

Supplier Engagement Forum

Procurement Regulatory Reforms as per PPR 2022

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13 July 2023





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- Paradigm shift in the procurement regulatory landscape which necessitated the revision of the Eskom tendering processes to align with the new legislative requirements.
- In 2022, there was a Constitutional court matter through which Regulations 3, 4 and 9 of the Preferential Procurement Regulations of 2017 (PPR of 2017) were successfully challenged.
- The judgement ruled that it was not necessary or expedient for the Minister to prescribe the impugned regulations.
- Consequently, the outcome vested the power to determine preferential procurement policy with the organ of state in accordance with Section 2(1) of the PPPFA.
- Focus has been **Regulation 4** and **Regulation 9** respectively.
 - Both regulations were to give effect on the government's determination to set aside 30% of appropriate categories of public procurement for purchasing from SMMEs, Cooperatives, as well as township and rural enterprises.
 - **Regulation 4** was on the prequalification criteria for preferential procurement whereas **Regulation 9** was on subcontracting as a condition of tender.
 - This culminated into the repeal of certain PPR of 2017 provisions as well as the introduction of new provisions.
- Subsequently, the then PPR of 2017 was repealed through PPR 2022 which came into effect on 16 January 2023.
- Of the revised provisions which will be of focus for today's session, are **Regulation 3, 4 and 5** on the application of 80/20 and 90/10 Procurement Preferential Points and the formulae thereof.

2. PPR 2017 vs PPR 2022

PPR 2017	PPR 2022
Defined Functionality	Silent
Pre-qualification to advance previously disadvantaged groups	Removed
80/20 applicable to procurement above 30 000	Silent – implying 80/20 application from 0.00 procurement up to R50mil
No clear direction w.r.t disposal evaluation	Preference point system for Disposals clearly captured
Criteria for tender cancellation	Silent
BBBEE certificate used for Preference point	Specific goals/RDP used for Preferential points
Implied that no need to use objective criteria	Emphasis on the use of Objective criteria where applicable.
Market related prices and price negotiations	Silent

✓ **Regulation 3** :Identification of Preference Point System:

- ✓ 10 or 20 Points for Preference are allocated on the basis of specific goals inline with the framework set out in the PPPFA.
- ✓ Requirements are as follows:
 - ✓ Tender enquiry/documents must stipulate the applicable preferential point system;
 - ✓ Specific goal in the invitation/enquiry 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.
 - ✓ 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 points systems; or
 - ✓ 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.

4. Application of the Preferential Points

- ✓ **Regulation 4:** 80/20 preference point system for acquisition of goods or services with Rand value equal to or below R50m:
 - ✓ The PPPFA provides for the 80/20 preference point system to apply to contracts equal to or below a prescribed amount. It therefore does not allow for a minimum threshold value to be prescribed.
 - ✓ 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 R50m, inclusive of all applicable taxes. Regulation no longer state “with a Rand value equal to or above R30 000 and up to R50m.
- ✓ Furthermore, reference is made in final revised regulations to specific goals and not necessarily on B-BBEE status level of contributor.
- ✓ However, Eskom has made a determination to allocate the 20 points for the B-BBEE status level of contributor as it remains a legislative requirement and compliance to it still has to be enforced.
- ✓ As a public entity, Eskom is still required to comply in terms of Section 10(b) of the B-BBEE Act when revising the section on its Preferential Procurement Procedure.
- ✓ Similar to Regulation 4, **Regulation 5:** 90/10 preference point system for acquisition of goods or services with the Rand value above R50m:

✓ **Regulation 6 and 7:** 80/20 and 90/10 preferential point system for tenders to generate income or to dispose of or to lease assets:

- ✓ This is a new provision that was not in the previous iteration of the regulations.
- ✓ Essentially, this provision allows for the formulae for the 80/20 and 90/10 preference point system to be applied in reverse.
- ✓ For example, in the 80/20 preference point system the formula would be applied as follows:

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

✓ Where:

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

- ✓ As an organ of state, Eskom is required to contribute towards advancing the transformation agenda through following the relevant regulatory prescripts.

Evaluation for Functionality/Technical Threshold:

- In accordance with PPR 2022, ITT/Enquiry is issued with a minimum qualifying score for Functionality/Technical requirements which form part of evaluation criteria.
 - Requirements must be clearly stated in the RFQ document.
 - Criteria for measuring functionality/technical threshold must be objective.
 - RFQ document must specify the evaluation criteria for measuring functionality,
 - Specify the points for each criterion and if any, each sub-criterion.
 - Specify the minimum qualifying score for functionality.
- Evaluation threshold will not be set too low that it may jeopardize the quality of the requires goods, works or services or too high to a point that they become unrealistic and unattainable.
- Scores attained for technical/functionality must be rounded off to the nearest two decimal points.
- Quotation that does not meet the minimum qualifying score for technical/functionality as per the specification will be deemed unacceptable.
- If it meets the minimum qualifying score for functionality then it qualifies to be evaluated further for price and specific goals (80/20 or 90/10 principle).

- **Evaluation for Price (80 points):**

- Preferential Point System must be adhered to when conducting price evaluation.
- 80/20 principle is applicable to transactions below R50m.
- Points scored for specific goals must be added to the points scored for price.
- Total score of both must be rounded off to the nearest two decimal places.
- Contract must be awarded to the bidder scoring the highest points unless objective criteria if any justify the award to another bidder.
- Notwithstanding the above, a tenderer recommended for award, must still meet contractual requirement as set out in the RFQ before approval.

- **Evaluation on Specific Goals (20 Points):**

- ✓ Requirements in terms of the PPPFA, PPR 2022 and Dtic related regulations as well as the Reconstruction & Development Programme (RDP).
- ✓ Transform the local industries in terms of capacity and capability in order to minimize dependency on the external/international markets.
 - Awarding to persons, or categories of persons, historically disadvantaged by unfair discrimination based on race, gender or disability.
 - Any specific goal for which a point maybe awarded, must be clearly specified in the enquiry/RFQ.
 - Specific goals to be used are defined in the SDL&I Work Instruction and are mandatory for all acquisitions of goods, works and services.
- ✓ Default position for Eskom is to allocate the 20 points for the B-BBEE status level of contributor as it remains a legislative requirement and compliance to it still has to be enforced.

6. Evaluation for Functionality/Technical Threshold

- ✓ Such criteria should:
 - ✓ Relate directly to the goods, services or engineering and construction works that are being procured, and to matters that cannot directly be expressed in monetary terms;
 - ✓ Be justifiable in terms of projected procurement outcomes;
 - ✓ Enable the most economically advantageous offer to be established; and
 - ✓ Be practicable, objective and quantifiable to enable tenders to be compared and assessed objectively.
- ✓ The evaluation of quality in the evaluation of tender offers alongside price adjusted for a preference, expands the preference points scoring system included in the Preferential Procurement Policy Framework Act to include points for quality as objective criteria, which are added after points for price and preference have been scored.
- ✓ This enables best economic value to be determined or the cost-effectiveness of the transaction to be considered in the awarding of contracts.
- ✓ In such instances, all tenderers who meet the criteria set or the minimum qualifying score for functionality then qualify to be evaluated further for price and specific goals.

7. Evaluation on Specific Goals & Objective Criteria

In advancing the transformation agenda, PPR 2022 advocates for the implementation of Preferential Points in order to increase the competitiveness, capacity, and capability of its local supply base as well as support government's goals of shared growth, employment creation, poverty reduction and skills development. This is operationalised through:

- ✓ Awarding to persons, or categories of persons, historically disadvantaged by unfair discrimination based on race, gender or disability.
- ✓ Specifying such goals for which a point maybe awarded in the enquiry/RFQ.
- ✓ Making them mandatory for all acquisitions of goods, works and services.
- ✓ 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.
- ✓ When applying Objective Criteria, it is possible to award to a bidder that did not score the highest points.
- ✓ In accordance with section 2(1)(f) of the PPPFA which states that the contract must be awarded to the bidder who scores the highest points unless **Objective Criteria** in addition to those contemplated in paragraphs (d) and (e) justify the award to another bidder. However, those must be justifiable. Examples of **Objective Criteria** are:
 - ✓ Local Content
 - ✓ Localization
 - ✓ Any other requirement deemed important such as registration to professional bodies.
- ✓ These are conditions for contract award and the consequence of not meeting such stipulated objective criteria must be stated on an enquiry/ITT.
- ✓ This will allow the CFT to assess the risk upfront that a tenderer with the highest score (following the application of the 80/20 or 90/10 principle) may not be awarded the tender.
- ✓ Once a determination has been made, a recommendation can be made to award to the second ranked tenderer.

8. Unpacking Objective Criteria

When applying Objective Criteria, it is possible to award to a bidder that did not score the highest points.

- ✓ In accordance with section 2(1)(f) of the PPPFA which states that the contract must be awarded to the bidder who scores the highest points unless **Objective Criteria** in addition to those contemplated in **paragraphs (d) and (e) justify the award to another bidder**. Those being:
 - ✓ (d) the specific goals may include (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; (ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;
 - ✓ (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
- ✓ However, there are instances where functionality criteria may serve as “objective criteria” for the award of a contract to a bidder other than the highest scoring one.
- ✓ The inclusion of objective criteria in an enquiry is not mandatory but a condition for contract award, and if included this must align to the requirements of the PPPFA [clause 2(1)(f) and be clearly stated in the enquiry together with the consequence of such objective criteria (i.e., if objective criteria are not met by the tenderer; it may lead to the second ranked tenderer being recommended for award).
- ✓ As part of government’s industrialization policy, government adopted designation of Sectors and Products for local production and content to be supported through public procurement.
- ✓ Therefore, procurement of locally manufactured products applies to all procurement irrespective of the value and method of procurement where suppliers are invited.

9. NIPP Requirements

- ✓ Implementing the National Industrial Participation Programme (NIPP) requirements which stipulate that all contracts with a FGN component or content of US\$5m or more should be concluded in accordance with the Dtic.
- ✓ Contractor / supplier has to contact dtic to arrange for support and development of local businesses.
- ✓ The following narrative must be captured in all tenders that have import/ foreign content equal to or in excess of USD\$5 million;-
 - ✓ “NIPP is a programme that seeks to leverage economic benefits and support the development of South African industry by effectively utilizing the instrument of government procurement. The NIPP programme is mandatory on all government and parastatal purchases or lease contracts (goods and services) with an imported content equal to or exceeding US\$5 million.
 - ✓ The programme is targeted at the South African and foreign industries, enterprises, and suppliers of goods and services to government / parastatals, where the imported content of such goods and services equals to or exceeds US\$5 million. The first customer of NIPP is the South African industry that benefits through the NIPP business plans which, when implemented generate new or additional business activities through one or more of the following: investment, export opportunities, job creation, increased local sales, SMME and BEE promotion, R & D and technology transfer.
 - ✓ Companies with a NIPP obligation are required to sign this obligation agreement with the Department of Trade, Industry and Competition (dtic) before the contract with Eskom Holdings SOC Ltd, as a purchasing entity, is signed. The obligation agreement governs the relationship between the dtic and supplier. It defines the NIPP obligation value/s, requirements to fulfil the NIPP obligation, performance milestones, performance monitoring processes and the NIPP credit allocation criteria
 - ✓ All tenders with an import content that is equal to or exceeds the threshold of US\$5 million, compels the winning bidder to negotiate and enter into a NIPP obligation agreement with the dtic before signing the contract with Eskom.”

- ✓ For all contracts equal to or in excess of US\$5 million, PSCM must engage with SDL&I and furnish the following information to the dtic five working days after the award of the tender (note that if a contract is not subsequently concluded, the dtic must be informed accordingly):
 - ✓ Bid number; Description of the goods or services; Date on the letter of intent to award the contract; Name, address and contact details of the contractor; Value of the contract; and Imported content of the contract, if possible.
- ✓ The dtic and Eskom are required to provide the DPE with a quarterly report on all contracts awarded with imported content equal to or more than US\$5 million during that quarter.



Conclusion