_s$  = Points scored for price of tender under consideration  
 $P_t$  = Rand value of tender under consideration  
 $P_h$  = Rand value of highest acceptable tender

- (2) A maximum of 10 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.
- (3) The points scored by a tenderer in respect of the goals contemplated in sub-regulation (2) must be added to the points scored for price.
- (4) Only the tender with the highest number of points scored may be selected.

### Stipulation of preference point system to be used

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

### Evaluation of tenders on functionality and price

- 8.(1) An organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price.
- (2) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value equal to, or below, R500 000, not exceed 80 points.
- (3) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value above R500 000, not exceed 90 points.

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- (4) When evaluating the tenders contemplated in this item, the points for functionality must be calculated for each individual tenderer.
- (5) The conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication.
- (6) The points for price, in respect of a tender which has scored the specified number of points contemplated in sub-regulation (5) must, subject to the application of the evaluation system for functionality and price contemplated in this regulation, be established separately and be calculated in accordance with the provisions of regulations 3 and 4.
- (7) Preferences for being an HDI and / or subcontracting with an HDI and / or achieving specified goals must be calculated separately and must be added to the points scored for functionality and price.
- (8) Only the tender with the highest number of points scored may be selected.

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

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

#### **Cancellation and re-invitation of tenders**

- 10.(1) In the event that, in the application of the 80/20 preference point system as stipulated in the tender documents, all tenders received exceed the estimated Rand value of R500 000, the tender invitation must be cancelled.
- (2) In the event that, in the application of the 90/10 preference point system as stipulated in the tender documents, all tenders received are equal to, or below R500 000, the tender must be cancelled.
- (3) An organ of state which has cancelled a tender invitation as contemplated in sub-regulations (1) and (2) must re-invite tenders and must, in the tender documents, stipulate the preference point system to be applied.

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

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

### PART THREE

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

### Duty to plan for invitation of tenders

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

- (a) properly plan for, and, as far as possible, accurately estimate the costs of, the provision of services or goods for which an invitation for tenders is to be made;
- (b) determine the appropriate preference point system to be utilised in the evaluation of the tenders; and
- (c) determine the deliverables or performance indicators in terms of which a person awarded a contract will be assessed.

### General conditions

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

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- Should preference points be awarded for local manufacturing and/or content, the award of such points must be clearly specified in the tendering conditions.
- (2) Only a tenderer who has completed and signed the declaration part of the tender documentation may be considered for preference points.
  - (3) An organ of state may, before a tender is adjudicated or at any time, require a tenderer to substantiate claims it has made with regard to preference.
  - (4) An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally.
  - (5) A discount which has been offered conditionally must, despite not being taken into account for evaluation purposes, be implemented when payment is effected.
  - (6) In the event that different prices are tendered for different periods of a contract, the price for each period must be regarded as a firm price if it conforms to the definition of a "firm price".
  - (7) Points scored must be rounded off to the nearest 2 decimals.
  - (8) In the event that two or more tenders have scored equal total points, the successful tender must be the one scoring the highest number of preference points for specified goals. Should two or more tenders be equal in all respects, the award shall be decided by the drawing of lots.

### Principles

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

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- (3) In the event that the percentage of ownership contemplated in sub-regulation (2) changes after the closing date of the tender, the tenderer must notify the relevant organ of state and such tenderer will not be eligible for any preference points.
- (4) Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership.
- (5) Subject to sub-regulations (1), (2), (3) and (4), all claims made for equity ownership by an HDI must be considered according to the following criteria:
  - (a) Equity within private companies must be based on the percentage of equity ownership;
  - (b) Preference points may not be awarded to public companies and tertiary institutions;
  - (c) The following formula must be applied to calculate the number of points for equity ownership by an HDI:

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

Where

NEP = Points awarded for equity ownership by an HDI

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

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

- (6) Equity claims for a Trust may only be allowed in respect of those persons who are both trustees and beneficiaries and who are actively involved in the management of the Trust.
- (7) Documentation to substantiate the validity of the credentials of the trustees contemplated in sub-regulation (6) must be submitted to the relevant organ of state.

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- (8) A Consortium or Joint Venture may, based on the percentage of the contract value managed or executed by their HDI members, be entitled to equity ownership in respect of an HDI.
- (9) The number of points scored for a Consortium or Joint Venture must be added to the number of points scored for achieving specified goals.
- (10) The points contemplated in sub-regulation (9) must be added to the points scored for price, in order to establish the total number of points scored.
- (11) Subject to regulations 9 and 10, the contract must be awarded to the tender which scores the highest points.
- (12) A person awarded a contract as a result of preference for contracting with, or providing equity ownership to, an HDI, may not subcontract more than 25% of the value of the contract to a person who is not an HDI or does not qualify for such preference.

#### Declarations

14. A tenderer must, in the stipulated manner, declare that-
  - (a) the information provided is true and correct;
  - (b) the signatory to the tender document is duly authorised; and
  - (c) documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the relevant organ of state.

#### Penalties

- 15.(1) An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.
- (2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulations (1)-
  - (a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;

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- (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
- (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
- (d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.

#### Tax clearance certificate

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

#### Specific goals

- 17.(1) The tendering conditions may stipulate that specific goals, as contemplated in section 2(1)(d)(ii) of the Act, be attained.
- (2) The stipulation contemplated in sub-regulations (1) must include the method to be used to calculate the points scored for achieving specific goals.
  - (3) Over and above the awarding of preference points in favour of HDIs, the following activities may be regarded as a contribution towards achieving the goals of the RDP (published in *Government Gazette* No. 16085 dated 23 November 1994):
    - (a) The promotion of South African owned enterprises;
    - (b) The promotion of export orientated production to create jobs;
    - (c) The promotion of SMMEs;
    - (d) The creation of new jobs or the intensification of labour absorption;

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- (e) The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
  - (f) The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
  - (g) The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
  - (h) The promotion of enterprises located in rural areas;
  - (i) The empowerment of the work force by standardising the level of skill and knowledge of workers;
  - (j) The development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and
  - (k) The upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.
- (4) Specific goals must be measurable and quantifiable and organs of state must monitor the execution of the contract for compliance with such goals.

#### Short title

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

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

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

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

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



**PRAVIN J. GORDHAN  
MINISTER OF FINANCE**

**SCHEDULE**

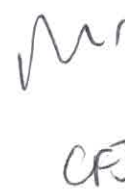
**Contents**

**PART ONE: DEFINITIONS**

1. Definitions
2. Application

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

3. Planning and stipulation of preference point system to be utilized
4. Evaluation of tenders on functionality
5. The 80/20 preference point system for the acquisition of goods, works and / or services up to a Rand value of R1 million
6. The 90/10 preference point system for the acquisition of goods, works and / or services with a Rand value above R1 million
7. Award of contracts to tenderers not scoring the highest number of points
8. Cancellation and re-invitation of tenders



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

9. Local production and content
10. B-BBEE status level certificates
11. Conditions
12. Declarations
13. Remedies
14. Tax clearance
15. Repeal of regulations
16. Short title and commencement

**PART ONE**

**DEFINITIONS AND APPLICATION**

**Definitions**

1. In these Regulations, any word or expression to which a meaning has been assigned in the Act has the meaning so assigned, and, unless the context otherwise indicates-
  - (a) **“Act”** means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
  - (b) **“all applicable taxes”** includes value-added tax, pay as you earn, income tax, unemployment insurance fund contributions and skills development levies;
  - (c) **“B-BBEE”** means broad-based black economic empowerment as defined in section 1 of the Broad-Based Black Economic Empowerment Act;
  - (d) **“B-BBEE status level of contributor”** means the B-BBEE status received by a measured entity based on its overall performance using the relevant scorecard contained in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;
  - (e) **“Broad-Based Black Economic Empowerment Act”** means the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
  - (f) **“comparative price”** means the price after the factors of a non-firm price and all unconditional discounts that can be utilized have been taken into consideration;


- (g) **“consortium or joint venture”** means an association of persons for the purpose of combining their expertise, property, capital, efforts, skill and knowledge in an activity for the execution of a contract;
- (h) **“contract”** means the agreement that results from the acceptance of a tender by an organ of state;
- (i) **“designated sector”** means a sector, sub-sector or industry that has been designated by the Department of Trade and Industry in line with national development and industrial policies for local production, where only locally produced services, works or goods or locally manufactured goods meet the stipulated minimum threshold for local production and content;
- (j) **“firm price”** means the price that is only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax, which, in terms of the law or regulation, is binding on the contractor and demonstrably has an influence on the price of any supplies, or the rendering costs of any service, for the execution of the contract;
- (k) **“functionality”** means the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer;
- (l) **“imported content”** means that portion of the tender price represented by the cost of components, parts or materials which have been or are still to be imported (whether by the supplier or its subcontractors) and which costs are inclusive of the costs abroad, plus freight and other direct importation costs, such as landing costs, dock dues, import duty, sales duty or other similar tax or duty at the South African port of entry;
- (m) **“local content”** means that portion of the tender price which is not included in the imported content, provided that local manufacture does take place;
- (n) **“non-firm prices”** means all prices other than “firm” prices;
- (o) **“person”** includes a juristic person;
- (p) **“stipulated minimum threshold”** means that portion of local production and content as determined by the Department of Trade and Industry;

- (q) **“rand value”** means the total estimated value of a contract in South African currency, calculated at the time of tender invitations, and includes all applicable taxes and excise duties;
- (r) **“sub-contract”** means the primary contractor’s assigning, leasing, making out work to, or employing, another person to support such primary contractor in the execution of part of a project in terms of the contract;
- (s) **“tender”** means a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals;
- (t) **“total revenue”** bears the same meaning assigned to this expression in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act and promulgated in the *Government Gazette* on 9 February 2007;
- (u) **“trust”** means the arrangement through which the property of one person is made over or bequeathed to a trustee to administer such property for the benefit of another person; and
- (v) **“trustee”** means any person, including the founder of a trust, to whom property is bequeathed in order for such property to be administered for the benefit of another person.

### Application

- 2. (1) These regulations apply to organs of state as contemplated in section 1 (iii) of the Act and all public entities listed in schedules 2, 3A, 3B, 3C and 3D to the Public Finance Management Act, 1999, Act No. 1 of 1999, (as amended by Act 29 of 1999) and municipal entities.
- (2) An organ of state contemplated in sub-regulation (1) must, unless the Minister of Finance has directed otherwise, only apply a preferential procurement system which is in accordance with the Act and these regulations.

## PART TWO

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

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

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



- (a) properly plan for, and, as far as possible, accurately estimate the costs of the provision of services, works or goods for which an invitation for tenders is to be made;
- (b) determine and stipulate the appropriate preference point system to be utilized in the evaluation and adjudication of the tenders; and
- (c) determine whether the services, works or goods for which an invitation for tenders is to be made has been designated for local production and content in terms of regulation 9.

#### **Evaluation of tenders on functionality**

4. (1) An organ of state must indicate in the invitation to submit a tender if that tender will be evaluated on functionality.
- (2) The evaluation criteria for measuring functionality must be objective.
- (3) When evaluating tenders on functionality, the-
- (a) evaluation criteria for measuring functionality;
  - (b) weight of each criterion;
  - (c) applicable values; and
  - (d) minimum qualifying score for functionality,
- must be clearly specified in the invitation to submit a tender.
- (4) No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation.
- (5) Tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the preference point systems prescribed in regulations 5 and 6.

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

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

$$P_s = 80 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where

- $P_s$  = Points scored for comparative price of tender or offer under consideration;
- $P_t$  = Comparative price of tender or offer under consideration; and

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$P_{min}$  = Comparative price of lowest acceptable tender or offer.

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

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

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

- (3) A maximum of 20 points may be allocated in accordance with sub-regulation (2).
- (4) The points scored by a tenderer in respect of B-BBEE contribution contemplated in sub-regulation (2) must be added to the points scored for price as calculated in accordance with sub-regulation (1).
- (5) Subject to regulation 7, the contract must be awarded to the tenderer who scores the highest total number of points.

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

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

$$P_s = 90 \left( 1 - \frac{P_t - P_{min}}{P_{min}} \right)$$

Where

- $P_s$  = Points scored for comparative price of tender or offer under consideration;
- $P_t$  = Comparative price of tender or offer under consideration; and
- $P_{min}$  = Comparative price of lowest acceptable tender or offer.

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

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

- (3) A maximum of 10 points may be allocated in accordance with sub-regulation (2).
- (4) The points scored by a tenderer in respect of the level of B-BBEE contribution contemplated in sub-regulation (2) must be added to the points scored for price as calculated in accordance with sub-regulation (1).
- (5) Subject to regulation 7, the contract must be awarded to the tenderer who scores the highest total number of points.

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

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

#### **Cancellation and re-invitation of tenders**

8. (1) (a) In the event that, in the application of the 80/20 preference point system as stipulated in the tender documents, **all** tenders received exceed the estimated Rand value of R1 000 000, the tender invitation must be cancelled.
- (b) If one or more of the acceptable tenders received are within the prescribed threshold of R 1000 000, all tenders received must be evaluated on the 80/20 preference point system.
- (2) (a) In the event that, in the application of the 90/10 preference point system as stipulated in the tender documents, **all** tenders received are equal to, or below R1 000 000, the tender must be cancelled.
- (b) If one or more of the acceptable tenders received are above the prescribed threshold of R 1 000 000, all tenders received must be evaluated on the 90/10 preference point system.
- (3) An organ of state which has cancelled a tender invitation as contemplated in sub-regulations (1)(a) and (2)(a) must re-invite tenders and must, in the tender documents, stipulate the correct preference point system to be applied.

- (4) An organ of state may, prior to the award of a tender, cancel a tender if-
- (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or
  - (b) funds are no longer available to cover the total envisaged expenditure; or
  - (c) no acceptable tenders are received.
- (5) The decision to cancel a tender in terms of sub-regulation (4) must be published in the *Government Tender Bulletin* or the media in which the original tender invitation was advertised.

### PART THREE

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

##### **Local Production and Content**

9. (1) An organ of state must, in the case of designated sectors, where in the award of tenders local production and content is of critical importance, advertise such tenders with a specific tendering condition that only locally produced goods, services or works or locally manufactured goods, with a stipulated minimum threshold for local production and content will be considered.
- (2) The National Treasury will issue instructions, circulars and guidelines to all organs of state, with specific reporting mechanisms to ensure compliance with sub-regulation (1).
- (3) Where there is no designated sector, an organ of state may include, as a specific tendering condition, that only locally produced services, works or goods or locally manufactured goods with a stipulated minimum threshold for local production and content, will be considered, on condition that such prescript and threshold(s) are in accordance with the specific directives issued for this purpose by the National Treasury in consultation with the Department of Trade and Industry.
- (4) Every tender issued in terms of regulation 9 must be measurable and audited.
- (5) Where necessary, for tenders referred to in sub-regulations (1) and (3), a two-stage tendering process may be followed, where the first stage involves functionality and minimum threshold for local production and content and the second stage price and B-BBEE with the possibility of price negotiations only with the short listed tenderer/s.

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

10. (1) Tenderers with annual total revenue of R5 million or less qualify as Exempted Micro Enterprises (EMEs) in terms of the Broad-Based Black Economic Empowerment Act, and must submit a certificate issued by a registered auditor, accounting officer (as contemplated in section 60(4) of the Close Corporation Act, 1984 (Act No. 69 of 1984)) or an accredited verification agency.
- (2) Tenderers other than Exempted Micro-Enterprises (EMEs) must submit their original and valid B-BBEE status level verification certificate or a certified copy thereof, substantiating their B-BBEE rating.
- (3) The submission of such certificates must comply with the requirements of instructions and guidelines issued by the National Treasury and be in accordance with notices published by the Department of Trade and Industry in the *Government Gazette*.
- (4) The B-BBEE status level attained by the tenderer must be used to determine the number of points contemplated in regulations 5 (2) and 6 (2).

**Conditions**

11. (1) Only a tenderer who has completed and signed the declaration part of the tender documentation may be considered.
- (2) An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally.
- (3) A discount which has been offered conditionally must, despite not being taken into account for evaluation purposes, be implemented when payment is effected.
- (4) Points scored must be rounded off to the nearest 2 decimal places.
- (5) (a) In the event that two or more tenders have scored equal total points, the successful tender must be the one scoring the highest number of preference points for B-BBEE.
- (b) However, when functionality is part of the evaluation process and two or more tenders have scored equal points including equal preference points for B-BBEE, the successful tender must be the one scoring the highest score for functionality.
- (c) Should two or more tenders be equal in all respects, the award shall be decided by the drawing of lots.
- (6) A trust, consortium or joint venture will qualify for points for their B-BBEE status level as a legal entity, provided that the entity submits their B-BBEE status level certificate.
- (7) A trust, consortium or joint venture will qualify for points for their B-BBEE status level as an unincorporated entity, provided that the entity submits their

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

- (8) A person must not be awarded points for B-BBEE status level if it is indicated in the tender documents that such a tenderer intends sub-contracting more than 25% of the value of the contract to any other enterprise that does not qualify for at least the points that such a tenderer qualifies for, unless the intended sub-contractor is an exempted micro enterprise that has the capability and ability to execute the sub-contract.
- (9) A person awarded a contract may not sub-contract more than 25% of the value of the contract to any other enterprise that does not have an equal or higher B-BBEE status level than the person concerned, unless the contract is sub-contracted to an exempted micro enterprise that has the capability and ability to execute the sub-contract.
- (10) A person awarded a contract in relation to a designated sector, may not sub-contract in such a manner that the local production and content of the overall value of the contract is reduced to below the stipulated minimum threshold.
- (11) When an organ of state is in need of a service provided by only tertiary institutions, such services must be procured through a tendering process from the identified tertiary institutions.
- (12) Tertiary institutions referred to in sub-regulation (11) will be required to submit their B-BBEE status in terms of the specialized scorecard contained in the B-BBEE Codes of Good Practice.
- (13) (a) Should an organ of state require a service that can be provided by one or more tertiary institutions or public entities and enterprises from the private sector, the appointment of a contractor must be done by means of a tendering process;  
(b) Public entities will be required to submit their B-BBEE status in terms of the specialized scorecard contained in the B-BBEE Codes of Good Practice.

#### Declarations

12. A tender must, in the manner stipulated in the tender document, declare that-
  - (a) the information provided is true and correct;
  - (b) the signatory to the tender document is duly authorised; and
  - (c) documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the relevant organ of state.

#### Remedies

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

- (a) the B-BBEE status level of contribution has been claimed or obtained on a fraudulent basis; or
- (b) any of the conditions of the contract have not been fulfilled,

act against the tenderer or person awarded the contract.

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

- (a) disqualify the person from the tendering process;
- (b) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
- (c) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
- (d) restrict the tenderer or contractor, its shareholders and directors, or only the shareholders and directors who acted on a fraudulent basis, from obtaining business from any organ of state for a period not exceeding 10 years, after the *audi alteram partem* (hear the other side) rule has been applied; and
- (e) forward the matter for criminal prosecution.

#### **Tax clearance**

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

#### **Repeal of Regulations**

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

#### **Short title and commencement**

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

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**“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 19<sup>th</sup> 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.<sup>1</sup>

## 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

<sup>1</sup> 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.

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- (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-

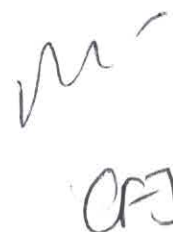
- (a) a tenderer having a stipulated minimum B-BBEE status level of contributor;
- (b) an EME or QSE;
- (c) a tenderer subcontracting a minimum of 30% to-
  - (i) an EME or QSE which is at least 51% owned by black people;
  - (ii) an EME or QSE which is at least 51% owned by black people who are youth;
  - (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

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- (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:

$$P_s = 80 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where-

- $P_s$  = Points scored for price of tender under consideration;
- $P_t$  = Price of tender under consideration; and
- $P_{\min}$  = 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

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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-

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$$P_s = 90 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

- $P_s$  = Points scored for price of tender under consideration;
- $P_t$  = Price of tender under consideration; and
- $P_{\min}$  = 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-

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- (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;

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- (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.

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## 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);

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- (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.

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## GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

## NATIONAL TREASURY

NO. 2721

4 November 2022

PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000:  
PREFERENTIAL PROCUREMENT REGULATIONS

The Minister Finance has, in terms of section 5, read with section 2(1)(b)(i) and (ii) and 2(1)(c), of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), and with effect from 16 January 2023, made the regulations set out in the Schedule.

## SCHEDULE

## PREFERENTIAL PROCUREMENT REGULATIONS, 2022

## Contents

1. Definitions
2. Application
3. Identification of preference point system
4. 80/20 preference point system for acquisition of goods or services with Rand value equal to or below R50 million
5. 90/10 preference point system for acquisition of goods or services with Rand value above R50 million
6. 80/20 preference points system for tenders to generate income or to dispose of or lease assets with Rand value equal to or below R50 million
7. 90/10 preference point system for tenders to generate income or to dispose of or lease assets with Rand value above R50 million
8. Criteria for breaking deadlock in scoring
9. Remedies
10. Repeal of regulations
11. 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—

“**highest acceptable tender**” means a tender that complies with all specifications and conditions of tender and that has the highest price compared to other tenders;

“**lowest acceptable tender**” means a tender that complies with all specifications and conditions of tender and that has lowest price compared to other tenders;

“**price**” means an amount of money tendered for goods or services, and includes all applicable taxes less all unconditional discounts;

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

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**“specific goals”** means specific goals as contemplated in section 2(1)(d) of the Act which may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender and disability including the implementation of programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994;

**“tender”** means a written offer in the form determined by an organ of state in response to an invitation to provide goods or services through price quotations, competitive tendering process or any other method envisaged in legislation;

**“tender for income-generating contracts”** means a written offer in the form determined by an organ of state in response to an invitation for the origination of income-generating contracts through any method envisaged in legislation that will result in a legal agreement between the organ of state and a third party that produces revenue for the organ of state, and includes, but is not limited to, leasing and disposal of assets and concession contracts, excluding direct sales and disposal of assets through public auctions; and

**“the Act”** means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000).

### Application

2. These Regulations apply to organs of state as defined in section 1<sup>1</sup> of the Act.

### Identification of preference point system

3.(1) An organ of state must, in the tender documents, stipulate—

- (a) the applicable preference point system as envisaged in regulations 4, 5, 6 or 7;
- (b) the specific goal in the invitation to submit the tender for which a point may be awarded, and the number of points that will be awarded to each goal, and proof of the claim for such goal.

(2) If it is unclear whether the 80/20 or 90/10 preference point system applies, an organ of state must, in the tender documents, stipulate in the case of—

- (a) an invitation for tender for income-generating contracts, that either the 80/20 or 90/10 preference point system will apply and that the highest acceptable tender will be used to determine the applicable preference point system; or
- (b) any other invitation for tender, 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.

### 80/20 preference point system for acquisition of goods or services with Rand value equal to or below R50 million

4.(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 equal to or below R50 million, inclusive of all applicable taxes:

<sup>1</sup> Paragraph (b) 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 Notices—

(a) 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, 1996; and  
 (b) R 571 of 16 June 2017 recognises, with effect from 17 June 2017, national and provincial government components listed in Schedule 3 to the Public Service Act, 1994 and municipal entities as defined in section 1 of the Local Government Municipal Systems Act, 2000, as institutions to which the Act applies.  
 Note should be taken of notices issued from time to time in terms of paragraph (1) of this definition. The application of these Regulations is also subject to applicable exemptions approved in terms of section 3 of the Act.

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$$P_s = 80 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where-

$P_s$  = Points scored for price of tender under consideration;

$P_t$  = Price of tender under consideration; and

$P_{\min}$  = Price of lowest acceptable tender.

(2) A maximum of 20 points may be awarded to a tenderer for the specific goal specified for the tender.

(3) The points scored for the specific goal must be added to the points scored for price and the total must be rounded off to the nearest two decimal places.

(4) Subject to section 2(1)(f) of the Act, the contract must be awarded to the tenderer scoring the highest points.

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

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

$$P_s = 90 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where-

$P_s$  = Points scored for price of tender under consideration;

$P_t$  = Price of tender under consideration; and

$P_{\min}$  = Price of lowest acceptable tender.

(2) A maximum of 10 points may be awarded to a tenderer for the specific goal specified for the tender.

(3) The points scored for the specific goal must be added to the points scored for price and the total must be rounded off to the nearest two decimal places.

(4) Subject to section 2(1)(f) of the Act, the contract must be awarded to the tenderer scoring the highest points.

**80/20 preference points system for tenders for income-generating contracts with Rand value equal to or below R50 million**

6.(1) The following formula must be used to calculate the points for price in respect of an invitation for tender for income-generating contracts, with a Rand value equal to or below R50 million, inclusive of all applicable taxes:

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

Where-

- Ps = Points scored for price of tender under consideration;
- Pt = Price of tender under consideration; and
- Pmax = Price of highest acceptable tender.

(2) A maximum of 20 points may be awarded to a tenderer for the specific goal specified for the tender.

(3) The points scored for the specific goal must be added to the points scored for price and the total must be rounded off to the nearest two decimal places.

(4) Subject to section 2(1)(f) of the Act, the contract must be awarded to the tenderer scoring the highest points.

#### **90/10 preference point system for tenders for income-generating contracts with Rand value above R50 million**

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

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

Where-

- Ps = Points scored for price of tender under consideration;
- Pt = Price of tender under consideration; and
- Pmax = Price of highest acceptable tender.

(2) A maximum of 10 points may be awarded to a tenderer for the specific goal specified for the tender.

(3) The points scored for the specific goal must be added to the points scored for price and the total must be rounded off to the nearest two decimal places.

(4) Subject to section 2(1)(f) of the Act, the contract must be awarded to the tenderer scoring the highest points.

#### **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 specific goals.

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

#### **Remedies**

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9.(1) If an organ of state is of the view that a tenderer submitted false information regarding a specific goal, it must—

- (a) inform the tenderer accordingly; and
- (b) give the tenderer an opportunity to make representations within 14 days as to why the tender may 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.

(2) After considering the representations referred to in subregulation (1)(b), the organ of state may, if it concludes that such information is false—

- (a) disqualify the tenderer or terminate the contract in whole or in part; and
- (b) if applicable, claim damages from the tenderer.

### **Repeal of regulations**

10.(1) Subject to this regulation, the Preferential Procurement Regulations, 2017 published in Government No. 40553 of 20 January 2017, are hereby repealed with effect from the date referred to in regulation 11.

(2) Any tender advertised before the date referred to in regulation 11 must be dealt with in terms of the Preferential Procurement Regulations, 2017.

### **Short title and commencement**

11. These Regulations are called the Preferential Procurement Regulations, 2022 and take effect on 16 January 2023.

  
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REPUBLIC  
OF  
SOUTH AFRICA



REPUBLIEK  
VAN  
SUID-AFRIKA

# Government Gazette Staatskoerant

*Regulation Gazette*

No. 6824

*Regulasiekoerant*

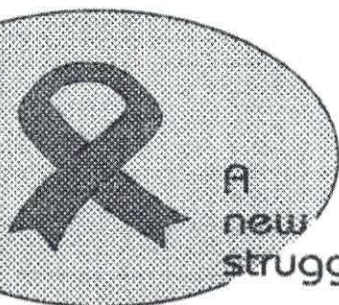
Vol. 420

PRETORIA, 5 JUNE  
JUNIE 2000

No. 21253

**We all have the power to prevent AIDS**

AIDS  
affects  
us all



A  
new  
struggle

Prevention is the cure

**AIDS  
HELPUNE**

**0800 012 322**

DEPARTMENT OF HEALTH

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**CONTENTS**

**INHOUD**

No.	Page No.	Gazette No.	No.	Bladsy No.	Koerant No.
<b>GOVERNMENT NOTICE</b>			<b>GOEWERMENSKENNISGEWING</b>		
<b>State Expenditure, Department of</b>			<b>Staatsbesteding, Departement van</b>		
<i>Government Notice</i>			<i>Goewermentskennisgewing</i>		
R. 562	3	21253	R. 562	4	21253
Preferential Framework Regulations			Wetsontwerp op die Raamwerk vir Voorkeurverkrygingsbeleid (5/2000): Konsepregulasies		
Procurement Act (5/2000): Draft					
Policy Draft					

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GOVERNMENT NOTICE  
GOEWERMENTSKENNISGEWING

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DEPARTMENT OF STATE EXPENDITURE

No. R. 562

5 June 2000

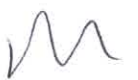
**PREFERENTIAL PROCUREMENT POLICY  
FRAMEWORK ACT, 2000,  
(ACT NO. 5 OF 2000):  
DRAFT REGULATIONS**

The draft Regulations set out in the Schedule are hereby published for public comments in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000).

Interested persons are invited to lodge written comments on the draft Regulations by not later than 30 June 2000 to:

**The Acting Director-General  
Department of State Expenditure  
Private Bag X 845  
PRETORIA  
0001**

All comments must be marked for the attention of Mr NK Mlamla and may either be posted to the above address or transmitted by fax to (012) 315 4533 or by e-mail to [MlamlaN@dse.pwv.gov.za](mailto:MlamlaN@dse.pwv.gov.za)



(CF)

## DEPARTEMENT VAN STAATSBESTEDING

No. R. 562

5 Junie 2000

**WETSONTWERP OP DIE RAAMWERK VIR  
VOORKEURVERKRYGINGSBELEID, 2000  
(WET NR. 5 OF 2000):  
KONSEPREGULASIES**

Die Engelse teks van die Konsepregulasies wat in die Bylae uiteengesit is, word hiermee ter voldoening van artikel 5 van die Wetsontwerp op die Raamwerk vir Voorkeurverkrygingsbeleid, 2000 (Wet Nr. 5 van 2000) vir openbare kommentaar gepubliseer.

Belanghebbendes word uitgenooi om skriftelike kommentaar nie later as 30 Junie 2000 in te dien by:

**Die Waarnemende Direkteur – Generaal  
Departement van Staatsbesteding  
Privaatsak X 845  
PRETORIA  
0001**

Alle kommentaar moet vir die aandag van Mnr NK Mlamla gemerk en geadresseer word na die bogemelde adres of versend word na faksimilee (012) 315 4533 of e-pos [MlamlaN@dse.pwv.gov.za](mailto:MlamlaN@dse.pwv.gov.za)

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## REGULATIONS

The Minister of Finance has, under section 5 of the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000), made the regulations contained in the Schedule hereto.

## SCHEDULE

### 1. DEFINITIONS

In these regulations "**the Act**" means the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000), and any word or expression to which a meaning has been assigned in the Act shall bear the meaning so assigned to it, unless the context indicates otherwise.

"**Agent**" means an independent institution or individual which has the proxy from another institution or individual from the industry, to independently do business on behalf of or represent such an institution or individual.

"**Comparative price**" means the price after the factors of non-firm prices against firm prices and all unconditional discounts were taken into consideration.

"**Consortia / Joint Ventures**" means an association of natural or legal persons for which purpose they combine their expertise, property, capital, efforts, skill and knowledge in a joint venture, to execute the contract.

"**Contract**" means the agreement that results from the acceptance of a tender.

"**Firm prices**" are deemed to be the prices that are only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax which, in terms of a law or regulation is binding upon the contractor and demonstrably have an influence on the prices of any, supplies, or the rendering costs of any services, for the execution of the contract.

"**Historically Disadvantaged Individuals (HDIs)**" means all South African citizens –

- (i) who had no franchise in national elections prior to the introduction of the 1983 and 1993 constitutions;
- (ii) women; or
- (iii) disabled persons.

Persons who obtained South African citizenship after the first democratic election in April 1994, cannot qualify for preference as an HDI.

"**Imported content**" means that portion of the tender price represented by the cost of components, parts or materials which have been or are still to be imported (whether by the tenderer or his suppliers or sub-contractors) and which costs are inclusive of the costs abroad, plus freight and other direct importation costs such

  
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as landing costs, dock dues, import duty, sales duty, or other similar tax or duty at the South African place of entry as well as transportation and handling charges to the factory in the Republic where the supplies that have been tendered for are manufactured.

**"Local content"** means that portion of the tender price that is not included in the imported content provided that local manufacture does take place.

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

**"Non-firm prices"** means all prices other than "firm" prices.

**"Small, Medium and Micro Enterprises (SMMEs)"** means as defined in the National Small Business Act, 1996 (Act 102 of 1996).

**"Tender"** means a written offer on the official tender documents forming part of an invitation to tender.

**"Trust"** means the arrangement through which the ownership of property of one person is by virtue of a trust instrument made over or bequeathed to the trustee or beneficiaries designated in the trust instrument.

**"Trustee"** means any person, including the founder of a trust, who acts as trustee by virtue of authority.

2. Subject to the provisions of any Act of Parliament/Provincial Legislation, the application of any preference system shall be done by all organs of state as contemplated in section 1(iii) of the Act, only in accordance with this Act. No other preference will be allowed and purchasing authorities are not allowed to encompass preferences in any other manner than those prescribed in the regulations.
3. The framework as contemplated in section 2 of the Act must be followed.
4. The determination of the Rand value of the contract must be based on the total estimated contract value at the time of tender invitation.
5. **(1) PREFERENCE POINT SYSTEM: 80 / 20**

For all contracts with a Rand value equal to or below R2,0million (two million Rand), the following formula must be used to calculate the points for price:

$$P_s = 80 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

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Where  $P_s$  = Point scored for price of tender under consideration  
 $P_t$  = Rand value of tender under consideration  
 $P_{min}$  = Rand value of lowest acceptable tender

## (2) PREFERENCE POINT SYSTEM: 90 / 10

For all contracts with a Rand value above R2,0 million the following formula must be used to calculate the points for price:

$$P_s = 90 \left( 1 - \frac{P_t - P_{min}}{P_{min}} \right)$$

Where  $P_s$  = Point scored for price of tender under consideration  
 $P_t$  = Rand value of tender under consideration  
 $P_{min}$  = Rand value of lowest acceptable tender

It must be stipulated in the tender document which point system will be applied to that specific tender.

Should it occur that the application of the 80/20 preference point system was stipulated in the tender documents and the Rand value of **any** of the tenders received are in excess of R2,0 million, all tenders received must be evaluated according to the 80 /20 preference point system. Should it occur that the application of the 80 /20 preference point system was stipulated in the tender documents and the Rand value of **all** the tenders received are in excess of R 2,0 million, the tender must be cancelled and re-invited with the appropriate preference point system encompassed in the tender documents.

Should it occur that the application of the 90/10 preference point system was stipulated in the tender documents and the Rand value of **any** of the tenders received are less than R2,0 million, all tenders received must be evaluated according to the 90/10 preference system. Should it occur that the application of the 90/10 preference point system was stipulated in the tender documents and the Rand value of **all** the tenders received are equal to or less than R 2,0 million, the tender must be cancelled and re-invited with the appropriate preference point system encompassed in the tender documents.

Organs of State must therefore ensure that proper planning and calculations of the estimated costs are done prior to prescribing the appropriate preference point system in the tender invitation.

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## 6. GENERAL CONDITIONS

- 6.1 Should any preference points be allocated for local content it would be applicable to only local manufacturers/suppliers/ service providers residing in South Africa.
- 6.2 Failure on the part of a tenderer to fill in and / or to sign the declaration will be construed to mean that preference points are not claimed.
- 6.3 Any organ of State reserves the right to require of a tenderer, either before a tender is adjudicated or at any time subsequently, that the tenderer should substantiate any claim with regard to preference and in any manner required by the organ of State.
- 6.4 Conditional discounts may not be taken into consideration in the calculation of comparative prices.
- 6.5 Where different prices are tendered for different periods of the contract, the tender price applicable in respect of a particular period of the contract shall be a firm price if, as regards such period, it conforms to the definition of "firm prices".
- 6.6 Points scored will be rounded off to the nearest 2 decimal places.
- 6.7 In the event of equal total points scored, the tender will be awarded to the tenderer scoring the highest number of preference points.
- 6.8 An agent will, if awarded a tender, be regarded as a contractor and will be liable for all benefits / losses.

## 7. PRINCIPLES

The following principles must be applied to the preferences during the evaluation of the tenders:

- (1)(a) Equity ownership shall be equated to the percentage of an enterprise which is owned by individuals, or in the case of a company, the percentage shares that are owned by individuals who are actively involved in the management and daily business operations of the enterprise and exercise control over the enterprise, commensurate with their degree of ownership at the closing date of the tender. Should the degree of ownership change after the closing date of the tender the tenderer should notify the relevant organ of State and the tenderer will not be eligible to any preference points.
  - (b) Where individuals are not actively involved in the management and daily business operations and do not exercise control over the enterprise commensurate with their degree of ownership, preference points for equity ownership may not be claimed for them.
- (2) With due consideration of paragraph 7(1)(a) and (b) above, if claims are made for equity ownership for HDIs, it must be considered as follows:

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- (a) Equity within private companies must be based on the percentage equity ownership.
- (b) As public companies are subject to constant change in shareholding, no preference points will be awarded to public companies.
- (c) No preference points will be awarded for tertiary institutions.
- (d) The following formula will be applied to calculate the number of points scored for equity ownership by HDIs:

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

Where NEP is the number of points awarded for equity ownership by HDIs.

NOP is the maximum number of points awarded for equity ownership by HDIs.

EP is the percentage of Equity Ownership by HDIs within the enterprise, determined in accordance with paragraph 7(2) (a) to (c), and

- (3)(a) Equity claims for a Trust, as the legal entity, will be allowed only for those persons who are both a trustee and a beneficiary and must be actively involved in the management and daily operation of the Trust. Substantiating documentation is required with regard to trustees thereby validating their appointments.
- (b) Equity claims by persons / companies that fall within the definition of an "Agent" will be able to claim preference points if substantiating documents are submitted thereby validating their appointments.
- (4) A consortium or Joint Venture (JV) can be entitled to equity ownership in respect of HDIs. Equity claims by Consortia and JVs must be based on the following:

It should be indicated what percentage of the total contract value will be executed by each party in the consortium or JV and the managers from each party must be indicated according to the percentage equity ownership and control as applicable for Private Companies.

**Principle:** Each consortium or JV member is allowed equity ownership based on that percentage of the contract to be executed by the consortium or JV member.

**Total number of points scored for equity ownership for Consortia / JVs must be calculated as per (i), (ii) and (iii) below:**

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(i) **To establish part point entitlement per Consortium/JV member:**

$$\text{PPE} = \text{NOP} \times \frac{\text{percentage of contract to be executed}}{100}$$

Where PPE is part point entitlement per Consortium /JV member.

NOP is the maximum number of points awarded for equity ownership for Consortia/ JVs.

(ii) **To establish consortium/JV member's equity point:**

$$\text{CEP} = \text{PPE} \times \frac{\text{EP}}{100}$$

Where CEP is the number of points awarded to the Consortium/JV member,

PPE is part point entitlement per Consortium/JV member (as calculated in (i) above), and

EP is the percentage equity ownership within the Consortium /JV member.

(iii) **Total number of points scored by Consortium / JV (NEP)**

NEP = the total of the CEPs [points obtained per Consortium /JV]

Note: The number of points scored for Consortia/JVs [NEP] must be added to the number of points scored for price [P<sub>s</sub>] in order to establish the total number of points scored and the contract must then be awarded to the tenderer who scores the highest points, unless objective criteria in addition to the goals justify the award to another tenderer.

**8. DECLARATIONS**

All tenderers must complete a declaration that:

- (a) the information provided is true and correct;
- (b) the signatory is duly authorised to sign the tender document, and
- (c) documentary proof regarding any tendering issue will be submitted to the satisfaction of the organ of State when called upon to do so.

**9. PENALTIES**

An organ of State may, should any information furnished be found to be false, act against a contractor and in addition to any other remedy it may have:

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- (a) recover all costs, losses or damages incurred or sustained by the organ of State as a result of the contract; and / or
- (b) cancel the contract and claim any damages which the State may suffer by having to make less favourable arrangements after such cancellation; and / or
- (c) impose a penalty not exceeding 5 % of the value of the contract.

#### 10. TAX CLEARANCE CERTIFICATE

No contracts will be awarded to tenderers who have failed to submit an original Tax Clearance Certificate from the South African Revenue Services certifying that their taxes are in order or that suitable arrangements have been made with the South African Revenue Service to satisfy them.

#### 11. GOALS

The goals as contemplated in section 2(1)(d)(ii) of the Act, are the goals that *inter alia* may be prescribed in the tendering conditions as goals to be achieved. Every goal to be achieved must be clearly specified in the tendering conditions, including the method to be used to calculate the points scored for achieving the specified goals.

The goals must be measurable and quantifiable and organs of State must monitor the execution of the tender for compliance.

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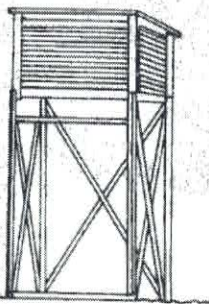
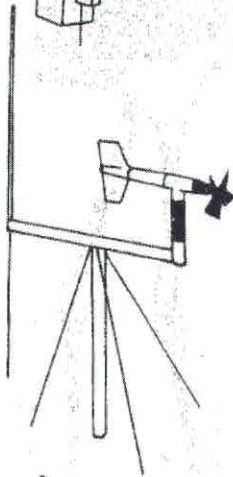
Wetlands are wonderlands!



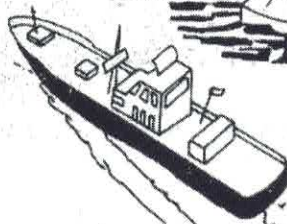
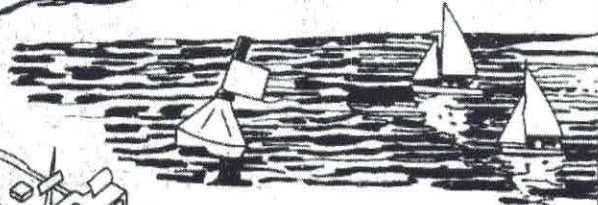
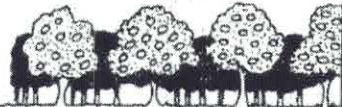
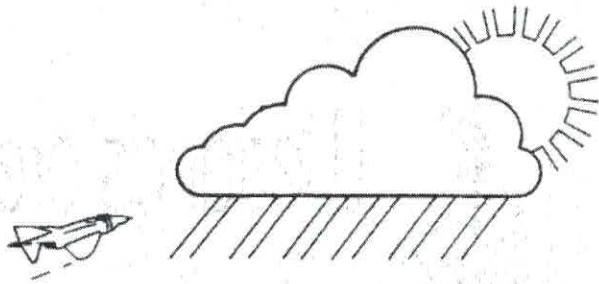
Department of Environmental Affairs and Tourism

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DEPT. OF ENVIRONMENTAL AFFAIRS AND TOURISM · DEPT. VAN OMGEWINGSAKE EN TOERISME

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THE WEATHER BUREAU: DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM

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# THE WEATHER BUREAU HELPS FARMERS TO PLAN THEIR CROP



THE WEATHER BUREAU: DEPARTMENT OF ENVIRONMENTAL AFFAIRS & TOURISM  
DIE WEERBURO: DEPARTEMENT VAN OMGEWINGSAKE EN TOERISME

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# Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA  
REPUBLIEK VAN SUID-AFRIKA

Vol. 530

Pretoria, 14 August 2009  
Augustus

No. 32489

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**CONTENTS • INHOUD**

No. Page No. Gazette No.

**GENERAL NOTICE**

**National Treasury**

*General Notice*

1103 Preferential Procurement Policy Framework Act (5/2000): Draft Preferential Procurement Regulations, 2009: For public comments ..... 3 32489

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**GENERAL NOTICE**

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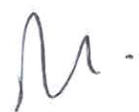
**NOTICE 1103 OF 2009****NATIONAL TREASURY****PREFERENTIAL PROCUREMENT POLICY  
FRAMEWORK ACT, 2000,  
(ACT NO. 5 OF 2000):****DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2009**

The draft Preferential Procurement Regulations, 2009, aligned with the prescripts of the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 and its related Strategy as set out in the Schedule, are hereby published for public comments in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000.

Interested persons who wish to comment on the draft Regulations may submit their representations in writing before **14 September 2009** to:

**The Director-General**  
National Treasury  
Private Bag X115  
PRETORIA  
0001

All representations must be marked for the attention of **Mr. JAN Breytenbach** or **Mr. HML Malinga** and may either be posted to the above address or transmitted by fax to **012 – 315 5343** or **315 5355** or by e-mail to [jan.breytenbach@treasury.gov.za](mailto:jan.breytenbach@treasury.gov.za) or [henry.malinga@treasury.gov.za](mailto:henry.malinga@treasury.gov.za) respectively.



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**DRAFT - FOR PUBLIC COMMENTS****DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2009****EXPLANATORY MEMORANDUM**

1. The purpose of the Preferential Procurement Regulations, 2009 is to ensure that Government's preferential procurement procedures are aligned with the aims of the Broad-Based Black Economic Empowerment Act, 2003 and associated Codes of Good Practices.
2. The effect of the new regulations can be summarized as follows:
  - (i) The preference points systems as per the current Act and Regulations will be retained.
  - (ii) The current Preferential Procurement Regulations determine that the HDI status and certain RDP goals should be used to determine preference points in the awarding of bids. The new Regulations replace the awarding of bids on the basis of HDI status and the promotion of RDP goals with the BEE rating of a bidder.
  - (iii) In addition, the threshold value to distinguish between the 80/20 and the 90/10 preference points systems, is increased from R 500 000 in the current regulations to R1,0 million in the new regulations to strengthen the contribution towards the development of small, medium and micro enterprises.
  - (iv) The application of the new Regulations is further extended to apply to all organs of state and not only to national and provincial departments, municipalities, Parliament, provincial legislatures and schedule 3A and 3C public entities.
3. The draft Preferential Procurement Regulations, 2009 are gazetted for comments.



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**DRAFT – FOR PUBLIC COMMENTS****PREFERENTIAL PROCUREMENT REGULATIONS, 2009 PERTAINING TO THE  
PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT: NO. 5 OF 2000****Contents****PART ONE DEFINITIONS AND APPLICATION**

- 1 Definitions
- 2 Application

**PART TWO PREFERENCE POINT SYSTEM AND BROAD-BASED BLACK  
ECONOMIC EMPOWERMENT STATUS, EVALUATION OF BIDS ON  
FUNCTIONALITY, AWARD OF CONTRACTS TO BIDDERS NOT  
SCORING THE HIGHEST POINTS AND THE CANCELLATION AND  
RE-INVITATION OF BIDS**

- 3 Planning and stipulation of preference point system to be utilized
- 4 The 80/20 preference point system for the acquisition of goods, works and / or services up to a Rand value of R1,0 million
- 5 The 90/10 preference point system for the acquisition of goods, works and / or services with a Rand value above R1,0 million
- 6 The 80/20 preference point system for the sale and letting of assets up to a Rand value of R1,0 million
- 7 The 90/10 preference point system for the sale and letting of assets with a Rand value above R1,0 million
- 8 Evaluation of bids on functionality
- 9 Award of contracts to bids not scoring the highest number of points
- 10 Cancellation and re-invitation of bids

**PART THREE GENERAL CONDITIONS, PRINCIPLES, DECLARATIONS,  
REMEDIES, TAX CLEARANCE CERTIFICATES, REPEAL OF  
REGULATIONS AND SHORT TITLE**

- 11 General conditions
- 12 Principles
- 13 Declarations
- 14 Remedies
- 15 Tax clearance certificates
- 16 Repeal of regulations
- 17 Short title

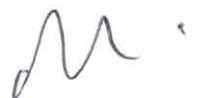
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**DRAFT - FOR PUBLIC COMMENTS****REGULATIONS**

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

**SCHEDULE****PART ONE****DEFINITIONS AND APPLICATION****Definitions**

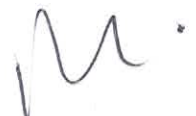
1. In these regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act bears the same meaning, and-
  - (a) **"Act"** means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
  - (b) **"Acceptable bid"** means a bid that complies in all respect with all the specifications and conditions prescribed in the bid documentation and assurance that the potential contractor has the ability and capability to execute the contract;
  - (c) **"BEE Status"** bears the same meaning assigned to this expression as in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 and promulgated in the *Government Gazette* on 9 February 2007;
  - (d) **"B-BBEE status level of contributor"** is the B-BBEE status received by a measured entity based on its overall performance using the Generic Scorecard contained in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 and promulgated in the *Government Gazette* on 9 February 2007
  - (e) **"Bid"** means a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive bidding processes or proposals;
  - (f) **"Black people"** is a generic term, which bears the same meaning assigned to this expression in the Broad-Based Black Economic Empowerment Act, 2003 and its Codes of Good Practice.;



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**DRAFT - FOR PUBLIC COMMENTS**

- (g) **“Broad-Based Black Economic Empowerment” (B-BBEE)** as assigned in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 and promulgated in the *Government Gazette* on 9 February 2007, means the economic empowerment of all black people through diverse but integrated socio-economic strategies that include, but not limited to:
- i) increasing the number of black people that manage, own and control enterprises and productive assets;
  - ii) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
  - iii) human resources and skills development;
  - iv) achieving equitable representation in all occupational categories and levels in the workforce;
  - v) preferential procurement; and
  - vi) investment in enterprises that are owned or managed by black people.
- (h) **“Comparative price”** means the price after the factors of a non-firm price and all unconditional discounts that can be utilised have been taken into consideration;
- (i) **“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;
- (j) **“Contract”** means the agreement that results from the acceptance of a bid by an organ of state;
- (k) **“Firm price”** is the price that is only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax, which, in terms of a law or regulation, is binding on the contractor and demonstrably has an influence on the price of any supplies, or the rendering costs of any service, for the execution of the contract;
- (l) **“Functionality”** means the measurement according to predetermined norms of a service or commodity designed to be practical and useful, working or operating, taking into account among others quality, reliability, viability and durability of a service;
- (m) **“Non-firm prices”** means all prices other than “firm” prices;
- (n) **“Person”** includes reference to a juristic person;



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- (o) **“Rand value”** means the total estimated value of a contract in South African currency, calculated at the time of bid invitations and includes all applicable taxes and excise duties;
- (p) **“Sub-Contract”** means the primary contractor's assigning or leasing or making out work to, or employing, another person to support such primary contractor in the execution of part of a project in terms of the contract;
- (q) **“Total revenue”** bears the same meaning assigned to this expression as in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 and promulgated in the *Government Gazette* on 9 February 2007;
- (r) **“Trust”** means the arrangement through which the property of one person is made over or bequeathed to a trustee to administer such property for the benefit of another person; and
- (s) **“Trustee”** means any person, including the founder of a trust, to whom property is bequeathed in order for such property to be administered for the benefit of another person.

**Application**

- 2.(1) These regulations apply to organs of state as contemplated in section 1 (iii) of the Act and all public entities listed in schedules 2, 3A, 3B, 3C and 3D to the Public Finance Management Act, 1999, Act No. 1 of 1999, (as amended by Act 29 of 1999).
- (2) An organ of state contemplated in sub-regulation (1) must, unless the Minister of Finance has directed otherwise, only apply a preferential procurement system which is in accordance with the Act and these regulations.

**PART TWO****PREFERENCE POINT SYSTEM AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT STATUS, EVALUATION OF BIDS ON FUNCTIONALITY, AWARD OF CONTRACTS TO BIDDERS NOT SCORING THE HIGHEST NUMBER OF POINTS AND THE CANCELLATION AND RE-INVITATION OF BIDS****Planning and stipulation of preference point system to be utilized**

- 3(1) An organ of state must, prior to making an invitation for bids-
  - (a) properly plan for, and, as far as possible, accurately estimate the costs of the provision of services, works or goods for which an invitation for bids is to be made; and



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- (b) determine and stipulate the appropriate preference point system to be utilized in the evaluation and adjudication of the bids.

**The 80/20 preference point system for acquisition of goods, works and / or services up to a Rand value of R1,0 million**

- 4.(1) The following formula must be used to calculate the points for price in respect of competitive bids / price quotations with a Rand value equal to, or above R 30 000 and up to a Rand value of R1 000 000 (all applicable taxes included). Organs of state may, however, apply this formula for price quotations with a value less than R 30 000, if and when appropriate:

$$P_s = 80 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where

$P_s$  = Points scored for comparative price of bid / offer under consideration

$P_t$  = Comparative price of bid / offer under consideration


$P_{\min}$  = Comparative price of lowest acceptable bid / offer.

- (2) A maximum of 20 points must be awarded to a bidder for attaining the B-BBEE status level contemplated in the B-BBEE Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 and promulgated in the *Government Gazette* on 9 February 2007.

- (3) Points must be awarded to a bidder on the following basis:

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

- (4) The points scored by a bidder in respect of B-BBEE contribution contemplated in sub-regulation (3) must be added to the points scored for price.
- (5) Only the bid with the highest number of points scored may be selected.

  
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**DRAFT - FOR PUBLIC COMMENTS****The 90/10 preference point system for acquisition of goods, works and / or services with a Rand value above R1,0 million**

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

$$P_s = 90 \left( 1 - \frac{P_t - P_{min}}{P_{min}} \right)$$

Where

- $P_s$  = Points scored for comparative price of bid under consideration  
 $P_t$  = Comparative price of bid under consideration  
 $P_{min}$  = Comparative price of lowest acceptable bid

- (2) A maximum of 10 points must be awarded to a bidder for attaining their B-BBEE status level contemplated in the B-BBEE Codes of Good Practice.  
 (3) Points must be awarded to a bidder on the following basis:

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

- (4) The points scored by a bidder in respect of the level of B-BBEE contribution contemplated in sub-regulation (3) must be added to the points scored for price.  
 (5) Only the bid with the highest number of points scored may be selected.

**The 80/20 preference point system for the sale and letting of assets up to a Rand value of R1,0 million.**

- 6.(1) The following formula must be used to calculate the points for price in respect of competitive bids / price quotations with a Rand value equal to, or above R 30

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000 and up to a Rand value of R1 000 000 (all applicable taxes included) and which relate to the sale and letting of assets. Organs of state may, however, apply this formula for sales and letting of assets with a Rand value less than R30 000, if and when appropriate:

$$P_s = 80 \left( 1 + \frac{P_t - P_h}{P_h} \right)$$

Where

- $P_s$  = Points scored for price of bid / offer under consideration  
 $P_t$  = Price of bid / offer under consideration  
 $P_h$  = Price of highest acceptable bid/offer

- (2) A maximum of 20 points must be awarded to a bidder for attaining the B-BBEE status level, contemplated in the B-BBEE: Codes of Good Practice.
- (3) Points must be awarded to a bidder on the following basis:

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

- (4) The points scored by a bidder in respect of the level of B-BBEE contribution contemplated in sub-regulation (3) must be added to the points scored for price.
- (5) Only the bid with the highest number of points scored may be selected.
- (6) If any assets are let or sold by public auction, the award must be made to the highest bidder.

**The 90/10 preference point system for the sale and letting of assets with a Rand value above R1,0 million**

- 7.(1) The following formula must be used to calculate the points for price in respect of bids with a Rand value above R1 000 000 (all applicable taxes included) and which relate to the sale and letting of assets:

$$P_s = 90 \left( 1 + \frac{P_t - P_h}{P_h} \right)$$

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Where

Ps = Points scored for price of bid under consideration

Pt = Price of bid under consideration

Ph = Price of highest acceptable bid

- (2) A maximum of 10 points must be awarded to a bidder for attaining the B-BBEE status level contemplated B-BBEE Codes of Good Practice.

- (3) Points must be awarded to a bidder on the following basis:

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

- (4) The points scored by a bidder in respect of the level of B-BBEE contribution contemplated in sub-regulation (3) must be added to the points scored for price.
- (5) Only the bid with the highest number of points scored may be selected.
- (6) If any assets are let or sold by public auction, the award must be made to the highest bidder.

**Evaluation of bids based on functionality -**

- 8(1) An organ of state must in the bid documents indicate if, in respect of a particular bid invitation, bids will also be evaluated on functionality;
- (2) When evaluating bids on functionality, the evaluation criteria for measuring functionality, the weight of each criterion, the applicable values as well as the minimum qualifying score for functionality, should be clearly indicated in the bid documents;
- (3) A bid must be disqualified if it fails to achieve the minimum qualifying score for functionality as indicated in the bid documents; and

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- (4) Bids that have achieved the minimum qualification score for functionality must be evaluated further in terms of the preference point systems prescribed in Regulations 4 and 5.

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

- 9(1) Despite sub-regulations 4.(5), 5.(5), 6.(5), and 7.(5), a contract may, on reasonable and justifiable grounds, be awarded to a bidder that did not score the highest number of points.
- 9(2) If a bid other than the one that scored the highest number of points is approved, the organ of state must, in writing, within ten (10) working days notify the Auditor-General and the relevant treasury of the reasons for not selecting the bidder that scored the highest number of points.

**Cancellation and re-invitation of bids**

- 10(1) In the event that, in the application of the 80/20 preference point system as stipulated in the bid documents, **all** bids received exceed the estimated Rand value of R1 000 000, the bid invitation must be cancelled. If one or more of the acceptable bids received are within the prescribed threshold of R 1000 000, all bids received must be evaluated on the 80/20 preference point system.
- (2) In the event that, in the application of the 90/10 preference point system as stipulated in the bid documents, **all** bids received are equal to, or below R1 000 000, the bid must be cancelled. If one or more of the acceptable bids received are above the prescribed threshold of R 1 000 000, all bids received must be evaluated on the 90/10 preference point system.
- (3) An organ of state which has cancelled a bid invitation as contemplated in sub-regulations (1) and (2) must re-invite bids and must, in the bid documents, stipulate the correct preference point system to be applied.
- (4) An organ of state may, prior to the award of a bid, cancel a bid if-
- (a) due to changed circumstances, there is no longer a need for the goods, works or services offered, or
  - (b) funds are no longer available to cover the total envisaged expenditure; or
  - (c) no acceptable bids are received.
- (5) The decision to cancel a bid in terms of sub-regulation (4) must be published in at least the *Government Tender Bulletin* and / or the media in which the original bid was advertised.



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**DRAFT - FOR PUBLIC COMMENTS****PART THREE****GENERAL CONDITIONS, PRINCIPLES, DECLARATIONS, REMEDIES, TAX CLEARANCE , REPEAL OF REGULATIONS AND SHORT TITLE****General conditions**

- 11.(1) For specific industries (identified by the Department of Trade and Industry), where the award of bids to local manufacturers are of critical importance, such bids may be advertised with a specific bidding condition that only locally manufactured products will be considered.
- (2) Only a bidder who has completed and signed the declaration part of the bid documentation may be considered.
- (3) Bidders other than Exempted Micro-Enterprises (EMEs) as indicated in sub-regulation (6) and (7), must submit their original B-BBEE status level verification certificate or a certified copy thereof issued by:
  - (a) verification agencies accredited by South African National Accreditation System (SANAS), as contemplated in the B-BBEE: Framework for accreditation and verification by all Verification Agencies promulgated in the Government Gazette No 31255 on 18 July 2008; or
  - (b) verification agencies that are in possession of a valid pre-assessment letter from SANAS; or
  - (c) non-accredited verification agencies prior to 9 April 2009, as contemplated in the notice promulgated in Government Gazette No 32094 on 9 April 2009.
- (4) With effect from 1 August 2009, only verification certificates issued in terms of sub-regulation 11 (3) (a) and (b) will be valid.
- (5) Verification certificates issued in terms of sub-regulation 11 (3) (c) will only remain valid for 12 months from the date of issue.
- (6) Enterprises with an annual total revenue not exceeding R 5,0 million per annum are deemed to have the status of a B-BBEE level 4 contributor and therefore qualify as Exempted Micro Enterprises. Evidence of such qualification is a certificate issued by an accounting officer (as contemplated in section 60 sub-section 4 of the Close Corporation Act, 1984) or a SANAS accredited verification agency or a non-accredited verification agency (subject to sub-regulations 11 (4) and (5) or a certificate from the South African Revenue Services (SARS). As an alternative, when possible, the SARS may forward such confirmation directly to the organ of state.
- (7) Should an EME improve on its B-BBEE status as a level 4 contributor, a certificate substantiating its improved status must be submitted by the



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**DRAFT - FOR PUBLIC COMMENTS**

respective supplier. The submission of the certificate must comply with the requirements of sub-regulation (3) above.

- (8) Any certificate substantiating the B-BBEE status level of a bidder must be based on the findings of the previous year's financial statements of the relevant enterprise.
- (9) An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally.
- (10) A discount which has been offered conditionally must, despite not being taken into account for evaluation purposes, be implemented when payment is effected.
- (11) Points scored must be rounded off to the nearest 2 decimals.
- (12) (a) In the event that two or more bids have scored equal total points, the successful bid must be the one scoring the highest number of preference points for B-BBEE.  
(b) However, when functionality is part of the evaluation process and two or more bids have scored equal points including equal preference points for B-BBEE, the successful bid must be the one scoring the highest score for functionality.  
(c) Should two or more bids be equal in all respects, the award shall be decided by the drawing of lots.
- (13) Bidders should not be disqualified or regarded as non-responsive for being a non-compliant B-BBEE contributor. Under such circumstances bidders will score no points for their B-BBEE status.

**Principles**

- 12(1) A consortium or joint venture will qualify for points for their B-BBEE status level as a legal entity provided that the entity submits their B-BBEE status as a consortium or joint venture.
- (2) A person awarded a contract may not sub-contract more than 25% of the value of the contract to a person who does not have an equal or higher B-BBEE status level.
- (3) A person must not be awarded points for B-BBEE status level if it is indicated in the bid documents that such a person intends sub-contracting more than 25% of the value of the contract to someone who does not qualify for at least the points that such a person qualifies for.
- (4) When an organ of state is in need of a service provided by only tertiary institutions, such services must be procured from the tertiary institution(s) identified by means of a competitive bidding process. Tertiary institutions will be

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required to submit their B-BBEE status in terms of the specialized scorecard contained in the B-BBEE Codes of Good practice.

- (5) Should an organ of state require a service that can be provided by one or more tertiary institutions or public entities as well as enterprises from the private sector, the appointment of a contractor must be done by means of the normal competitive bidding process. Public entities will be required to submit their B-BBEE status in terms of the specialized scorecard contained in the B-BBEE Codes of Good practice.

**Declarations**

13. A bidder must, in the stipulated manner, declare that-
- (a) the information provided is true and correct;
  - (b) the signatory to the bid document is duly authorised; and
  - (c) documentary proof regarding any bidding issue will, when required, be submitted to the satisfaction of the relevant organ of state.

**Remedies**

- 14.(1) An organ of state must, upon detecting that the B-BBEE status level has been claimed or obtained on a fraudulent basis, or any of the conditions of contract have not been fulfilled, act against the bidder or person awarded the contract.
- (2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulations (1)-
- (a) disqualify a person from the bidding process;
  - (b) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
  - (c) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
  - (d) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the bid; and
  - (e) 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 the *audi alteram partem* (hear the other side) rule has been applied.

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**DRAFT - FOR PUBLIC COMMENTS****Tax clearance**

15. No contract may be awarded to a person whose tax matters have not been declared by SARS to be in order.

**Repeal of Regulations**

16. The Preferential Procurement Regulations, 2001, are hereby repealed.

**Short title**

17. These regulations are called the Preferential Procurement Regulations, 2009.

**PRAVIN GORDHAN  
MINISTER OF FINANCE**

Jan2024-PPPFA Regs 2009 – FV3

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**GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS**


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**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](mailto:pppfainputs@treasury.gov.za). Enquires may be directed to Leanda Kleinbooi at phone no. 012 315 5715.

The draft regulations are also available at [www.treasury.gov.za](http://www.treasury.gov.za).

**SCHEDULE****Draft Preferential Procurement Regulations, 2016****Contents**

1. Definitions
2. Application
3. Identification of preference point system
4. Evaluation of tenders on functionality
5. 80/20 preference point system for acquisition of goods or services for Rand value of up to R100 million
6. 90/10 preference point system for acquisition of goods or services with Rand value above R100 million
7. Award of contracts to tenderers not scoring highest points
8. Criteria for breaking deadlock in scoring
9. Local production and content
10. Pre-qualification criteria for preferential procurement
11. Disposal, sale and letting of property or assets
12. Cancellation of tender
13. Sub-contracting
14. Remedies
15. Circulars and guidelines
16. Repeal of regulations
17. Short title and commencement




## 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

(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-

- (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:

$$P_s = 90 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where

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

$P_t$  = Comparative price of tender or offer under consideration; and

$P_{\min}$  = 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 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 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.

(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:

$$P_s = 80 \left( 1 + \frac{P_t - P_{min}}{P_{min}} \right)$$

Where

- $P_s$  = Points scored for comparative price of tender or offer under consideration;
- $P_t$  = Comparative price of tender or offer under consideration ; and
- $P_{min}$  = 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:

$$P_s = 90 \left( 1 + \frac{P_t - P_{min}}{P_{min}} \right)$$

Where

- $P_s$  = Points scored for comparative price of tender or offer under consideration;  
 $P_t$  = Comparative price of tender or offer under consideration; and  
 $P_{min}$  = 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 .....



## GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

## NATIONAL TREASURY

NO. R. 1851

10 March 2022

**PUBLICATION OF DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2022 FOR PUBLIC COMMENT**

In accordance with section 5(2) of the Preferential Procurement Policy Framework Act, 2000 (the Act), the draft Preferential Procurement Regulations, 2022 (the draft Regulations), in the Schedule are published for public comment. These Regulations are intended to be made by the Minister of Finance in terms of section 5(1), read with section 2(1)(b) and (c) and the definition of "prescribed" in section 1, of the Act.

The draft Regulations propose to prescribe—

- the threshold amounts in which the 80/20 and 90/10 preference point systems must be used, together with the formula to be applied; and
- other matters necessary or expedient in order to achieve the objects of the Act.

Written comments on the draft Regulations submitted by **11 April 2022** to [CommentDraftLegislation@treasury.gov.za](mailto:CommentDraftLegislation@treasury.gov.za) will be considered. By making a submission, the commentor agrees that the name of the commentator and the submission may be made public by the National Treasury and the submission will be disclosed if requested in terms of the Promotion of Access to Information Act, 2000.

**SCHEDULE****PREFERENTIAL PROCUREMENT REGULATIONS, 2022****Contents**

1. Definitions
2. Application
3. Identification of preference point system
4. 80/20 preference point system for acquisition of goods or services with Rand value equal to or above R30 000 and up to R50 million
5. 90/10 preference point system for acquisition of goods or services with Rand value above R50 million
6. 80/20 preference points system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R30 000 and up to Rand value of R50 million
7. 90/10 preference point system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R50 million
8. Criteria for breaking deadlock in scoring
9. Award of contracts to tenderers not scoring highest points
10. Remedies
11. Repeal of regulations
12. Short title and commencement

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## 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—

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

“**price**” includes all applicable taxes less all unconditional discounts;

“**Rand value**” means the total estimated value of a contract in Rand, calculated at the time of the tender invitation; and

“**the Act**” means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000).

## Application

2. These Regulations apply to organs of state as defined in section 1<sup>1</sup> of the Act.

## Identification of preference point system

3.(1) An organ of state must, in the tender documents, stipulate—

(a) the preference point system applicable to the tender as envisaged in regulations 4, 5, 6 or 7; and

(b) any specific goal as envisaged in section 2(1)(d) and (e) of the Act.

(2) If it is unclear whether the 80/20 or 90/10 preference point system applies—

(a) in the case of a tender to generate income or to dispose of or lease assets, the highest acceptable tender; or

(b) in the case of any other tender, the lowest acceptable tender, must be used to determine the applicable preference point system.

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

4.(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:

$$P_s = 80 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

<sup>1</sup> 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 Notices—

(a) 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; and

(b) R. 571 of 15 June 2017 recognises, with effect from 17 June 2017, national and provincial government components listed in Schedule 3 to the Public Service Act, 1994 and municipal entity as defined in section 1 of the Local Government: Municipal Systems Act, 2000, 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.

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmin = Price of lowest acceptable tender.

(2) A maximum of 20 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

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

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

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

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

$$P_s = 90 \left( 1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmin = Price of lowest acceptable tender.

(2) A maximum of 10 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

**80/20 preference points system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R30 000 and up to Rand value of R50 million**

6.(1) The following formula must be used to calculate the points for price in respect of a tender to generate income or to dispose of or lease assets, with a Rand value equal to, or above R 30 000 and up to a Rand value of R50 million, inclusive of all applicable taxes:

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$$P_s = 80 \left( 1 + \frac{P_t - P_{max}}{P_{max}} \right)$$

Where-

$P_s$  = Points scored for price of tender under consideration;

$P_t$  = Price of tender under consideration; and

$P_{max}$  = Price of highest acceptable tender.

(2) A maximum of 20 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

### **90/10 preference point system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R50 million**

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

$$P_s = 90 \left( 1 + \frac{P_t - P_{max}}{P_{max}} \right)$$

Where-

$P_s$  = Points scored for price of tender under consideration;

$P_t$  = Price of tender under consideration; and

$P_{max}$  = Price of highest acceptable tender.

(2) A maximum of 10 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

### **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 specific goals.

(2) 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**

9. 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.

### Remedies

10.(1) Upon detecting that a tenderer submitted false information regarding specific goals 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 representations within 14 days as to why—
    - (i) the tender submitted may 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 organ of state should not restrict the tenderer from conducting any business for a period not exceeding 10 years with any organ of state.
- (2) After considering the representations referred to in subregulation (1)(b), the organ of state may—

- (a) if it concludes 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;
  - (b) if it concludes that the tenderer must be restricted, restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years.
- (3) An organ of state must, within five working days—
- (a) inform the National Treasury, in writing, of any action taken in terms of subregulation (2); and
  - (b) if it decides to restrict a tenderer, request the National Treasury to publish the name of the tenderer in its list of restricted suppliers.
- (4) The National Treasury must, within three working days after receiving a request in terms of subregulation (3)(b), publish the name of the tenderer in its list of restricted suppliers.

### Repeal of regulations

11. Any regulations made under section 5 of the Act are repealed.

### Short title and commencement

12. These Regulations are called the Preferential Procurement Regulations, 2022 and take effect on the date of promulgation of these Regulations.



**national treasury**

Department:  
National Treasury  
REPUBLIC OF SOUTH AFRICA

## **MEDIA STATEMENT**

### **FURTHER COMMUNICATION ON CONSTITUTIONAL COURT JUDGMENT REGARDING PREFERENTIAL PROCUREMENT REGULATIONS, 2017**

Following the Constitutional Court judgement issued on 16 February 2022 on the matter between the Minister of Finance and Afribusiness regarding the 2017 Preferential Procurement Regulations, the following steps have been taken by National Treasury to ensure that public procurement is not delayed and service delivery is uninterrupted.

National Treasury in communications dated 25 February 2022, and 3 and 11 March 2022 provided clarity on the implications of the Constitutional Court judgement. The advice was cautionary and not prohibitive and after considering all legal options and consultations organs of state were advised on 3 March 2022 to apply, in terms of section 3, for exemption from certain provisions of the Preferential Procurement Policy Framework Act.

National Treasury recognises the urgency of the requests for exemption in terms of section 3 of the Act and rapidly put internal processes in place to ensure that the requests are dealt with expeditiously. Once the Minister has made his decision on the exemption requests, the acting Chief Procurement Officer communicates the decision to the organ of state concerned. This process generally takes 72 hours from application to response. Organs of state that are granted exemptions may procure goods and services using their procurement policy. The exemption process will continue until new regulations are in place or the Constitutional Court has provided clarity on the matters put before them.

National Treasury has never prevented nor prohibited organs of state from procuring goods and services.

On 10 March 2022, the draft Preferential Procurement Regulations were published in the national and provincial *Gazettes* for public comment and the closing date was 11 April 2022. National Treasury is considering all the public comments received on the draft Preferential Procurement Regulations, 2022. After due process including seeking clarity where required, the department will publish the new regulations in the Gazette and on the department's website.

Concerning the Minister of Finance's application to the Constitutional Court seeking clarity on its judgement of 16 February 2022, the Registrar of the Court had advised that it is receiving the Court's attention and that the parties will be advised when the judgement will be handed down. As soon as the judgement is received from the Constitutional Court, it will be communicated accordingly.

**Issued by National Treasury**

**Date: 13 May 2022**

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