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PROVINCIAL NOTICE

The following Provincial Notice is published for general information.

ADV. B. GERBER,
DIRECTOR-GENERAL

Provincial Legislature Building,
Wale Street,
Cape Town.

PROVINSIALE KENNISGEWING

Die volgende Provinsiale Kennisgewing word vir algemene inligting gepubliseer.

ADV. B. GERBER,
DIREKTEUR-GENERAAL

Provinsiale Wetgewer-gebou,
Waalstraat,
Kaapstad.

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GENERAL NOTICE**NATIONAL TREASURY**

**PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000:
DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2016 PUBLISHED FOR PUBLIC COMMENT**

In terms of section 5(2) of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), the draft regulations set out in the Schedule, is hereby published for public comment. These draft regulations are the same as the draft published in Government Notice No. 719 of 14 June 2016 in the national Government Gazette (No. 40067).

Any comment received by 23 September 2016 will be considered and should be emailed to pppfainputs@treasury.gov.za. Enquires may be directed to Leanda Pietersen at phone no. 012 315 5715.

The draft regulations are also available at www.treasury.gov.za.

SCHEDULE

**Draft Preferential Procurement Regulations, 2016
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Definitions

1. In these Regulations, any word or expression to which a meaning has been assigned in the Act has the meaning so assigned, and unless the context otherwise indicates-
 - “**B-BBEE**” means broad-based black economic empowerment as defined in section 1 of the Broad-Based Black Economic Empowerment Act;
 - “**B-BBEE status level of contributor**” means the B-BBEE status of an entity in terms of a code of good practice on black economic empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;
 - “**black people**” means black people as defined in section 1 of the Broad-Based Black Economic Empowerment Act;
 - “**Broad-Based Black Economic Empowerment Act**” means the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
 - “**comparative price**” means a price which is determined to be fair and reasonable after conducting market analysis utilising applicable price analysis techniques and taking into account the factors of a non-firm price and all unconditional discounts that may be utilised;
 - “**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;
 - “**co-operative**” means a co-operative registered in terms of the Co-operatives Act, 2005 (Act No. 14 of 2005);
 - “**designated group**” means-
 - (a) black people
 - (b) women;
 - (c) people with disabilities; or
 - (d) small enterprises, as defined in the National Small Enterprise Act, 1996 (Act No. 102 of 1996);
 - “**designated sector**” means a sector, sub-sector or industry designated by the National Treasury, after consultation with the Department of Trade and Industry, taking into account-
 - (a) national development and industrial policies for local production and content; and
 - (b) competition and other economic factors,
 and to which a stipulated minimum threshold applies;

“**EME**” means an exempted micro enterprise in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

“**functionality**” means the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents;

“**goods**” includes infrastructure;

“**infrastructure**” means-

- (a) immovable assets which are acquired or constructed or which results from construction operations; or
- (b) moveable assets which cannot function independently from purpose built immovable assets;

“**local production and content**” means that portion of the tender excluding-

- (a) the cost of components, parts or materials which have been or will be imported (whether by the supplier or a subcontractor);
- (b) costs abroad; and
- (c) freight and other direct importation costs, including landing costs, dock dues and any applicable taxes payable at the South African port of entry;

“**National Treasury**” has the meaning assigned to it in the Public Finance Management Act 1999 (Act No. 1 of 1999);

“**non-firm price**” means a price other than a price that is only subject to adjustments in accordance with the increase or decrease resulting from the amendment, imposition or abolition of any applicable tax which affects the price of the required goods or services;

“**QSE**” means a qualifying small business enterprise in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act;

“**Rand value**” means the total estimated value of a contract in Rand, calculated at the time of the tender invitation and includes all applicable taxes;

“**rural area**” means-

- (a) a sparsely populated area in which people farm or depend on natural resources, including villages and small towns that are dispersed through the area; or
- (b) an area including a large settlement which depends on migratory labour and remittances and government social grants for survival, and may have a traditional land tenure system;

“**services**” includes any services to build or maintain infrastructure;

“**stipulated minimum threshold**” means that portion of local production and content as determined by the National Treasury after consultation with the Department of Trade and Industry;

“**the Act**” means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);

“**township**” means an urban living area that any time from the late 19th century until 27 April 1994, were reserved for black people, as defined in the Broad-Based Black Economic Empowerment Act;

“**treasury**” means treasury as defined in section 1 of the Public Finance Management Act 1999 (Act No. 1 of 1999).

Application

2. These Regulations applies to organs of state as envisaged in the definition of "organ of state" in section 1 of the Act.

Identification of preference point system

3. An organ of state must-

- (a) determine, and stipulate in the tender documents, the applicable preference point system applicable to the tender; and
- (b) determine whether the 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 9.

Evaluation of tenders on functionality

- 4. (1) An organ of state must indicate in the tender documents if the tender will be evaluated on functionality.
- (2) The evaluation criteria for measuring functionality must be objective.
- (3) When evaluating a tender on functionality, the tender documents must specify-
 - (a) the evaluation criteria for measuring functionality;
 - (b) the points for each criteria and, if any, each sub-criteria; and
 - (c) the minimum qualifying score for functionality.
- (4) The minimum qualifying score for functionality for a tender to be considered further-
 - (a) may not be generic;
 - (b) must be determined separately for each tender; and
 - (c) may not be so-
 - (i) low that it may jeopardise the quality of the required goods or services; or
 - (ii) high that it is unreasonably restrictive.
- (5) A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents is not an acceptable tender.
- (6) Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point systems in accordance with regulation 5 or 6, as the case may be.

80/20 preference point system for acquisition of goods or services for Rand value up to R100 million

5. (1) The following formula must be used to calculate the points out of 80 for price in respect of an invitation for a tender with a Rand value of up to R100 million:

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

Where

P_s = Points scored for comparative price of tender or offer under consideration;

P_t = Comparative price of tender or offer under consideration; and

P_{\min} = Comparative price of lowest acceptable tender or offer.

(2) The following table must be used to calculate the score out of 20 for B-BBEE:

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

(3) A tenderer must submit proof of its B-BBEE status level of contributor.

(4) If a tenderer fails to submit proof of B-BBEE status level of contributor or is a non-compliant contributor to B-BBEE, the tenderer is not be disqualified but may only score points out of 80 for price and scores 0 points out of 20 for B-BBEE.

(5) A trust, consortium or joint venture qualifies for points for B-BBEE status level of contributor as if it is a legal entity, if it submits proof of its B-BBEE status level of contributor.

(6) The points scored by a tenderer for B-BBEE in terms of sub-regulation (2) must be added to the points scored for price under sub-regulation (1).

(7) The total number of points scored must be rounded off to the nearest 2 decimal places.

(8) Subject to regulation 7, the contract must be awarded to the tenderer who scores the highest total number of points.

90/10 preference point system for acquisition of goods or services with Rand value above R100 million

6. (1) The following formula must be used to calculate the points out 90 for price in respect of an invitation for a tender with a Rand value above R100 million:

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

Where

P_s = Points scored for comparative price of tender or offer under consideration;

P_t = Comparative price of tender or offer under consideration; and

P_{\min} = Comparative price of lowest acceptable tender or offer.

- (2) The following table must be used to calculate the points out of 10 for B-BBEE:

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

- (3) A tenderer must submit proof of its B-BBEE status level of contributor.
- (4) If a tenderer fails to submit proof of B-BBEE status level of contribution or is a non-compliant contributor to B-BBEE, the tenderer is not disqualified but may only score points out of 90 for price and scores 0 points out of 10 for BBEE.
- (5) A trust, consortium or joint venture qualifies for points for B-BBEE status level of contributor as if it is a legal entity, if it submits proof of its B-BBEE status level of contributor.
- (6) The points scored by a tenderer for B-BBEE contribution in terms of sub-regulation (2) must be added to the points scored for price under sub-regulation (1).
- (7) The total number of points scored must be rounded off to the nearest 2 decimal places.
- (8) Subject to regulation 7, the contract must be awarded to the tenderer who scores the highest total number of points.

Award of contracts to tenderers not scoring highest points

7. (1) A contract may be awarded to a tenderer that did not score the highest points only in accordance with section 2(1)(f) of the Act.
- (2) If an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.
- (3) The objective criteria stipulated in terms of sub-regulation (2), must be specific to the context of the required goods or services, must be objective and may include, but are not limited to-
- (a) a tenderer sub-contracting a minimum of 30% of the value of the resulting contract to one or more:
- EMEs or QSEs owned by black people who are female;
 - EMEs or QSEs owned by black people who are from the ages of 14 to 35;
 - EMEs or QSEs owned by black people;
 - EMEs or QSEs owned by black people with disabilities;
 - co-operatives conducting business in the municipal area or province where the goods or services are required;
 - enterprises conducting business in a township or rural area in the municipal area or the province where the goods or services are required;
- (b) economic or financial projections regarding the capacity of the tenderer to deliver on the required goods or services;
- (c) a quantity surveyor's projection as to the time that it is likely to take to complete an infrastructure project;
- (d) the anticipated lead-time to deliver the required goods or services.
- (4) If an organ of state awards a contract to a tenderer that did not score the highest points, in terms of section 2(1)(f) of the Act, read with this regulation, that organ of state must, within 30 days of the award, report to the National Treasury the following information:
- The reasons for not awarding to the tenderer that scored the highest number of points;
 - objective criteria, envisaged in section 2(1)(f) of the Act, used;
 - the price of the tenderer awarded the contract and the price of the tenderer that scored the highest points;
 - the duration of the contract; and
 - type of goods or services procured.

Criteria for breaking deadlock in scoring

8. (1) If two or more tenderers score an equal total number of points, the contract must be awarded to the tenderer that scored the highest points for B-BBEE.
- (2) If functionality is part of the evaluation process and two or more tenderers score equal total points and equal preference points for B-BBEE, the contract must be awarded to the tenderer that scored the highest points for functionality.

- (3) If two or more tenderers score equal total points in all respects, the award must be decided by-
- (a) in the case of two equal tenders, the tossing of a coin; or
 - (b) in the case of more than two equal tenders, the drawing of lots.

Local production and content

9. (1) An organ of state must, in the case of a designated sector, advertise the invitation to tender with a specific condition that only locally produced goods or locally manufactured goods, meeting the stipulated minimum threshold for local production and content, will be considered.
- (2) When a determination is made in accordance with the definition of "designated sector" in regulation 1, the National Treasury must issue a circular, in terms of regulation 14, to inform organs of state of the determination.
- (3) An invitation to tender referred to in sub-regulation (1) may follow a two-stage process whereby the first stage involves functionality and minimum threshold for local production and content and the second stage involves price and B-BBEE.

Pre-qualification criteria for preferential procurement

10. (1) If an organ of state intends to apply pre-qualifying criteria in the evaluation of a tender, the criteria stated in the tender documents may include, but are not limited to-
- (a) the tenderer having a stipulated minimum B-BBEE status level of contributor;
 - (b) the tenderer to sub-contract at a minimum of 30% of the value of the contract to one or more-
 - (i) EMEs or QSEs owned by black people who are female;
 - (ii) EMEs or QSEs owned by black people from the ages 14 to 35;
 - (iii) EMEs or QSEs owned by black people;
 - (vi) EMEs or QSEs owned by black people with disabilities.
- (2) A tender that fails to obtain any pre-qualifying criteria stipulated in the tender documents is not an acceptable tender.
- (3) If the tenderer is part of a joint venture, consortium or sub-contracting arrangement, such tenderer may not submit a separate tender for the same invitation to tender for which they are bidding as part of the joint venture, consortium or sub-contracting arrangement.

Disposal, sale and letting of property or assets

11. (1) Regulations 5 and 6 do not apply to the disposal, sale and letting of movable and immovable property.
- (2) If an organ of state seeks to empower a designated group, the rate per square metre for the lease of immovable property must be fixed at such percentage of the market value, as the National Treasury determines.
- (3) (a) The following formula must be used to calculate the points for price in respect of letting of property with a Rand value of up to a R100 million:

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

Where

- P_s = Points scored for comparative price of tender or offer under consideration;
- P_t = Comparative price of tender or offer under consideration ; and
- P_{min} = Comparative price of highest acceptable tender or offer.

- (b) The following formula must be used to calculate the points for price in respect of letting of property with a Rand value or transaction value above R100 million:

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

Where

- P_s = Points scored for comparative price of tender or offer under consideration;
- P_t = Comparative price of tender or offer under consideration; and
- P_{min} = Comparative price of highest acceptable tender or offer.

Cancellation of tender

12. (1) An organ of state may, before the award of a tender, cancel a tender invitation if-
- (a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation; or
 - (b) funds are no longer available to cover the total envisaged expenditure; or
 - (c) no acceptable tenders are received.

(2) The decision to cancel a tender invitation in terms of sub-regulation (1) must be published in the same manner in which the original tender invitation was advertised.

(3) An organ of state may only with the prior approval of the treasury cancel a tender invitation for the second time.

Sub-contracting

13. (1) For contracts above R30 million, the tenderer must sub-contract a minimum of 30% of the value of the contract to-

- (a) one or more of the categories referred to in regulation 10(1)(b);
 - (b) one or more EMEs or QSEs; or
 - (c) one or more small businesses, as defined in the National Small Business Act, 1996 (Act No. 102 of 1996).
- (2) If a successful tenderer subcontracts to another person without disclosing it in its tender documents, the organ of state must penalise the tenderer 10% of the value of the contract, unless the tenderer submit a satisfactory reason for failing to make the disclosure.

Remedies

14. (1) When detecting that a tenderer has submitted false information regarding its B-BBEE status level of contributor or any other matter required in terms of these Regulations which will affect or has affected the evaluation of a tender, the organ of state must-

- (a) inform the tenderer accordingly; and
- (b) give the tenderer an opportunity to make submissions as to why-
 - (i) the tender submitted should not be disqualified or, if the tender has already been awarded to the tenderer, the contract should not be terminated in whole or in part; and
 - (ii) the tenderer should not be restricted by the treasury from conducting any business for a period not exceeding 10 years with any organ of state;
- (c) concludes, after considering submissions, that such false information was submitted by the tenderer-
 - (i) disqualify the tenderer or terminate the contract in whole or in part; and
 - (ii) if applicable, claim damages from the tenderer.

(2) (a) An organ of state must inform the treasury, in writing of any actions taken in terms of sub-regulation (1) and submissions of the tenderer as to whether the tenderer should be restricted to conduct business with any organ of state.

(b) The treasury may request further information from an organ of state pertaining to sub-regulation (1) to be submitted within a specified period.

(3) The treasury must, after considering the submissions of the tenderer and any other relevant information, decide whether to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years.

Circulars and guidelines

15. The National Treasury may issue-

- (a) a circular to inform organs of state of any matter pertaining to these Regulations; or
- (b) a guideline to assist organs of state with the implementation of any provision of these Regulations.

Repeal of Regulations

16. The Preferential Procurement Regulations, 2011, as published in Government Gazette No R. 502 of 08 June 2011, are hereby repealed with effect from the date referred to in regulation 17.

Short title and commencement

17. These Regulations are called the Preferential Procurement Regulations, 2016 and take effect on