



THE PROVINCE OF MPUMALANGA
DIE PROVINSIE MPUMALANGA

**Provincial Gazette Extraordinary
Buitengewone Provinsiale Koerant**

(Registered as a newspaper) • (As 'n nuusblad geregistreer)

Vol. 16

NELSPRUIT, 14 AUGUST
AUGUSTUS 2009

No. 1707

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GENERAL NOTICE

NOTICE 244 OF 2009

NATIONAL TREASURY

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

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

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

The Director-General
National Treasury
Private Bag X115
PRETORIA
0001

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

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

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

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**PREFERENTIAL PROCUREMENT REGULATIONS, 2009 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) **“Acceptable bid”** means a bid that complies in all respect with all the specifications and conditions prescribed in the bid documentation and assurance that the potential contractor has the ability and capability to execute the contract;
 - (c) **“BEE Status”** bears the same meaning assigned to this expression as in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 and promulgated in the *Government Gazette* on 9 February 2007;
 - (d) **“B-BBEE status level of contributor”** is the B-BBEE status received by a measured entity based on its overall performance using the Generic Scorecard contained in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 and promulgated in the *Government Gazette* on 9 February 2007
 - (e) **“Bid”** means a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive bidding processes or proposals;
 - (f) **“Black people”** is a generic term, which bears the same meaning assigned to this expression in the Broad-Based Black Economic Empowerment Act, 2003 and its Codes of Good Practice.;

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

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

Application

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

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

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

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

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

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

$$Ps = 80 \left(1 - \frac{Pt - P_{min}}{P_{min}} \right)$$

Where

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

Pt = Comparative price of bid / offer under consideration

Pmin = Comparative price of lowest acceptable bid / offer.

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

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

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

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

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

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

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

Where

P_s = Points scored for comparative price of bid under consideration

P_t = Comparative price of bid under consideration

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

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

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

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

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

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

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

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

Where

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

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

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

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

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

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

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

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Where

Ps = Points scored for price of bid under consideration
 Pt = Price of bid under consideration
 Ph = Price of highest acceptable bid

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

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

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

Evaluation of bids based on functionality -

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

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

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

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

Cancellation and re-invitation of bids

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

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

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

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

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

Principles

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

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

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

Declarations

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

Remedies

- 14.(1) An organ of state must, upon detecting that the B-BBEE status level has been claimed or obtained on a fraudulent basis, or any of the conditions of contract have not been fulfilled, act against the bidder or person awarded the contract.
- (2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulations (1)-
 - (a) disqualify a person from the bidding process;
 - (b) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
 - (c) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
 - (d) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the bid; and
 - (e) restrict the bidder or contractor, its shareholders and directors, or only the shareholders and directors who acted on a fraudulent basis, from obtaining business from any organ of state for a period not exceeding 10 years. after the *audi alteram partem* (hear the other side) rule has been applied.

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

Repeal of Regulations

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

Short title

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

**PRAVIN GORDHAN
MINISTER OF FINANCE**