

PREFERENTIAL PROCUREMENT : A CASE STUDY OF SOUTH AFRICA

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ABSTRACT

Preferential procurement also known as affirmative procurement comprises participation programmes aimed at the engagement of Small Medium Micro Enterprises (SMMEs) owned by previously disadvantaged persons in all types of contracts and the generation of income for marginalised sectors of society. Marginalised sectors refer to people who were discriminated against on the basis of race, gender, ethnicity and disability under the former apartheid regime (separate development based on race). The implementation of the Preferential Procurement Policy Framework Act 5 of 2000, gives effect to section 217(3) of the Constitution of the Republic of South Africa of 1996, by providing a framework for the implementation of a fair public preferential procurement policy.

The South African government identified the above procurement policy as part of the overall public sector procurement reform initiative, as critical to the economic empowerment of those sectors of the country's population who were previously excluded from mainstream economic activities. Preferential procurement endeavours to ensure that public funds are expended in such a way that all segments of the South African population benefit from such expenditure through job creation and commercial activity.

In this paper, the purpose for the formulation of the Preferential Procurement policy will be discussed. The Draft Preferential Procurement Regulations of 2009 are also reviewed. The article concludes with a number of recommendations.

INTRODUCTION

It can be argued that the primary aim of the South African government's procurement policy is to redress past imbalances created under the former policy of separate development (apartheid) by favouring historically disadvantaged people in the awarding of state tenders. Specific terms have been used to define those who are seen as having been disadvantaged in the past. Such terms include: PDI or HDI (previously or historically disadvantaged individual), ABE (affirmable business enterprise), APSP (affirmative professional services provider). Primarily, preference is to be given to disadvantaged people in terms of race, gender and disability.

The commencement of South Africa's procurement policy was the publication of the "10-point Plan" by the Department of Public Works in November 1995. The Constitution of the Republic of South Africa Act 108 of 1996 features a built-in clause (section 217) which enables state departments to design tender adjudication criteria to fulfil particular social goals. During April 1997, the Green Paper on Public Sector Procurement Reform in South Africa saw the light, but this document is vague and merely proposes principles that should be followed for good governance. The Preferential Procurement Policy Framework Act 5 of 2000 and the Preferential Procurement Regulations, 2001 set out how the policy is to be implemented. The regulations define what is meant by a "Historically Disadvantaged Individual", and allows a maximum of 10% of the tender adjudication criteria to be allocated for HDI status when the contract is over R500 000 in value. For contracts of under R500 000 in value, a maximum of 20% may be allocated for social goals.

It was decided by Cabinet that a preference mechanism must be introduced in the procurement of all goods and services to target especially those individuals discriminated against under the previous political dispensation. For this purpose, the presumption is made that South African citizens who fall into population groups that had no franchise in national elections to the introduction of the 1983 and 1993

Constitutions, are Previously Disadvantaged Individuals (hereinafter, PDIs). It is incumbent on individuals to demonstrate their claims to fall into such population groups on the basis of identification and association (Provincial Tender Board: User Manual, 2000:67).

A brief historical overview of preferential procurement in South Africa follows.

HISTORICAL OVERVIEW OF PREFERENTIAL PROCUREMENT IN SOUTH AFRICA

Nano (2008:1) states that the previous procurement approach had various fallacies. There was, for example, limited accountability, transparency and no fair equitable distribution of economic resources. Furthermore, there were no supporting structures to oversee the process. Against this background, the government realised the need to have an integrated approach towards the acquisition of public goods and services (Nano, 2008:1). The idea was for the public service to operate in an environment where there is fairness, equity, transparency, competition and value for money.

In terms of the Green Paper on Public Sector Procurement Reform in South Africa (Government Gazette No. 17928, 14 April 1997:33), a system of Affirmative Procurement was advocated. This green paper was a discussion document which contained proposals aimed at achieving the objectives of good governance, developing and utilising the country's human resources potential to the full and encouraging a well-developed and competitive business sector (Nano, 2008:2). Taken further, the preferential procurement policy was advocated to enact the vision for the procurement reform process and to facilitate purposefully the flow of commerce to and through to those population segments who had been historically under-utilised and excluded from participation. Watermeyer (2000) argues that this would be done in such a manner that participation in procurement activities would be ensured through making the tender process accessible to specific groups without guaranteeing work, link the flow of money into targeted business enterprises (a system of procurement which is aimed at providing employment and business opportunities for disadvantaged / marginalised communities referred to

as “target groups”) with a concomitant flow of responsibility, increase the volume of work available to the poor and marginalised sectors of society and provide employment and income generation opportunities for marginalised sectors of society in all types of contracts, for example, building and construction (Government Gazette No. 17928, 14 April 1997:33).

In terms of prescriptions contained in the above-mentioned Government Gazette, (No. 17928, 14 April 1997:49), it was envisaged that preferential procurement would, in the long term, facilitate growth in terms of the efficiency and effectiveness of service delivery as well as the numbers and sizes of business enterprises owned and controlled by previously disadvantaged individuals. Furthermore, emerging enterprises were to contribute to the tax base, engage workers who are affiliated to labour organisations, adhere to safety and environmental regulations and, in their business activities reflect norms and standards prevalent in developed countries.

The above-mentioned proposals as discussed in the Green Paper on public sector procurement in relation to the previously disadvantaged individuals, resulted in the implementation of the Preferential Procurement Policy Framework Act 5 of 2000, whereby the latter Act gives effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution. In terms of section 217(3) of the Constitution, national legislation must prescribe a framework within which the procurement policy may be implemented. However, in terms of an amendment to section 217 of the Constitution, the discretionary power of “may” has been amended to “must” which now places an obligation on government.

In terms of prescriptions contained in the Preferential Procurement Policy Framework Act 5 of 2000, an organ of state must determine its preferential procurement policy and implement it within a framework which will be discussed briefly below.

It is stipulated in section 2(1)(b)(i) of the above-mentioned Act that a preference point system must be followed, that is, in respect of contracts

with a Rand currency value above a prescribed amount, a maximum of 10 points may be allocated for specific goals, provided that the lowest acceptable tender scores 90 points for price. Section 2(1)(b)(ii) of the mentioned Act stipulates that contracts with a Rand currency value equal to or below a prescribed amount, a maximum of 20 points may be allocated for specific goals provided that the lowest acceptable tender scores 80 points for price. Furthermore, section 2(1)(c) of the Preferential Procurement Policy Framework Act 5 of 2000, stipulates that any other acceptable tenders which are higher in price must score fewer points on a **pro rata** basis. The points are calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula, namely:

- (i) Contract with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability.
- (ii) The implementation of the Reconstruction and Development Programme (hereinafter, RDP), as published in Government Gazette No. 16085 dated 23 November 1994.
- (iii) Any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender (Preferential Procurement Policy Framework Act 5 of 2000).

The contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in the above paragraphs justify the award to another tenderer (Preferential Procurement Policy Framework Act 5 of 2000).

Any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies that the organ of state may have (Preferential Procurement Policy Framework Act 5 of 2000).

Any contemplated goals must be measurable, quantifiable and monitored for compliance. The Minister may, on request, exempt an organ of state from any or all the provisions of this Act if:

- It is in the interests of national security;
- The likely tenderers are international suppliers; and
- If it is in the public interest (Preferential Procurement Policy Framework Act 5 of 2000).

Any procurement process implemented under a preferential procurement policy where the invitation to tender was advertised before the commencement of this Act, must be finalised as if this Act had not come into operation (Preferential Procurement Policy Framework Act 5 of 2000).

The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objectives of the Act mentioned above. Draft regulations must be published for public comment in the Government gazette and in every Provincial Gazette before promulgation (Preferential Procurement Policy Framework Act 5 of 2000).

In the section that follows an overview of the Draft Preferential Procurement Regulations of 2009 is provided.

DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2009

South Africa's policy of black economic empowerment (BEE) is not simply a moral initiative to redress the imbalances of the past. It is a pragmatic growth strategy that aims to realise the country's full economic potential. The purpose of the Draft Preferential Procurement Regulations, 2009 (Preferential Procurement Policy Framework Act 5 of 2000), is to ensure that government's preferential procedures are aligned with the aims of the Broad Based Black Economic Empowerment Act 53 of 2003 (BBBEE) as well as the Codes of Good Practices. The effect of the new proposed regulations are that:

- The preference points systems as per the current Act and regulations are to be maintained;
- The current Preferential Procurement Regulations determine that the Human Disadvantaged individual (HDI's) status and certain Reconstruction and Development Programme (RDP) goals should be used to determine preference points in the awarding of bids. The new proposed 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;
- In addition, the threshold value to distinguish between the 80/20 and the 90/10 preference points system, is to be increased from R500 000 in the current regulations to R1,0 million in the new proposed regulations to strengthen the contribution towards the development of small, medium and micro enterprises (SMMEs); and
- The application of the new proposed 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 (www.parliament.gov.za).

Kroukamp (2009:18) states that the objectives of the BBBEE Act are to:

- Promote economic participation of black people;
- Change the racial constitution of management and ownership structures;
- Increase access to economic activities, infrastructure and skills development as well as owning and managing of new and existing enterprises to communities and black women;
- Promoting broad-based participation in the economy by black people through investment programmes;
- Facilitating access to economic activities by empowering rural and local communities; and
- Facilitating access to finance for black economic empowerment.

Kroukamp (2009:18) further argues that the Code of Good Practice was developed to present a standard framework for the measurement of BBBEE across all sectors of the South African economy. The assumption is that this will allow for all industries to be equal when presenting their BBBEE credentials. The Code of Good Practice is to provide transparent and comprehensive measurement of broad-based Black Economic Empowerment.

In the section that follows, an overview is provided on the importance of the Ten Point Plan in terms of preferential procurement.

EMERGENCE OF THE TEN POINT PLAN

When the current government took office, one of the challenges it faced was to transform the landscape of economic power to reflect the composition of the South African population. This process of transformation had to be implemented sensitively and sensibly. The interim strategies were a compilation of means to accommodate and enhance the historically disadvantaged who had previously been denied access to public sector procurement.

The 10 Point Plan proposed that the procurement of goods and services for any project or other requirement of the Government be obtained in the smallest possible quantities without incurring undue negative impacts on the quality, time and cost parameters of such services and goods. The purpose was to provide opportunities and make it easier for small businesses to participate and increase their share in public sector procurement.

In order to ensure the practical and effective implementation of the Cabinet approved interim measures of the 10-Point Plan, and to affirm the RDP in a practical manner, the Property Development Branch of the Public Works Department began to utilise the above documents on all projects in 1996 (Department of Public Works, 1996:01). Consequently, the commencement of South Africa's reformation of public sector procurement policy was the publication of the 10-Point Plan in November 1996 by the Department of Public Works. Hereunder, the 10-

Point Plan as expounded upon by the Department of Public Works (1996:03-18), outlines the principles which were taken into consideration in awarding tenders to SMMEs is discussed briefly.

In 1995, the Ten Point Plan was introduced as an interim strategy to lay the foundation for Public Sector Procurement, which outlines the principles to be taken into consideration in awarding tenders to Small, Medium and Micro Enterprises (SMMEs) viz:

- **Access to tendering information**

The State Tender Board will assist with the compilation and dissemination of tendering and related information in a simplified and uncomplicated format. This information should be easily accessible to any business or organisation in a prescribed manner.

- **Tender Advice Centres (TACs)**

The Government has established TACs throughout the country with the primary objective to provide effective communication and assistance to tenderers. In the Province of the Eastern Cape, these advice centres are located in Umtata, Queenstown and Port Elizabeth. These fall under the authority of the Department of Economic Affairs, Environment and Tourism.

- **Review procurement procedure for contracts less than R7 500**

The Provincial Tender Board has reviewed the existing data-base of suppliers with the specific objective to incorporate the emerging SMME sector. It is likely that the SMME sector will be competitive in this market due to their low overhead structure.

- **Waiver of security/sureties**

When contractors are granted loans for projects, the aspect of providing surety is 'built-in' into the terms of the loan. The contractor is, therefore, not required to advance surety or security upfront.

- **Break-out procurement (packaging into smaller contracts)**

The procurement of goods and service for any project or other requirement of Government must be obtained in the smallest possible quantities without incurring undue negative impacts on the quality, time and cost parameters of such goods and services. The purpose is to provide opportunities and make it easier for smaller businesses to participate and increase their share in public sector procurement.

- **Early payment cycles**

It is proposed that a 30-day period be enforced as the maximum time for payment. Wherever possible, payment to suppliers will be made with minimum delay. Wherever possible, payment to suppliers will be made with minimum delay.

- **Preferences/Targeting**

It is proposed that a price preference system be effected to target a specific group, that is, persons disadvantaged by unfair discrimination within the emerging SMME sector. This policy will be based on a percentage preference and shall apply to all contracts which are less than R2million.

- **Simplification of tender submission requirements**

Tender submission documentation will be rationalised and simplified in order to make it easier for small business to deal with the paperwork involved in tendering. This will be done at the TACs.

- **Appointment of a procurement public protector (ombudsman)**

Consideration is being given to the appointment of a procurement public protector (ombudsman). The Provincial Tender Board identified a need for a procurement public protector (ombudsman) who will work in close liaison with the Provincial Tender Board on the one hand and the TACs on the other in the dissemination of information pertinent to tender procedures and give attention to complaints from tenderers.

- **Classification of building and civil engineering contracts**

To provide interventions that will assist towards establishing, regulating and promoting an enabling environment and thereby ensuring the meaningful and effective involvement of SMMEs (Department of Public Works, 1996:03-18)

A municipality is often viewed as one of the largest purchasers of goods and services in a locality. The cheapest or most efficient supplier may appear to be a national or multi-national company. However, a municipality's Integrated Development Plan (IDP) with social and economic objectives, could be used for a more progressive tender selection policy.

A strategy that could advantage local small enterprises would require the division of large contracts into smaller parts, a reduction in the requirements to provide securities, use of more accessible advertising media and the provision of training and institutional support to small suppliers.

The Constitution (1996) further deals with the process of procurement as follows:

- Section 217(1) when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do

so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

- Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for:
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

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

In the section that follows an overview of the certain prescriptions proposed in the Draft Preferential Procurement Regulations of 2009 are provided.

APPLICATION OF THE PREFERENCE POINT SYSTEM

For purposes of this paper it should be noted that for the sections that now follow there has been significant reliance on the Draft Preferential Procurement Regulations, 2009. In terms of section 3(1) of Draft Preferential Procurement Regulations, 2009 (Government Gazette No 32489, 14 August 2009) hereafter referred to as the DPPR, 2009, an organ of state must, prior to making an invitation for bids, 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. Furthermore, an indication must be provided of the appropriate preference point system to be utilized in the evaluation and adjudication of the bids.

An overview of the 80/20 preference point system for the acquisition of goods, works and / or services up to a Rand value of R1.0 million now follows:

THE 80/20 PREFERENCE POINT SYSTEM FOR ACQUISITION OF GOODS, WORKS AND / OR SERVICES UP TO A RAND VALUE OF R1,0 MILLION

In terms of section 4.(1) of the DPPR, 2009, 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; and

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

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 of 9 February 2007.

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-complaint contributor	0

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. In terms of the DPPR of 2009 only the bid with the highest number of points scored may be selected.

THE 90/10 PREFERENCE POINT SYSTEM FOR ACQUISITION OF GOODS, WORKS AND / OR SERVICES WITH A RAND VALUE ABOVE R1,0 MILLION

In terms of section 5.(1) of the DPPR, 2009, the following formula must be used to calculate the points for price in respect of bids with a Rand value above R1 000000 (all applicable taxes included):

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

Where:

Ps = Points scored for comparative price of bid under consideration;

Pt = Comparative price of bid under consideration; and

Pmin = Comparative price of lowest acceptable bid.

In terms of section 5.(2) and (3) of the DPPR, 2009, 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 and 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-complaint contributor	0

In terms of section 5.(4) of the DPPR, 2009, 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 and 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

Section 6.(1) of the DPPR, 2009, prescribes that 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) 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:

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

Ph

Where:

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

P_t = Price of bid / offer under consideration; and

P_h = Price of highest acceptable bid/offer.

In terms of section 6.(2) and (3) of the DPPR, 2009, 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 and 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-complaint contributor	0

Section 6.(4) of the DPPR, 2009, requires that 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 and section 6.(5) states that only the bid with the highest number of points scored may be selected. Section 6.(6) recommends that 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

In terms of section 7.(1) of the DPPR, 2009, 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:

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

Where:

Ps = Points scored for price of bid under consideration;

Pt = Price of bid under consideration; and

Ph = Price of highest acceptable bid.

In terms of section 7.(2) and (3) of the DPPR, 2009, 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 and 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-complaint contributor	0

In terms of section 7.(4) of the DPPR, 2009, 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. Sections 7.(5) and (6) require that only the bid with the highest number of points scored may be selected and 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

Section 8(1) of the DPPR, 2009, states that 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. Sections 8.(2), (3) and (4) indicate that 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. A bid must be disqualified if it fails to achieve the minimum qualifying score for functionality as indicated in the bid documents; and 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

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. In terms of section 9(2) of the DPPR, 2009, 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

The DPPR, 2009, in section 10(1) state that 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 ODD, the bid invitation must be cancelled. If one or more of the acceptable bids received are within the prescribed threshold of R

1000000, all bids received must be evaluated on the 80/20 preference point system.

Section 10.(2) of the DPPR, 2009, further state that 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. Section 10.(3) prescribes that 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. In terms of section 10.(4) of the DPPR, 2009, 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.

What is of further importance is that in terms of section 10.(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.

In the section that follows a brief description is provided on the general conditions, principles, declarations and remedies as proposed in terms of the DPPR, 2009.

**SPECIFIC PRESCRIPTIONS CONTAINED IN THE DRAFT
PREFERENTIAL PROCUREMENT REGULATIONS, 2009**

An overview on the general conditions, principles, declarations and remedies as proposed in the DPPR, 2009, now follows:

General conditions

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 (Section 11.(1) of the DPPR, 2009). In this regard only a bidder who has completed and signed the declaration part of the bid documentation may be considered.

Section 11.(3) of the DPPR, 2009, states that 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. With effect from 1 August 2009, only verification certificates issued in terms of sub-regulation 11 (3) (a) and (b) will be valid. Verification certificates issued in terms of sub-regulation 11 (3) (c) will only remain valid for 12 months from the date of issue.

Section 11.(6) prescribes that 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.

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 respective supplier. The submission of the certificate must comply with the requirements of sub-regulation (3) above. 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. An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally. A discount which has been offered conditionally must, despite not being taken into account for evaluation purposes, be implemented when payment is effected. Points scored must be rounded off to the nearest 2 decimals. 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. 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. Should two or more bids be equal in all respects, the award shall be decided by the drawing of lots. 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 (sections 11.(7) to (13) of the DPPR, 2009).

Principles

In terms of sections 12(1) to (4) of the DPPR, 2009, 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. 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. 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.

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 required to submit their BBBEE status in terms of the specialized scorecard contained in the BBBEE Codes of Good Practice.

Declarations

In terms of section 13. of the DPPR, 2009, 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 authorized; and
- (c) documentary proof regarding any bidding issue will, when required, be submitted
to the satisfaction of the relevant organ of state.

Remedies

Section 14 of the DPPR, 2009 provides an overview of remedies to be applied. An organ of state must, upon detecting that the BBBEE 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.

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

- Disqualify a person from the bidding process;
- Recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
- Cancel the contract and claim damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
- Impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the bid; and
- 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.

CONCLUSION AND RECOMMENDATIONS

In an article in the Sunday Times, p.13, March 21, 2010), the changes proposed to the Preferential Procurement Policy Framework Act 5 of 2000 are expected to have a significant impact on the procurement policies in South Africa where organs of state are required to comply with prescriptions contained in the Broad Based Black Economic Empowerment Act of 53 of 2003. The most obvious proposed amendment is the adjustment of the weight of Black Economic Empowerment (BEE) status in a tender pitch. The current amount is R500.000. It is proposed that a contract below this value will allocate 80 of the total of 100 points to the price and functionality of the proposal. 20 points will be awarded to reconstruction and development goals.

Contracts above the R500 000 threshold will now ease the entry with an additional 10 points awarded to the proposal's price and functionality. In terms of the proposed Draft Preferential Procurement Regulations, 2009, the amount of R1 million will be the new threshold. Contracts below this amount will be adjudicated on the 80/20 principle. However, above the R1 million mark, the 90/10 principle will apply.

RECOMMENDATIONS

It is argued that as most of the preferential considerations in tender documents are highly subjective in nature, the adjudication of tenders has become open to all sorts of possible manipulation and abuse. Against this background, the following recommendations are proposed in response to the proposed Draft Preferential Procurement Regulations, 2009:

1. As is the practice internationally, the lowest **compliant** bidder should generally be awarded the contract;
2. Openness and transparency in the tender process is vital to maintain credibility;
3. All tender adjudications including all prices and disqualifications should be advertised in the same newspapers as the original call for the tender;
4. Tender documents should be kept as clear and unambiguous as possible so as not to disadvantage any particular segments of communities;
5. Ambiguity, duplication and unnecessary waffle can lead to uncertainty and provide loopholes, especially in the adjudication process (The Times, p.16, March 5, 2010).

Schultze (2010) argues that the black economic empowerment faction of South Africa must wake up and come to the party. The entrenched culture of patronage, particularly in black business, must be eradicated. Schultze (2010) further argues that there should be confidence in genuine young black entrepreneurs in South Africa who are, in fact, quite capable of winning tenders on merit and price alone. Time will tell whether or not the proposed Draft Preferential Procurement Regulations of 2009 will achieve this outcome.

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