



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

IMPLEMENTATION GUIDE

PREFERENTIAL PROCUREMENT REGULATIONS, 2017 PERTAINING TO THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, ACT NO 5 OF 2000

March 2017

TABLE OF CONTENTS

GENERAL

1. ACRONYMS AND ABBREVIATIONS
2. PURPOSE
3. APPLICABILITY
4. INVITATION TO TENDER / REQUESTS FOR QUOTATION
5. APPLICATION OF PRE-QUALIFICATION CRITERIA
6. TENDERS BASED ON FUNCTIONALITY AS A CRITERION
7. APPLICATION OF PREFERENCE POINT SYSTEMS
8. IDENTIFICATION OF APPLICABLE PREFERENCE POINT SYSTEM
9. BROAD-BASED BLACK ECONOMIC EMPOWERMENT (B-BBEE) STATUS LEVEL CERTIFICATES
10. VALIDITY OF B-BBEE STATUS LEVEL VERIFICATION CERTIFICATES
11. VERIFICATION OF B-BBEE LEVELS IN RESPECT OF EMES
12. ELIGIBILITY AS QUALIFYING SMALL ENTERPRISES (QSE)
13. LOCAL PRODUCTION AND CONTENT
14. SUB-CONTRACTING AS A CONDITION OF TENDER FOR PROCUREMENT ABOVE R 30 MILLION
15. EVALUATION OF TENDERS BASED ON FUNCTIONALITY AS A CRITERION
16. EVALUATION OF TENDERS BASED ON A STIPULATED MINIMUM THRESHOLD FOR LOCAL PRODUCTION AND CONTENT
17. EVALUATION IN TERMS OF PRICE AND PREFERENCE POINT SYSTEMS
18. CRITERIA FOR BREAKING DEADLOCK IN SCORING
19. NEGOTIATING A FAIR MARKET RELATED PRICE
20. CANCELLATION OF TENDERS
21. AWARD OF CONTRACTS TO TENDERER NOT SCORING THE HIGHEST TOTAL POINTS
22. REMEDIES
23. TAX CLEARANCE

- 24. BIDDING DOCUMENTS**
- 25. TRANSITIONAL ARRANGEMENTS**

GENERAL

1. ACRONYMS AND ABBREVIATIONS

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

****For the purposes of this Implementation Guide the term “bid” has the same meaning assigned to the term “tender”. Furthermore, the term “tender”/ “bid’ also includes price quotations, unless specifically excluded.***

2. PURPOSE

This Guide is intended to assist Accounting Officers and Accounting Authorities with the implementation of the Preferential Procurement Regulations, 2017 issued in terms of section 5 of the Preferential Procurement Policy Framework Act, Act Number 5 of 2000 (PPPFA).

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

3. APPLICABILITY

3.1 Institutions

3.1.1 The Preferential Procurement Regulations, 2017 are applicable to organs of state as contemplated in section 1 (iii) of the PPPFA and all public entities listed in Schedules 2, 3A, 3B, 3C and 3D to the PFMA, municipalities and municipal entities.

3.1.2 These organs of state and entities referred to in 3.1.1 above are hereafter referred to as institutions in this Guide.

4. INVITATION TO TENDER/ REQUESTS FOR QUOTATION

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

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

4.1.1. Properly plan for the provision of goods and services, to ensure that the procurement plan is aligned to the needs identified in the strategic plan of the institution and that goods and services are delivered at the right time, right price, right place and that the quantity and quality will satisfy those needs.

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

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

4.1.4. Determine whether the sector, sub-sector, industry or products for which an invitation is to be made have been designated for local production and content in terms of Regulation 8 of the Preferential Procurement Regulations. If designated, institutions must include a specific condition in the tender documents that only locally produced goods or locally manufactured goods with a stipulated minimum threshold for local production and content will be

considered. This will subsequently have a direct impact on the evaluation of the tender.

- 4.1.5. Must identify procurement opportunities where pre-qualification criteria as provided for in Regulation 4 must be applied by following the process specified in paragraph 5 below.
- 4.1.6. Must identify procurement opportunities where subcontracting as condition of tender for procurement above R 30 million must be applied by following the process specified in paragraph 14 below.

5. APPLICATION OF PRE-QUALIFICATION CRITERIA (Regulation 4)

- 5.1. Institutions must at procurement and tender planning stage identify procurement opportunities to advance designated groups and apply the pre-qualification criteria stipulated in Regulation 4 for this purpose.
- 5.2. Institutions must conduct market research or industry analysis to identify procurement opportunities, level of transformation in a particular sector or commodity, supply market, their B-BBEE status level and availability of EMEs or QSEs who may be eligible to tender.
- 5.3. The market research and Industry analysis must identify sectors and industries that are not transformed where pre-qualification provisions could be applied to transform such sectors and industries for the benefit and advancement of designated groups.
- 5.4. Prequalification must be used in identified tenders to advance designated groups on the basis of B-BBEE Status Level of contributor, EME or QSE or on the basis of subcontracting with EMEs or QSEs which are 51% owned by either of the following: Blacks; Black Youth; Black Women; Black people with disabilities; Black people living in rural or underdeveloped areas or townships; cooperatives owned by Black people; Black people who are Military Veterans.
- 5.5. Where procurement opportunities for designated groups have been identified, tenders must be advertised with a clear tendering condition that tenderers will be prequalified on the basis of one or more of the criteria mentioned in paragraph 4.4.above.
- 5.6. Tenderers that do not meet the pre-qualification criteria stipulated in the tender document should be disqualified from further evaluation.
- 5.7. Tenderers who meet the prequalification criteria are evaluated further in terms of any evaluation criteria stipulated in the tender including any technical specification, functionality and preference point system in terms of regulation 6 and 7 of the Preferential Procurement Regulations 2017.
- 5.8. Where a tender is advertised with a specific condition that only locally produced services or goods or locally manufactured goods may be procured, such tender must first be evaluated in terms of pre-qualification criteria, the local content and production requirements for that tender before being evaluated further in terms

of other specified criteria.

- 5.9. Tenderers must, where subcontracting is a prequalification requirement, submit proof of subcontracting arrangement between the main tenderer and the subcontractor. Proof of subcontracting arrangement may include a subcontracting agreement between main tenderer and subcontractor.
- 5.10. Where no tenderer meets prequalification criteria, the institution must cancel the tender; and must investigate the reasons for tenderers failing to meet prequalification criteria.
- 5.11. Where an Institution elects to use prequalification criteria for preferential procurement to advance or protect categories of enterprises as a condition of tender or price quotations, the following procedure must be followed:
 - 5.11.1. An industry and commodity analysis to determine availability of the category of enterprises that the organ of state seeks to advance and level of transformation in the sector, sector charter and codes may be considered.
 - 5.11.2. Verify the number of enterprises in the sector to determine if there will be sufficient competition.
 - 5.11.3. Determine which category of enterprises will be advanced in terms of Regulation 4
 - 5.11.4. When an organ of state decides to apply the sub-contracting provision as specified in Regulation 4(c) all tenders above the prescribed maximum threshold for quotations must be advertised through an open competitive bidding process subject to potential tenderers meeting the 30% minimum subcontracting requirement to EMEs or QSEs that are 51% owned by the following enterprises:
 - (i) Black people
 - (ii) Black people who are youth
 - (iii) Black people who are women
 - (iv) Black people with disabilities
 - (v) Black people living in rural or underdeveloped areas or townships
 - (vi) Cooperatives which are 51% owned by Black people
 - (vii) Black people who are military veterans
- 5.12. Any combination of designated groups stipulated in Regulation 4 (c) may be applied in a tender or request for quotation.
- 5.13. Where an organ of state elects to apply subcontracting as a prequalification, tenders or requests for quotation must be advertised with a clear condition that potential tenderers would be prequalified based on meeting subcontracting condition of tender or request for quotation. A tender must be advertised with a clear condition for prequalification.
- 5.14. Conditions of tender must clearly specify that it is the responsibility of the tenderer to select competent subcontractors that meet all requirements of the

tender so that their tender is not jeopardized by the subcontractor when evaluated. Tenderers are responsible for all due diligence on their subcontractors.

5.15. Tenders or requests for quotation must be evaluated in terms of the evaluation criteria stipulated in the tender or request for quotation documentation:

- (a) Prequalification criteria
- (b) Evaluation for mandatory criteria
- (c) Evaluation in terms of local production and content if part of the tender
- (d) Evaluation for Prequalification criteria
- (e) Evaluation in terms of Functionality if part of the tender
- (f) Evaluation in terms of 80/20 or 90/10 preference point system.

5.16. Note that all tender evaluations must form part of the report of the Bid Evaluation Committee to Bid Adjudication Committee and Accounting Officer/ Accounting Authority. (Whichever is applicable)

5.17. Institutions may not subcontract in such a way that there is no incentive for contractors and subcontractors to conduct business.

6. TENDERS BASED ON FUNCTIONALITY AS A CRITERION

6.1. Not all tenders should necessarily be invited on the basis of functionality as a criterion. The need to invite tenders on the basis of functionality as a criterion depends on the nature of specific commodity or service taking into account quality, reliability, viability and durability of a service and the tenderer's technical capacity and capability to execute a contract.

6.2. When an institution invites a tender or request for quotation that will also be evaluated on functionality as a criterion, the AO/ AA must clearly specify the following aspects in the tender documents:

Evaluation criteria for measuring functionality

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

Points for each criterion

6.4. The points allocated to each criterion should not be generic but should be determined separately for each tender on a case by case basis.

Points for each sub-criterion

6.5. The applicable points that will be utilized when scoring each sub-criterion should be objective.

Minimum qualifying score for functionality

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

7. APPLICATION OF PREFERENCE POINT SYSTEMS¹

- 7.1. The 80/20 preference point system is applicable to price quotations and tenders with a Rand value equal to, or above R30 000 and up to a Rand value of R50 million (all applicable taxes included).

Institutions **may** apply the 80/20 preference point system to price quotations with a value less than R30 000 if and when appropriate.

- 7.2. The 90/10 preference point system is applicable to bids with a Rand value above R50 million (all applicable taxes included).
- 7.3. The threshold value referred to in paragraphs 6.1 and 6.2 distinguishing the 80/20 and 90/10 preference point systems has been increased in the Preferential Procurement Regulations, 2017 from maximum R1 million to R50 million.

8. IDENTIFICATION OF APPLICABLE PREFERENCE POINT SYSTEM (Regulation 3)

- 8.1. In terms of Regulation 3 Institutions must stipulate the preference point system applicable to a tender or price quotation. There are, however, instances where it is uncertain to determine the preference point system applicable during preparation of invitation of a tender.
- 8.2. If there is uncertainty on the preference point system to be applied, institutions must advertise the tender indicating that the tender will be evaluated on either the 80/20 or 90/10 preference point system. Once a tender is received, the lowest acceptable tender must be used to determine the preference point system to be used for the evaluation of tenders.
- 8.3. Where the lowest acceptable tender is below R50 million, the 80/20 preference point system must be used.
- 8.4. If the lowest acceptable tender is above R50 million, the 90/10 preference point system must be used.
- 8.5. If pre-qualification criteria are applicable to the tender or price quotation as envisaged in regulation 4; the institution must state this clearly in the invitation to tender.

¹ The thresholds for preferential procurement do not affect the threshold values for procurement issued in terms of Instruction Note 7 of 2007/2008 or threshold values for procurement in terms of MFMA Supply Chain Management prescripts or threshold values for procurement issued by accounting authorities of schedule 2, 3B and 3D public entities.

- 8.6. Institutions must state clearly in the tender documents:-
- 8.6.1. If 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;
 - 8.6.2. If compulsory subcontracting is applicable to the tender as envisaged in regulation 9; and
 - 8.6.3. If objective criteria are applicable to the tender as envisaged in regulation 11.
- 8.7. It must be pointed out that the prescribed threshold values within which AOs /AAs may procure services, or goods by means of petty cash, verbal / written price quotations or advertised competitive bids are not affected by the Preferential Procurement Regulations, 2017.

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

- 9.1. Tenderers² are required to submit proof of B-BBEE Status Level of contributor. Proof includes original and valid B-BBEE Status Level Verification Certificates or certified copies thereof together with their tenders or price quotations, to substantiate their B-BBEE rating claims.
- 9.2. Tenderers who do not submit B-BBEE Status Level Verification Certificates or who are non-compliant contributors to B-BBEE do not qualify for preference points for B-BBEE but should not be disqualified from the tendering process. They will score points out of 90 or 80 for price only and zero (0) points out of 10 or 20 for B-BBEE.
- 9.3. However, should institutions stipulate a specific B-BBEE Status Level as prequalification criteria in terms of Regulation 4 and the tenderer does not meet this requirement; institutions must disqualify such tenderer as having submitted an unacceptable tender.
- 9.4. A trust, consortium or joint venture (including unincorporated consortia and joint ventures) must submit a consolidated B-BBEE Status Level Verification Certificate for every separate tender.
- 9.5. Public entities and tertiary institutions must also submit B-BBEE Status Level Verification Certificates together with their tenders.
- 9.6. If an institution is already in possession of a valid and original or certified copy of a tenderer's B-BBEE Status Level Verification Certificate that was obtained for the purpose of establishing the database of possible suppliers for price quotations or that was submitted together with another tender, it is not necessary to obtain a new B-BBEE Status Level Verification Certificate each time a tender is submitted from the specific tenderer.

²With the exception of EMEs and QSEs who are required to submit sworn affidavit in terms of Codes of good practice. Institutions must acquaint themselves with proof of B-BBEE as may be issued by the DTI from time to time

- 9.7. Such a certificate may be used to substantiate B-BBEE rating claims provided that the closing date of the tender falls within the expiry date of the certificate that is in the institution's possession.
- 9.8. Each time this provision is applied, cross-reference must be made to the B-BBEE Status Level Verification Certificate already in possession for audit purposes.
- 9.9. AOs / AAs must ensure that the B-BBEE Status Level Verification Certificates submitted are issued by the following agencies³:
- 9.9.1. **Tenderers other than EMEs**
- (i) Verification agencies accredited by SANAS; or
- 9.9.2. **Tenderers who qualify as EMEs**
- (i) Sworn affidavit signed by the EME representative and attested by a Commissioner of oaths.

10. VALIDITY OF B-BBEE STATUS LEVEL VERIFICATION CERTIFICATES

10.1 Verification agencies accredited by SANAS

- 10.1.1. These certificates are identifiable by a SANAS logo and a unique BVA number.
- 10.1.2. Confirmation of the validity of a B-BBEE Status Level Verification Certificate can be done by tracing the name of the issuing Verification Agency to the list of all SANAS accredited agencies. The list is accessible on http://www.sanas.co.za/directory/bbee_default.php
- 10.1.3. The relevant BVA may be contacted to confirm whether such a certificate is valid.
- 10.1.4. As a minimum requirement, all valid B-BBEE Status Level Verification Certificates should have the following information detailed on the face of the certificate:
- The name and physical location of the measured entity;
 - The registration number and, where applicable, the VAT number of the measured entity;
 - The date of issue and date of expiry;
 - The certificate number for identification and reference;
 - The scorecard that was used (for example QSE, Specialized or Generic);
 - The name and / or logo of the Verification Agency;
 - The SANAS logo;
 - The certificate must be signed by the authorized person

³ Certificates issued by IRBA and Accounting Officers have been discontinued; however valid certificates already issued before 1 January 2017 may be used until they phase out completely by December 2017.

- from the Verification Agency; and
- The B-BBEE Status Level of Contribution obtained by the measured entity.

11. VERIFICATION OF B-BBEE LEVELS IN RESPECT OF EMEs

- 11.1. In terms of the Generic Codes of Good Practice, an enterprise including a sole propriety with annual total revenue of R10 million or less qualifies as an EME.
- 11.2. In instances where Sector Charters are developed to address the transformation challenges of specific sectors or industries, the threshold for qualification as an EME may be different from the generic threshold of R10 million. In such instances, the relevant Sector Charter thresholds will therefore be used as a basis for a potential bidder to qualify as an EME. (For example the approved thresholds for EMEs for the Tourism and Construction Sector Charters are R2.5 million and R1.5 million respectively).
- 11.3. An EME automatically qualifies as a level 4 contributor with B-BBEE recognition level of 100% in terms of the Codes of Good Practice.
- 11.4. An EME with at least 51% black ownership qualifies as Level 2 Contributor with B-BBEE level of 125% in terms of the Codes of Good Practice.
- 11.5. An EME with 100% black ownership qualifies as a Level 1 contributor with B-BBEE level of 135% in terms of the Codes of Good Practice.
- 11.6. An EME that is regarded as a specialized enterprise with at least 75% black beneficiaries qualifies as Level 1 contributor with B-BBEE level of 135% in terms of Codes of Good Practice.
- 11.7. An EME that is regarded as a specialized enterprise with at least 51% black beneficiaries qualifies as a Level 2 contributor with B-BBEE level of 125% in terms of the Codes of Good Practice.
- 11.8. An EME is required to submit a sworn affidavit confirming their annual total revenue of R10 million or less and level of black ownership to claim points as prescribed by regulation 6 and 7 of the Preferential Procurement Regulations 2017.
- 11.9. An EME that is regarded as a Specialized Enterprise is required to submit a sworn affidavit confirming their annual turnover/ allocated budget/ gross receipt of R10 million or less and level of percentage of black beneficiaries to claim points as prescribed by regulation 6 and 7 of the Preferential Procurement Regulations 2017.
- 11.10. An EME may be measured in terms of the QSE scorecard should they wish to maximize their points and move to a higher B-BBEE recognition level. It is in this context that an EME may submit a B-BBEE verification certificate.

12. ELIGIBILITY AS QUALIFYING SMALL ENTERPRISES (QSE)

- 12.1. The Codes define a QSE as any enterprise with annual total revenue of between R10 million and R50 million.
- 12.2. A QSE with at least 51% black ownership qualifies as a Level 2 contributor.
- 12.3. A QSE with 100% black ownership qualifies as a Level 1 Contributor.
- 12.4. A QSE that is regarded as a specialized enterprise with at least 75% black beneficiaries qualifies as a Level 1 contributor with B-BBEE level of 135% in terms of the Codes of Good Practice.
- 12.5. A QSE that is regarded as a specialized enterprise with at least 51% black beneficiaries qualifies as a Level 2 contributor with B-BBEE level of 125% in terms of the Codes of Good Practice.
- 12.6. A QSE is required to submit a sworn affidavit confirming their annual total revenue of between R10 million and R50 million and level of black ownership or a B-BBEE level verification certificate to claim points as prescribed by regulation 6 and 7 of the Preferential Procurement Regulations 2017.
- 12.7. A QSE that is regarded as a specialized enterprise is required to submit a sworn affidavit confirming their annual turnover/ budget/ gross receipt of R50 million or less and level of percentage of black beneficiaries or a B-BBEE level verification certificate to claim points as prescribed by regulation 6 and 7 of the Preferential Procurement Regulations 2017.
- 12.8. Any enquiries in respect of B-BBEE Status Level Verification Certificates may be directed to the Department of Trade and Industry (dti) as follows:

Ms Lumka Kemele
Trade and Industry Advisor B-BBEE Unit
Department of Trade and Industry
Tel: (012) 394 5469
Fax: (012) 394 6469
E-mail: LKemele@thedti.gov.za

13. LOCAL PRODUCTION AND CONTENT

13.1. Designated Sectors

- 13.1.1. Tenders in respect of goods or services that have been designated for local production and content, **must** contain a specific bidding condition that only locally produced goods or services with a stipulated minimum threshold for local production and content will be considered.
- 13.1.2. AOs / AAs must stipulate in tender invitations that the exchange rate to be used for the calculation of local content (local content and local production are used interchangeably) must be the exchange rate published by the SARB at 12:00 on the date, one week (7 calendar days) prior to the closing date of the bid.
- 13.1.3. Only the South African Bureau of Standards (SABS) approved technical specification number SATS 1286:201x must be used to calculate local content.

The formula to calculate local content must be disclosed in the bid documentation

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

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

Where

x imported content

y bid price excluding value added tax (VAT)

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

- 13.1.5. For the purpose of paragraphs 13.1.1, 13.1.2 and 13.1.3 above, the SBD / MBD 6.2 (Declaration Certificate for Local Content) must form part of the bid documentation.
- 13.1.6. The Declaration Certificate for Local Content (SBD / MBD 6.2) must be completed and duly signed. AOs / AAs are required to verify the accuracy of the rates of exchange quoted by the bidder in paragraph 13.1.2 of this implementation guide.
- 13.1.7. In relation to a designated sector, a contractor must not be allowed to sub-contract in such a manner that the local production and content of the overall value of the contract is reduced to below the stipulated minimum threshold.

13.2. Non-Designated Sectors

- 13.2.1. Where there is no designated sector, institutions **may** decide to include a specific bidding condition that only locally produced goods or services 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 standards determined by the dti in consultation with the National Treasury.
- 13.2.2. Institutions must stipulate in bid invitations that the exchange rate to be used for the calculation of local content must be the exchange rate published by the SARB at 12:00 on the date, one week (7 calendar days) prior to the date of closure of the bid.
- 13.2.3. Only the South African Bureau of Standards approved technical specification number SATS 1286:201x as indicated in paragraph 13.1.3 above must be used to calculate local content.
- 13.2.4. For the purpose of paragraphs 13.2.1, 13.2.2 and 13.2.3 above, the SBD / MBD 6.2 (Declaration Certificate for Local Content) must form part of the bid documentation.

- 13.2.5. The Declaration Certificate for Local Content (SBD / MBD 6.2) must be completed and duly signed. Institutions are required to verify the accuracy of the rate(s) of exchange quoted by the bidder in paragraph 13.2.2 of this implementation guide. .
- 13.2.6. Any enquiries in respect of Local Production and Content must be directed to the Department of Trade and Industry (dti) as follows:

Dr. Tebogo Makube
Chief Director: Industrial Procurement
Tel: (012) 394 3927
Fax: (012) 394 4927
E-mail: TMakube@thedti.gov.za

14. SUBCONTRACTING AS A CONDITION OF TENDER FOR PROCUREMENT ABOVE R 30 MILLION (Regulation 9)

- 14.1. “The regulation states **that if feasible to contract above R 30 million**, an organ of **state must apply** subcontracting to advance designated groups”.
- 14.2. The term “feasible” is used in recognition of the fact that it may not always be possible to subcontract in all tenders due to the nature of some tenders. (For instance it may not be possible to sub-contract one piece of machinery that is above R 30 million)
- 14.3. Institutions must therefore identify procurement opportunities for designated groups where compulsory sub-contracting must be applied to all contracts/projects above R30 million.
- 14.4. The responsibility to determine whether it is feasible or not rests with the institution preparing the tender. Institutions must ensure participation of EMEs and QSEs in contracts or projects and not just dismiss this provision on the basis that it is not feasible without providing facts and objective analysis to substantiate their decision.
- 14.5. Notwithstanding the minimum 30% compulsory sub-contracting provision, institutions may identify procurement opportunities for participation of designated groups in contracts or projects below R30 million.
- 14.6. Tenders must be advertised with a condition that tenderers who fail to comply with this requirement would be disqualified.
- 14.7. Institutions must conduct market or industry research to identify level of transformation in the sector or commodity, role players and their B-BBEE status level and availability of EMEs or QSEs who may be eligible for subcontracting.
- 14.8. The Central Supplier Database (CSD) has been upgraded to allow bidders/contractors/ suppliers access to CSD for identification of potential sub-contractors from the pool of EMEs or QSEs to advance designated groups.

- 14.9. In the case of construction and built environment sectors, nothing prevents bidders/ contractors/ suppliers to select sub-contractors from the CIDB database who are registered on the CSD for the purposes of compliance with the minimum 30% compulsory sub-contracting provisions.
- 14.10. Tenderers or contractors must submit proof of subcontracting arrangement between the main tenderer and the subcontractor. Proof of subcontracting arrangement may include a subcontracting agreement between main tenderer and the subcontractor.
- 14.11. The responsibility for inclusion of compulsory subcontracting clause in the tender rests with the institution.
- 14.12. The responsibility to sub-contract with competent and capable subcontractors rests with the main contractor/ supplier.
- 14.13. The contract will be concluded between the main contractor and the institution, therefore, the main contractor and not the sub-contractor would be held liable for performance in terms of its contractual obligations.
- 14.14. Main contractors/ suppliers are discouraged from subcontracting with their subsidiary companies as this may be interpreted as subcontracting with themselves and / or using their subsidiaries for fronting. Where primary contractor subcontracts with a subsidiary this must be declared in tender documents.
- 14.15. Tenders that do not meet subcontracting requirements are considered as being not acceptable tenders and must be disqualified and may not be considered for further evaluation or award.
- 14.16. The report containing the list of potential subcontractors may be drawn by accessing the following link: www.csd.gov.za
- 14.17. The Central Supplier Database (CSD) was enhanced to enable Institutions to search for suppliers based on the criteria as per Preferential Procurement Regulations, 2017. The following steps can be followed:
- 14.17.1.1. Step 1: Complete the basic search elements. The Institution's CSD user will be required to complete basic search elements like supplier, commodity and B-BBEE status level. Once the institution's CSD user clicks on the Search button, the matching records for the search input provided will be displayed. The multiple matching records resulting from the search will enable the additional filters and Preferential Procurement Regulations, 2017 filters options to further refine the search.
- 14.17.1.2. Step 2: Refine the search using additional filters. The additional filters will enable the Institution's CSD user to refine commodities and locations, if required. Once commodities and/or locations are selected from the filter results, the institution's CSD user may click on the "Apply" button. Results

will be refined based on the additional criteria that were applied.

- 14.17.1.3. Step 3: Refine the search using Preferential Procurement Regulations 2017 filters. The filters will enable the institution's CSD user to refine the search for potential suppliers based on:
- a) B-BBEE status level of contributor; or
 - b) Enterprise type (Exempted Micro Enterprise (EME) and/or Qualifying Small Enterprise (QSE)); and/or
 - c) Designated groups which are at least 51% owned by:
 - (i) black people
 - (ii) black people who are youth
 - (iii) black people who are women
 - (iv) black people with disabilities
 - (v) black people who are military veterans
 - (vi) black people that formed a cooperative (primary, secondary or tertiary cooperative)
 - (vii) black people living in rural areas or underdeveloped area or townships.
 - (viii) EME or QSE
- 14.18. The Institution must make available the list of suppliers registered on the CSD to provide the required goods or services in respect of the applicable designated groups mentioned in the relevant tender from which the tenderer must select a supplier.
- 14.19. Practitioners are encouraged to frequently visit the CSD website to familiarize themselves with developments on the steps mentioned in paragraph 14.17.1.1 to 14.17.1.3. as more information on developments around this provision will be shared through the CSD.
- 14.20. Where no tenderer meets sub-contracting criteria, institutions must cancel the tender and investigate reasons for tenderers failing to meet compulsory sub-contracting.
- 14.21. In the event of uncertainty with regard to information provided by the tenderer and the CSD is unable to verify such information at that stage, the institution may request necessary proof to substantiate the information provided.

EVALUATION OF TENDERS

15. EVALUATION OF TENDERS BASED ON FUNCTIONALITY AS A CRITERION

Tenders invited on the basis of functionality as a criterion must be evaluated in two stages – first functionality must be assessed and then in accordance with the 80/20 or 90/10 preference point systems prescribed in Preferential Procurement Regulations 6 and 7. The evaluation must be done according to Procurement Regulations 2017 as follows:

15.1. First stage – Evaluation of functionality

15.1.1. Tenders must be evaluated in terms of the provisions contained in paragraph 5 of this implementation guide.

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

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

a) The scores for each criterion (and, where relevant, each sub-criterion) should be added to obtain the total score; and

b) The following formula should be used to convert the total score converted to a percentage for functionality:

$$P_s = \frac{S_o}{M_s} \times 100$$

where:

P_s = percentage scored for functionality by bid under consideration

S_o = total score of bid under consideration M_s = maximum possible score

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

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

15.2.1. Only bids that achieve the minimum qualifying score / percentage for functionality must be evaluated further in accordance with the 80/20 or 90/10 preference point systems prescribed in Preferential Procurement Regulations 6 and 7. [Guidance on the evaluation of bids in terms of the 80/20 or 90/10 preference points systems is provided in paragraph 17 of this Guide].

16. EVALUATION OF TENDERS BASED ON A STIPULATED MINIMUM THRESHOLD FOR LOCAL PRODUCTION AND CONTENT

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

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

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

16.1.2. A tender will be disqualified if:

The tender fails to achieve the stipulated minimum threshold for local production and content; and the Declaration Certificate for Local Content (SBD / MBD 6.2) referred to in paragraphs 13.1.6 and 13.2.5 is not submitted as part of the bid documentation.

16.1.3. Calculation of Local Content:

16.1.3.1. The local content (LC) as a percentage of the bid price must be calculated in accordance with the SABS approved technical specification number SATS 1286: 201x as indicated in paragraph 13.1.4 above.

16.1.4. AOs / AAs must verify the accuracy of the rates of exchange quoted by the tenderer in the Declaration Certificate for Local Content (SBD / MBD 6.2) in terms of paragraph 13.1.6.

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

16.2.1. Only bids that achieve the minimum stipulated threshold for local production and content must be evaluated further in accordance with the 80/20 or 90/10 preference point systems prescribed in Preferential Procurement Regulations 6 and 7. [Guidance on the evaluation of bids in terms of the 80/20 or 90/10 preference points systems is provided in paragraph 15 of this Guide].

17. EVALUATION IN TERMS OF PRICE AND PREFERENCE POINT SYSTEMS

17.1. Step 1: Calculation of points for price

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

17.1.2. When calculating prices:

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

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

17.1.3. The formulae to be utilized in calculating points scored for price are as follows:

80/20 Preference point system [(for acquisition of goods or services for a Rand value equal to or above R30 000 and up to R50 million) (all applicable taxes included)]

Where

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

P_s = Points scored for price of tender under consideration

P_t = Price of tender under consideration

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

90/10 Preference point system [(for acquisition of goods or services with a Rand value above R50 million) (all applicable taxes included)]

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

Where

P_s = Points scored for price of tender under consideration

P_t = Price of tender under consideration

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

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

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

17.2.1. Points must be awarded to a bidder for attaining the B-BBEE status level Points for B-BBEE Status level of contributor must be awarded in accordance with the table below:

B-BBEE STATUS LEVEL OF CONTRIBUTOR	NUMBER OF POINTS (90/10 SYSTEM)	NUMBER OF POINTS (80/20 SYSTEM)
1	10	20
2	9	18
3	6	14
4	5	12
5	4	8
6	3	6
7	2	4
8	1	2
Non-compliant	0	0

17.3. Calculation of total points scored for price and B-BBEE status level of

contributor

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

18. CRITERIA FOR BREAKING DEADLOCK IN SCORING

- 18.1. In the event that two or more tenderers have scored equal total points, the successful tenderer must be the one that scored the highest points for B-BBEE.
- 18.2. If two or more tenderers have equal points, including equal preference points for B-BBEE, the successful tenderer must be the one scoring the highest score for functionality, if functionality is part of the evaluation process.
- 18.3. In the event that two or more tenderers are equal in all respects, the award must be decided by the drawing of lots.

19. NEGOTIATING A FAIR MARKET RELATED PRICE

- 19.1. Institutions may include in their SCM policies a process for negotiating with preferred bidders after a competitive bidding process or price quotations. The policy may include amongst others the following principles:
 - (a) Delegations and threshold values for negotiating by the accounting officer
 - (b) Negotiating may not allow any preferred tenderer a second or unfair opportunity
 - (c) Is not to the detriment of any other tenderer
 - (d) Does not lead to higher price than the bid as submitted.
- 19.2. Institutions must include in the tender documents a condition stating clearly that the award of the tender may be subjected to price negotiation with the preferred tenderers.
- 19.3. The Bid Evaluation Committee may indicate in its report to the Bid Adjudication Committee that based on the evaluation the prices offered are above market related prices after factoring the premium to be paid in terms of the 80/20 or 90/10 preference point system and the findings of an objective market analysis conducted.
- 19.4. When the Bid Adjudication Committee considers the Evaluation report it must express itself on whether it agrees or disagrees with the Bid Evaluation Committee; if it disagrees, the decision must be recorded and reasons provided as part of the Bid Adjudication Committee report.
- 19.5. Where the Bid Adjudication Committee agrees with the BEC or on its own assessment is of the view that the tenderer is charging prices higher than the fair market price, the Bid Adjudication Committee may request from the AO/AA or delegated authority to subject the tender to price negotiations with the three preferred tenderers scoring the highest points (from first highest to third highest) before award is made.

- 19.6. Upon approval to negotiate, the AO/AA or delegated authority must appoint a cross functional negotiation team, with one member appointed to be team leader.
- 19.7. The negotiating team leader must ensure that all members of the negotiating team are clear on the negotiation strategy and desired outcomes.
- 19.8. Negotiations must be fair and objective and may not be used to unfairly prejudice the highest scoring / preferred tenderer or any other tenderer.
- 19.9. Members of the negotiating team must behave ethically at all material times during and after negotiations, may not divulge any information related to negotiations to third parties without prior consent from the accounting officer/ authority.
- 19.10. All negotiations must be officially closed with a decision communicated and agreed between parties before moving to negotiate with the next preferred tenderer.

20. CANCELLATION OF TENDERS

- 20.1. An AO / AA may, prior to the award of a tender, cancel the tender if:
 - 20.1.1. Due to changed circumstances, there is no longer a need for the goods or services requested. [AOs / AAs must ensure that only goods or services that are required to fulfill the needs of the institution are procured]; or
 - 20.1.2. Funds are no longer available to cover the total envisaged expenditure. [AOs / AAs must ensure that the budgetary provisions exist]; or
 - 20.1.3. No acceptable tenders are received. [If all bids received are rejected, the institution must review the reasons justifying the rejection and consider making revisions to the specific conditions of contract, design and specifications, scope of the contract, or a combination of these, before inviting new bids].
 - 20.1.4. Due to material irregularities in the tender process. If there are material irregularities that are committed during the tender process such that it renders the entire process unfair, the accounting officer or accounting authority may cancel the tender process and start afresh.
 - 20.1.5. Institutions may only with the prior approval of the relevant treasury cancel the tender for the second time. An organ of state must make representation to the relevant treasury stating reasons for cancellation for the second time.
 - 20.1.6. Cancellation mentioned in paragraph 20.1.5 does not refer to price quotations in terms of threshold for procurement but tenders that have been advertised for open competitive tendering process.

21. AWARD OF CONTRACTS TO TENDERER NOT SCORING THE HIGHEST TOTAL POINTS

- 21.1. A tender must be awarded to the tenderer who scored the highest total number of points in terms of the preference point systems (price and B-BBEE points), unless objective criteria in terms of section 2(1)(f) of the Act justify the award of the tender to another tenderer.
- 21.2. If an institution intends to apply objective criteria in terms of section 2(1)(f) of the Act, the institution must state what those objective criteria are in the tender documents.
- 21.3. Functionality and any element of the B-BBEE scorecard may not be used as objective criteria.

22. REMEDIES

- 22.1. AOs / AAs must when acting against the tenderer or person awarded the contract on a fraudulent basis, consider the following over and above the provisions of Regulation 14:
 - 22.1.1. Report the tenderer to the B-BBEE Commission
 - 22.1.2. Forward the matter for criminal prosecution.
 - 22.1.3. Involve their legal services when any of the remedies are applied.
- 22.2. The remedies provided for in Preferential Procurement Regulations 2017 do not prevent an institution from instituting remedies arising from any other prescripts or contract.
- 22.3. Institutions will recommend the restriction of suppliers to the National Treasury, who after considering representation from all parties may impose a restriction or penalty and publish on its official website the list of restricted suppliers.

23. TAX CLEARANCE

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

24. BIDDING DOCUMENTS

- 24.1. The Bidding Documents affected by the Preferential Procurement Regulations, 2017 are:
 - a) SBD 6.1 and MBD 6.1.
 - b) SBD 6.2.and MBD 6.2.
- 24.2. AOs / AAs should customize and utilize the bidding documents (SBDs or MBDs) by incorporating the institutions name, logo and contact details.
- 24.3. The relevant SBDs or MBDs must be utilized for procurement by means of written price quotations, advertised competitive bids or proposals.
- 24.4. Although these SBDs or MBDs have not been formally issued to Public Entities

listed in Schedules 2, 3B and 3D to the PFMA, nothing prohibits these institutions from customizing and utilizing these bidding documents as well.

- 24.5. The bidding documents can be accessed on OCPO website as follows:
http://ocpo.treasury.gov.za/Buyers_Area/Pages/Standard-Bidding-Forms.aspx

25. TRANSITIONAL ARRANGEMENTS

- 25.1. If a tender was advertised / invited in terms of the evaluation criteria prescribed in the Preferential Procurement Regulations, 2011 (prior to the date of coming into effect of the Preferential Procurement Regulations, 2017) but will only be evaluated and awarded after the date of coming into effect of the Preferential Procurement Regulations, 2017, the tender must be evaluated and awarded in terms of the evaluation criteria prescribed in the Preferential Procurement Regulations, 2011 and in terms of the conditions contained in the bid documents.
- 25.2. Such a tender must be evaluated and awarded as soon as possible but not later than the initial expiry of the validity period of the tender. The extension of the validity period of such a bid must not be allowed.

END
