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GENERAL NOTICE

13 Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000): Draft Preferential Procurement Regulations, 2004 1956

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No. 13, 2004

4 October 2004

**PREFERENTIAL PROCUREMENT POLICY
FRAMEWORK ACT, 2000,
(ACT NO. 5 OF 2000):
DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2004**

THE draft Preferential Procurement Regulations, 2004, aligned with the prescripts of the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 and its related Strategy as set out in the Schedule and the proposed Broad Based Black Economic Empowerment Scorecards (Annexure SC1 and SC2), are hereby published for public comments in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000.

Interested persons who wish to comment on the draft Regulations may submit their representations in writing before 25 October 2004 to:

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

All representations must be marked for the attention of **Mr JAN Breytenbach** or **Mr HML Malinga** and may either be posted to the above address or transmitted by fax: to (012) 3265445 or 315 5355 or by e-mail to jan.breytenbach@treasury.gov.za or henry.malinga@treasury.gov.za respectively.

DRAFT

PREFERENTIAL PROCUREMENT REGULATIONS, 2004 PERTAINING TO THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT: NO. 5 OF 2000

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REGULATIONS

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

SCHEDULE

PART ONE

DEFINITIONS AND APPLICATION

Definitions

1. In these regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act bears the same meaning, and —
 - (a) **“Act”** means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
 - (b) **“Bid”** means a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods;
 - (c) **“Black people”** is a generic term, which means Africans, Coloureds and Indians who are South African citizens.
 - (d) **“Broad-Based Black Economic Empowerment”** means the economic empowerment of all black people through diverse but integrated socio-economic strategies that include, but not limited to —
 - (i) increasing the number of black people that manage, own and control enterprises and productive assets;
 - (ii) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
 - (iii) human resources and skills development;
 - (iv) achieving equitable representation in all occupational categories and levels in the workforce;
 - (v) preferential procurement; and
 - (vi) investment in enterprises that are owned or managed by black people.
 - (e) **“Comparative price”** means the price after the factors of a non-firm price and all unconditional discounts that can be utilised have been taken into consideration;
 - (f) **“Consortium or Joint Venture”** means an association of persons for the purpose of combining their expertise, property, capital, efforts, skill and knowledge in an activity for the execution of a contract;
 - (g) **“Contract”** means the agreement that results from the acceptance of a bid by an organ of state;
 - (h) **“Disability”** means, in respect of a person, a permanent impairment of a physical, intellectual, or sensory function, which results in restricted, or lack of, ability to perform an activity in the manner, or within the range, considered normal for a human being;
 - (i) **“Firm price”** is the price that is only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax, which, in terms of a law or regulation, is binding on the contractor and demonstrably has an influence on the price of any supplies, or the rendering costs of any service, for the execution of the contract;
 - (j) **“Management”**; refers to the membership of any board or similar governing body which is charged with the day-to-day management control of the enterprise/business. This entails the power to determine policies and direction of economic activities and resources.
 - (k) **“Non-firm prices”** means all prices other than “firm” prices;
 - (l) **“Person”** includes reference to a juristic person;
 - (m) **“Rand value”** means the total estimated value of a contract in Rand denomination which is calculated at the time of bid invitations and includes all applicable taxes and excise duties;
 - (n) **“Sub-Contracting”** means the primary contractor’s assigning or leasing or making out work to, or employing, another person to support such primary contractor in the execution of part of a project in terms of the contract;
 - (o) **“Trust”** means the arrangement through which the property of one person is made over or bequeathed to a trustee to administer such property for the benefit of another person;
 - (p) **“Trustee”** means any person, including the founder of a trust, to whom property is bequeathed in order for such property to be administered for the benefit of another person.

Application

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

PART TWO

PREFERENCE POINT SYSTEM AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT, EVALUATION OF BIDS, AWARDING OF CONTACTS TO BIDS NOT SCORING THE HIGHEST POINTS AND THE CANCELLATION AND RE-INVITATION OF BIDS

The 80/20 preference point system for acquisition of goods and/or services up to a Rand value of R1million

3. (1) The following formula must be used to calculate the points for price in respect of competitive bids/price quotations with a Rand

value equal to, or above R 30 000 and up to a Rand value of R1 000 000. Organs of state may, however, apply this formula for price quotations with a value less than R 30 000, if and when appropriate:

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

Where

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

P_t = Comparative price of bid/offer under consideration

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

- (2) The balanced scorecard measuring Broad-Based Black Economic Empowerment prescribed by the National Treasury must form part of the evaluation criteria of all bids.
- (3) A maximum of 20 points may be awarded to a bidder for achieving Government's procurement related socio-economic objectives. The total percentage scored for Broad-Based Black Economic Empowerment will be converted to a point out of a maximum of 20 points. This will be calculated by multiplying the total percentage scored by 20. No points will be awarded for achieving Government's Broad-Based Black Economic Empowerment objectives if the total percentage scored for Broad-Based Black Economic Empowerment is less than the prescribed minimum.
- (4) The points scored by a bidder in respect of the objectives contemplated in sub-regulation (3) must be added to the points scored for price.
- (5) Only the bid with the highest number of points scored may be selected.

The 90/10 preference point system for acquisition of goods and/or services with a Rand value above R1million

4. (1) The following formula must be used to calculate the points for price in respect of bids with a Rand value above R1000 000:

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

Where

P_s = Points scored for comparative price of bid under consideration

P_t = Comparative price of bid under consideration

P_{\min} = Comparative price of lowest acceptable bid

- (2) A balanced scorecard measuring Broad-Based Black Economic Empowerment must form part of the evaluation criteria of all bids. Where the Minister of Trade and Industry, in terms of section 9 of the Broad Based Black Economic Empowerment Act, No.53 of 2003, gazetted a code of good practice for a particular sector, the scorecard contained in the gazetted code of good practice must be utilised in the evaluation process. In the absence of such code of good practice for a particular sector, the balanced scorecard prescribed by the National Treasury must form part of the evaluation criteria.
- (3) A maximum of 10 points may be awarded to a bidder for achieving Government's procurement related socio-economic objectives. The total percentage scored for Broad-Based Black Economic Empowerment will be converted to a point out of a maximum of 10 points. This will be calculated by multiplying the total percentage scored by 10. No points will be awarded for achieving Government's Broad-Based Black Economic Empowerment objectives if the total percentage scored for Broad-Based Black Economic Empowerment is less than the prescribed minimum.
- (4) The points scored by a bidder in respect of the objectives contemplated in sub-regulation (3) must be added to the points scored for price.
- (5) Only the bid with the highest number of points scored may be selected.

The 80/20 preference point system for the sale and letting of assets up to a Rand value of R1million

5. (1) The following formula must be used to calculate the points for price in respect of competitive bids/price quotations with a Rand value equal to, or above R 30 000 and up to a Rand value of R1 000 000 and which relate to the sale and letting of assets. Organs of state may, however, apply this formula for sales and letting of assets with a Rand value less than R30 000, if and when appropriate:

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

Where

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

P_t = Price of bid/offer under consideration

P_h = Price of highest acceptable bid/offer

- (2) The balanced scorecard measuring Broad-Based Black Economic Empowerment prescribed by the National Treasury must form part of the evaluation criteria of all bids.
- (3) A maximum of 20 points may be awarded to a bidder for achieving Government's procurement related socio-economic objectives. The total percentage scored for Broad-Based Black Economic Empowerment will be converted to a point out of a maximum of 20 points. This will be calculated by multiplying the total percentage scored by 20. No points will be awarded for

achieving Government's Broad-Based Black Economic Empowerment objectives if the total percentage scored for Broad-Based Black Economic Empowerment is less than the prescribed minimum.

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

The 90/10 preference point system for the sale and letting of assets with a Rand value above R1million

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

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

Where

P_s = Points scored for price of bid under consideration

P_t = Price of bid under consideration

P_h = Price of highest acceptable bid

- (2) The balanced scorecard measuring Broad-Based Black Economic Empowerment prescribed by the National Treasury must form part of the evaluation criteria of all bids.
- (3) A maximum of 10 points may be awarded to a bidder for achieving Government's procurement related socio-economic objectives. The total percentage scored for Broad-Based Black Economic Empowerment will be converted to a point out of a maximum of 10 points. This will be calculated by multiplying the total percentage scored by 10. No points will be awarded for achieving Government's Broad-Based Black Economic Empowerment objectives if the total percentage scored for Broad-Based Black Economic Empowerment is less than the prescribed minimum.
- (4) The points scored by a bidder in respect of the objectives contemplated in sub-regulation (3) must be added to the points scored for price.
- (5) Only the bid with the highest number of points scored may be selected.

Stipulation of preference point system to be used

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

Evaluation of bids on functionality (quality) and price, including when consultants are appointed

8. (1) An organ of state must, in the bid documents, indicate if, in respect of a particular bid invitation, bids will be evaluated on functionality and price.
- (2) The total combined points allowed for functionality and price may, in respect of bids/offers with an estimated Rand value equal to, or below, R1 000 000, not exceed 80 points.
- (3) The total combined points allowed for functionality and price may, in respect of bids with an estimated Rand value above R1 000 000, not exceed 90 points.
- (4) When evaluating the bids contemplated in this item, the points for functionality must be calculated for each individual bidder.
- (5) The conditions of bid may stipulate that a bidder must score a specified minimum number of points for functionality to qualify for further adjudication.
- (6) The points for price, in respect of a bid which has scored the specified minimum number of points contemplated in sub-regulation (5) must, subject to the application of the evaluation system for functionality and price contemplated in this regulation, be established separately and be calculated in accordance with the provisions of regulations 3 and 4.
- (7) The number of points scored for achieving Government's Broad-Based Black Economic Empowerment objectives must be calculated separately and must be added to the points scored for functionality and price.
- (8) Only the bid with the highest number of points scored may be selected.

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

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

Cancellation and re-invitation of bids

10. (1) In the event that, in the application of the 80/20 preference point system as stipulated in the bid documents, all bids received exceed the estimated Rand value of R1 000 000, the bid invitation must be cancelled.
- (2) In the event that, in the application of the 90/10 preference point system as stipulated in the bid documents, all bids received are equal to, or below R 1 000 000, the bid must be cancelled.
- (3) An organ of state which has cancelled a bid invitation as contemplated in sub-regulations (1) and (2) must re-invite bids and must, in the bid documents, stipulate the correct preference point system to be applied.
- (4) An organ of state may, prior to the award of a bid, cancel a bid if —
 - (a) due to changed circumstances, there is no longer a need for the goods, works or services offered, or
 - (b) funds are no longer available to cover the total envisaged expenditure; or
 - (c) no acceptable bids are received.

PART THREE**DUTY TO PLAN, GENERAL CONDITIONS, PRINCIPLES, DECLARATIONS, PENALTIES AND TAX CLEARANCES****Duty to plan for invitation of bids****11.** An organ of state must, prior to making an invitation for bids —

- (a) properly plan for, and, as far as possible, accurately estimate the costs of the provision of services, works or goods for which an invitation for bids is to be made; and
- (b) determine the appropriate preference point system to be utilised in the evaluation of the bids.

General conditions

- 12.** (1) For specific industries (identified by the Department of Trade and Industry), where the award of bids to local manufacturers are of critical importance, such bids may be advertised with a specific bidding condition that only locally manufactured products will be considered.
- (2) Only a bidder who has completed and signed the declaration part of the bid documentation may be considered for preference points.
- (3) An organ of state may, before a bid is adjudicated or at any time, require a bidder to substantiate claims it has made with regard to preference.
- (4) An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally.
- (5) A discount which has been offered conditionally must, despite not being taken into account for evaluation purposes, be implemented when payment is effected.
- (6) Points scored must be rounded off to the nearest 2 decimals.
- (7) 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 Broad-Based Black Economic Empowerment. Should two or more bids be equal in all respects, the award shall be decided by the drawing of lots.

Principles

- 13.** (1) In the event that the percentage equity ownership by a black person changes after the closing date of the bid, the bidder must notify the relevant organ of state of the changes. The bidder will, if the percentage ownership by a black person increases, not be eligible for any additional preference points. Should the percentage equity ownership by a black person decrease, the preference points for equity ownership would be reduced accordingly.
- (2) Equity claims for a Trust may only be allowed in respect of those persons who are both trustees and beneficiaries and who are actively involved in the management of the Trust.
- (3) A consortium or joint venture may be entitled to preference claims, based on the percentage profit for a particular contract value, shared by black-owned enterprises as a consortium or joint venture for the particular contract.
- (4) A person awarded a contract as a result of preference for Broad-Based Black Economic Empowerment may not subcontract more than 25% of the value of the contract to a person who does not qualify for such preference.

Declarations**14.** A bidder must, in the stipulated manner, declare that —

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

Penalties

- 15.** (1) An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any of Government's Broad-Based Black Economic Empowerment objectives are not attained in the performance of the contract, act against the person awarded the contract.
- (2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulations (1) —
- (a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
 - (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation; and
 - (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the bid.

Tax clearance certificate

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

Repeal of Regulations

- 17.** The Preferential Procurement Regulations, 2001, is hereby repealed.

Short title

18. These regulations are called the Preferential Procurement Regulations, 2004.

T. A. MANUEL, MP
MINISTER OF FINANCE

Annexure SC1

BROAD-BASED BLACK ECONOMIC EMPOWERMENT (BBBEE)
BALANCED SCORECARD 1:
(80/20 PREFERENCE POINT SYSTEM)

For competitive bids/price quotations up to a Rand value of R1 million

Core component of BBBEE	Indicators	% Raw Score	% Weighting	% Score
Direct Empowerment (Ownership and Control)				
Equity ownership	% owned by black persons		30	
	% owned by black disabled persons		5	
	% owned by black women		10	
Management	% black persons in executive management and/or executive board and board committees		20	
Human Resource Development				
Employment Equity	Weighted employment equity analysis (% of black people as a proportion of total workforce)		5	
Skills development	Skills development expenditure as a proportion (%) of total payroll		5	
Indirect empowerment				
Preferential Procurement	Procurement from black-owned and empowered enterprises as a proportion (%) of total procurement		15	
Residual				
Local content	% local content in relation to the bid price		10	
Total Score out of 100 %			100	

NB

The total score out of 100% will be converted to a point out of a maximum of 20 points for BBBEE. No points will, however, be awarded if the total percentage score is less than 40 % for BBBEE.

ANNEXURE SC2

BROAD-BASED BLACK ECONOMIC EMPOWERMENT (BBBEE)
BALANCED SCORECARD 2:
(90/10 PREFERENCE POINT SYSTEM)

For competitive bids with a Rand above R1 million

Core component of BBBEE	Indicators	% Raw Score	% Weighting	% Score
Direct Empowerment (Ownership and Control)				
Equity ownership	% owned by black persons		20	
	% owned by black disabled persons		5	
	% owned by black women		12	
Management	% black persons in executive management and/or executive board and board committees		13	

Human Resource Development

Employment Equity	Weighted employment equity analysis (% of black people as a proportion of total workforce)	6
Skills development	Skills development expenditure as a proportion (%) of total payroll	6

Indirect empowerment

Preferential Procurement	Procurement from black-owned and empowered enterprises as a proportion (%) of total procurement	8
Enterprise Development	Investment in enterprises, owned 100% by, black persons as a proportion (%) of total assets	8
	% of profit shared by a Black-owned enterprise as a consortium or joint venture for this contract or % of this contract that will be sub-contracted to a Black-owned Enterprise	12

Residual

Local content	% local content in relation to the bid price	10
Total Score out of 100 %		100

NB

The total score out of 100% will be converted to a point out of a maximum of 10 points for BBBEE. No points will, however, be awarded if the total percentage score is less than 40 % for BBBEE.