

# Squaring up for government tenders

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This is a follow-up to my earlier article, "*Preferential Procurement: urgent legislative reform required*" (without prejudice September 2010 p41), which addressed the implications of *Sizabonke Civils CC t/a Pilcon Projects v the Zululand District Municipality* 2010 JDR 0565 (KZP) (*Sizabonke*).

*Sizabonke* highlighted the need for urgent legislative reform in the field of preferential procurement, and my discussion of this case concluded: "An alternative regime that could be followed is one which requires the adjudication of functionality as a separate gatekeeping exercise in order to ensure that tenderers have the required experience before points are allocated within the framework

of the PPPFA. This is the regime contemplated in the Draft Preferential Procurement Regulations, 2009, and in light of the glaring lacuna left in the wake of the *Sizabonke* Judgement, the promulgation of these Draft Regulations cannot happen soon enough." It seems this plea for legislative resolve may finally have been answered.

As of December 7 2011, significant and welcome changes to the legislative framework governing preferential procurement will come into effect. The Preferential Procurement Regulations, 2011 (GN 502, GG 34350, 8 June 2011, "the new Regulations") were recently published in terms of the Preferential Procurement Policy Framework Act, 2000 (PPPFA). The new Regulations were drafted to ensure that government's preferential procurement procedures are aligned with the aims of the Broad-Based Black Economic Empowerment Act, 2003 (B-BBEE Act) and associated Codes of Good Practices. While the general scheme of the existing regulations remains largely intact, there are some notable devel-

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opments with which entities involved in state procurement processes should become familiar. What follows is a brief snapshot of some of the significant changes to be introduced by the new Regulations, and their implications.

### Broader Application

The Preferential Procurement Regulations, 2001 (GN R725, GG 22549, 10 August 2001, "the current Regulations") apply solely to organs of state as defined in s1(iii) of the PPPFA. In comparison, the new Regulations will also apply to Schedule 2 and Schedule 3 public entities (listed under the Public Finance Management Act, 1999) as well as municipal entities. This extends the application of the preferential procurement policy framework to entities such as Transnet Limited, ESKOM and Alexkor Limited and it is also in line with the extension of the application of the PPPFA (as determined by GN R501, GG 34350, 8 June 2011).

### Introduction of B-BBEE rating criteria

Currently the Historically Disadvantaged Individual (HDI) status of an entity and the promotion of RDP goals (published in GG 16085, November 23 1994) are considered when awarding bids. Under the new Regulations, tenderers are awarded a maximum of 10 points based on their B-BBEE status, and these are then added to those scored for price. Interestingly, in terms of sub-regulation 11(5)(a) of the new Regulations, where two or more tenderers have scored an equal number of points, the successful tenderer must be the one who scored the highest number of preference points for B-BBEE. A tenderer's B-BBEE status is, therefore, to be the new "trump card." Specific provisions targeting "fronting" have also been introduced. For example, Regulation 11(9) provides that, unless otherwise provided, a person awarded a contract may not sub-contract more than 25% of the value of the contract to any other enterprise that does not have an equal or higher B-BBEE status level to that of the tenderer. This provision seeks to prevent tenderers from using B-BBEE window-dressing to win the work and then outsourcing it to non-B-BBEE compliant entities, which is a typical manifestation of "fronting."



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### Evaluation of tenders on functionality

Two recent high court decisions have declared Regulations 8(2) to 8(7) of the current Regulations, relating to the evaluation of tenders on functionality, to be invalid (*Sizabonke and Bomme Ba Matla Catering & Projects CC v Minister of Defence* 2011 JDR 0149 (GNP)). These decisions held that the points for functionality cannot be allocated as part of the 90 points scored in respect of price. This is because the PPPFA requires points to be awarded solely in respect of price and to the extent that the current Regulations contemplate otherwise, they are *ultra vires* the Act.

In terms of the new Regulations, points for functionality will no longer be awarded within the preference points system. Rather, tenderers will have to overcome a gateway hurdle of meeting various objective criteria and will have to achieve a minimum qualification score for functionality in order for the tender to be considered acceptable. Only once this functionality hurdle has been overcome, may a tender be assessed in terms of the preference point system as prescribed in the new Regulations.

### Change of threshold values

The threshold value which is determinative of whether the 80/20 or the 90/10 preference point systems is applied, will increase from R500 000, as provided for in the current regulations, to R1m. As explained in the memorandum accompanying the draft of the new Regulations, the new threshold is aimed at "strengthen[ing] the contribution towards the development of small, medium and micro enterprises."

### Local production and content

Currently, an organ of state may, but is not obliged, to consider the importance of procuring locally manufactured products in the adjudication of tenders. The new Regulations, by contrast, introduce a mandatory consideration of local production and content in the case of certain designated sectors (sectors designated by the Department of Trade and Industry in line with national development and industrial policies for local production). For designated sectors, only locally produced services, works or goods, or locally manufactured goods will meet the stipulated minimum threshold for local production and content.



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The new Regulations provide a welcome resolution to many outstanding issues of uncertainty in the preferential procurement domain. For example, after the decision in *Sizabonke*, it was unclear how functionality would be assessed in relation to the PPPFA framework. The new regime clearly

establishes the adjudication of functionality as a necessary gateway hurdle before points can be allocated within the PPPFA framework. This is a welcome change in the right direction, even though the implementation of the new Regulations may raise other areas of concern.

In the meantime, however, it is clear that the new Regulations are specifically aimed at furthering two especially laudable aims: B-BBEE and the promotion of local contributions. All entities are thus advised to become familiar with these new requirements for the benefit of their own tendering processes. ♦

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a whole lot wiser

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