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GOVERNMENT NOTICE

No. R.

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**PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000:
PREFERENTIAL PROCUREMENT REGULATIONS, 2015**

I, Nhlanhla J. Nene, Minister of Finance, acting in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), hereby make the Regulations set out in the Schedule.

Signed at Pretoria on this day of2015.

**NHLANHLA M. NENE
MINISTER OF FINANCE**

SCHEDULE

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PART ONE

DEFINITIONS AND APPLICATION

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-
 - (a) **“acceptable price”** means a price which is determined to be fair and reasonable after conducting price analysis.
 - (b) **“Act”** means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
 - (c) **“all applicable taxes”** includes value-added tax, pay as you earn, income tax, unemployment insurance fund contributions and skills development levies;
 - (d) **“B-BBEE”** means broad-based black economic empowerment as defined in section 1 of the Broad-Based Black Economic Empowerment Act;

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- (e) **“B-BBEE status level of contributor”** means the B-BBEE status received by a measured entity based on its overall performance using the relevant 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;
- (f) **“Broad-Based Black Economic Empowerment Act”** means the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
- (g) **“comparative price”** means the price after the factors of a non-firm price and all unconditional discounts that can be utilized have been taken into consideration;
- (h) **“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;
- (i) **“contract”** means the agreement that results from the acceptance of a tender by an organ of state;
- (j) **“designated sector”** means a sector, sub-sector or industry that has been designated by the Department of Trade and Industry in line with national development and industrial policies for local production, where only locally produced services, works or goods or locally manufactured goods meet the stipulated minimum threshold for local production and content;
- (k) **“firm price”** means 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 the 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, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer;
- (m) **“imported content”** means that portion of the tender price represented by the cost of components, parts or materials which have been or are still to be imported (whether by the supplier or its subcontractors) and which costs are inclusive of the costs abroad, plus freight and other direct importation costs, such as landing costs, dock dues, import duty, sales duty or other similar tax or duty at the South African port of entry;

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- (n) **“local content”** means that portion of the tender price which is not included in the imported content, provided that local manufacture does take place;
- (o) **“non-firm prices”** means all prices other than “firm” prices;
- (p) **“person”** includes a juristic person;
- (q) **“price analysis”** is a review, analysis or examination of the price proposed by a supplier and an assessment or evaluation as to whether or not it is fair and reasonable.
- (r) **“stipulated minimum threshold”** means that portion of local production and content as determined by the Department of Trade and Industry;
- (s) **“rand value”** means the total estimated value of a contract in South African currency, calculated at the time of tender invitations, and includes all applicable taxes and excise duties;
- (t) **“sub-contract”** means the primary contractor’s assigning, leasing, 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;
- (u) **“tender”** 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 tendering processes or proposals;
- (v) **“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
- (w) **“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) and municipal entities.
- (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.

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PART TWO PLANNING AND STIPULATION OF PREFERENCE POINT SYSTEM TO BE UTILIZED, EVALUATION OF TENDERS ON FUNCTIONALITY, PREFERENCE POINT SYSTEM AND THE CANCELLATION AND RE-INVITATION OF TENDERS

Planning of preference point system to be utilized

3. An organ of state must, prior to making an invitation for tenders-
 - (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 tenders is to be made;
 - (b) determine the appropriate preference point system to be utilized in the evaluation and adjudication of the tenders; and
 - (c) determine whether the services, works or goods for which an invitation for tenders is to be made has been designated for local production and content in terms of regulation 9.

Evaluation of tenders on functionality

4. (1) An organ of state must indicate in the invitation to submit a tender if that tender will be evaluated on functionality.
 - (2) The evaluation criteria for measuring functionality must be objective.
 - (3) When evaluating tenders on functionality, the-
 - (a) evaluation criteria for measuring functionality;
 - (b) points for each criterion and each sub-criterion; and
 - (c) minimum qualifying score for functionality.must be clearly specified in the invitation to submit a tender.
 - (4) No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation.
 - (5) The minimum qualifying score that must be obtained for functionality in order for a bid to be considered further should not be generic. It should be determined separately for each bid on a case by case basis. The minimum qualifying score must not be prescribed so low that it may jeopardise the quality of the service required nor so high that it may be restrictive to the extent that it jeopardizes the fairness of the SCM system.
 - (6) Tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of price and the preference point systems prescribed in regulations 5, 6 and 7.

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The 80/20 preference point system for acquisition of services, works or goods for a Rand value of R10 million up to R50 million

5. (1) (a) The following formula must be used to calculate the points for price in respect of tenders with a Rand value equal to R 10 million and up to a Rand value of R50 million (all applicable taxes included):

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

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) Subject to sub-regulation (3), points must be awarded to a tenderer for attaining the B-BBEE status level of contributor in accordance with the table below.

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 maximum of 20 points may be allocated in accordance with sub-regulation (2).
- (4) Bidders who do not submit proof of their B-BBEE status level of contribution or who are non-compliant contributors to B-BBEE do not qualify for preference points for BBBEE but should not be disqualified from the bidding process. They will score points out of 90 or 80 for price only and zero (0) points out of 10 or 20 for BBBEE.
- (5) A trust, consortium or joint venture will qualify for points for their B-BBEE status level as a legal entity, provided that the entity submits proof of their B-BBEE status level of contribution.

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(6) The points scored by a tenderer in respect of B-BBEE contribution contemplated in sub-regulation (2) must be added to the points scored for price as calculated in accordance with sub-regulation (1).

(7) Points scored must be rounded off to the nearest 2 decimal places.

(8) The contract must be awarded to the tenderer who scores the highest total number of points.

The 90/10 preference point system for acquisition of services, works or goods with a Rand value above R50 million

6. (1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value above R50 million (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 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) Subject to sub-regulation (3), points must be awarded to a tenderer for attaining their B-BBEE status level of contributor in accordance with the table below:

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 maximum of 10 points may be allocated in accordance with sub-regulation (2).

(4) Bidders who do not submit proof of their B-BBEE status level of contribution or who are non-compliant contributors to B-BBEE do not qualify for preference points for BBBEE but should not be disqualified from the bidding process. They

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will score points out of 90 or 80 for price only and zero (0) points out of 10 or 20 for BBEE.

(5) A trust, consortium or joint venture will qualify for points for their B-BBEE status level as a legal entity, provided that the entity submits proof of their B-BBEE status level of contribution.

(6) The points scored by a tenderer in respect of the level of B-BBEE contribution contemplated in sub-regulation (2) must be added to the points scored for price as calculated in accordance with sub-regulation (1).

(7) Points scored must be rounded off to the nearest 2 decimal places.

(8) The contract must be awarded to the tenderer who scores the highest total number of points.

The 50/50 preference point system for bids and quotations below R10 million

7. The following approach / methodology will be used when calculating points in respect of bids and quotations below R10 million:

(1) Points will be allocated in accordance with the table below:

No.	Criteria	Points
1.	Price	50
Specific Goals:		
2.1	Individuals who had no franchise in national elections before the 1983 and 1993 Constitutions	12
2.2	51% or more ownership by females	12
2.3	51% or more ownership by persons with a disability	12
2.4	SMME (Small, Medium and Micro-enterprise)	6
2.5	LED (Local Economic Development)	8
Sub-total		50
Total		100

(2) (a) For the specific goals under 2.2 to 2.5 in the table above, the Minister of Finance (Minister) may, from time to time, prescribe targets that must be procured from certain categories of person or commodity groups. Therefore, the number of points, as well as the groups referred to in the specific goals in sub-regulation (1) (number 2.2 to 2.5 in the table) above may change, depending on what is prescribed.

(b) The specific goal relating to individuals who had no franchise in national elections before the 1983 and 1993 Constitutions will always be included in a tender document and thus remain unchanged, unless determined otherwise by the Minister by proclamation in the Government Gazette.

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- (c) The tender documents must stipulate the specific goals, as prescribed by the Minister, to be attained.
- (3) Bidders who claim points on the basis of ownership by females and ownership by persons with a disability will be able to claim the maximum number of points (i.e. 12), provided that such ownership in the enterprise is at 51% or more. If such ownership is less than 51%, a score of zero (0) will be claimed.
- (4) In the absence of any specific category of persons or commodity group being prescribed by the Minister, points will be claimed on the basis of the specific goals as contemplated in sub-regulation (1), or as determined by the particular organ of state, depending on the specific tender and analysis of the market.
- (5) Should an organ of state choose to not include one or more of the specific goals listed in in sub-regulation (1) (numbers 2.2 to 2.5 in the table) above, then such goals may be excluded and the points reduced by the equivalent value corresponding to the goal(s), then multiplied by 50.
- (6) The points scored for price must be added to the points scored for the specific goals to obtain the bidder's total points scored out of 100.
- (7) Points scored must be rounded off to the nearest 2 decimal places.
- (8) The contract must be awarded to the tenderer who scores the highest total number of points.

Cancellation and re-invitation of tenders

8. (1) An organ of state may, prior to the award of a tender, cancel a tender if-
- (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; 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 in terms of sub-regulation (1) must be published in the prescribed media in which the original tender invitation was advertised.

PART THREE

LOCAL PRODUCTION AND CONTENT, FAIR AND REASONABLE PRICING, DISPOSAL, SALE AND LETTING OF PROPERTY / ASSETS, NEGOTIATIONS, DEVIATIONS, COMPETITIVE BIDDING THRESHOLDS, CONTRACT AMENDMENTS, SERVICE RENDERED BY TERTIARY INSTITUTIONS AND PUBLIC ENTITIES, CONDITIONS, DECLARATIONS, REMEDIES, INSTRUCTIONS,

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**CIRCULARS AND GUIDELINES, REPEAL OF REGULATIONS AND SHORT TITLE
AND COMMENCEMENT**

Local Production and Content

9. (1) An organ of state must, in the case of designated sectors, where in the award of tenders local production and content is of critical importance, advertise such tenders with a specific tendering condition that only locally produced goods, services or works or locally manufactured goods, with a stipulated minimum threshold for local production and content will be considered.
- (2) The National Treasury will issue instructions, circulars and guidelines to all organs of state, taking into account competition and other economic factors, with specific reporting mechanisms to ensure compliance with sub-regulation (1).
- (3) Every tender issued in terms of regulation 9 must be measurable and audited.
- (4) Where necessary, for tenders referred to in sub-regulations (1) and (3), a two-stage tendering process may be followed, where the first stage involves functionality and minimum threshold for local production and content and the second stage price and B-BBEE with the possibility of price negotiations only with the short listed tenderer/s.

Fair and reasonable pricing

10. (1) An organ of state must conduct price analysis in order to determine what fair and reasonable pricing is. Price analysis techniques include:
- (a) Comparing same or similar goods or services at similar units of measure.
 - (b) Comparing competitive prices received in response to a bid with one another.
 - (c) Comparing proposed prices with prices under existing contracts and with prices proposed in the past for the same or similar goods or services. Factor in market changes (e.g., commodity price changes) or other influences (e.g., inflation, raw material costs, and transportation costs).
 - (d) Comparing proposed prices with average market prices and competitive price offered to other institutions.
 - (e) Comparing proposed rates with rates set by law or regulation.
- (2) Each price analysis must be documented in writing.
- (3) This price analysis must form part of the evaluation pack.

Disposal, sale and letting of property / assets

11. (1) The preference point systems prescribed in regulations 5 and 6 above are not applicable to the disposal, sale and letting of movable and immovable property.

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- (2) In instances where assets are sold or leased or need to be disposed of, the principles as outlined in regulation 7 above will apply, i.e. the 50/50 preference points system will apply.

Negotiations

12. (1) Where appropriate, pre-award negotiations may be conducted with preferred bidders identified through a competitive bidding or any other bidding process.
- (2) Negotiations should be conducted in a manner that is fair to the bidders with whom negotiations are taking place.
- (3) All communications, clarifications and decisions taken shall be conducted in a manner that supports fairness and filed for review and audit purposes.
- (4) Each tender document should include provisions governing negotiation with one or more respondents.

Deviations

13. (1) Where an organ of state:
- (a) procures goods or services by a means other than a competitive bidding process; or
 - (b) does not appoint the supplier that scored the highest points

Then such deviation must be reported to National Treasury within the timeframe prescribed in the Instruction note.

- (c) The following information should be reported:
- (i) The circumstances leading to the purchase or deviation;
 - (ii) The actions taken and procurement methods used; and
 - (iii) List of goods or services procured.

Competitive Bidding Thresholds

14. Organs of state must procure goods, services or works within the threshold values that may be prescribed by National Treasury from time to time in an instruction note.

Contract amendments

15. Organs of state must, prior to the amendment, variation, extension or transfer of a contract awarded, ensure that they adhere to the principles / processes prescribed by National Treasury in an instruction note.

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Services rendered by Tertiary Institutions and Public Entities

16. Organs of state must, when procuring goods, services or works from public entities or tertiary institutions, do so in accordance with the prescriptions issued by National Treasury in an instruction note.

Conditions

17. (1) Only a tenderer who has complied with the conditions and requirements of the tender may be considered.
- (2) An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally.
- (3) (a) In the event that two or more tenders have scored equal total points, the successful tender 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 tenders have scored equal points including equal preference points for B-BBEE, the successful tender must be the one scoring the highest score for functionality.
- (c) Should two or more tenders be equal in all respects, the award shall be decided by the drawing of lots or the tossing of a coin.
- (4) A person must not be awarded points for B-BBEE status level if it is indicated in the tender documents that such a tenderer intends sub-contracting more than 30% of the value of the contract to any other enterprise.
- (5) If the bidding entity is part of a joint venture / consortium or sub-contracting arrangement, such bidding entity shall not submit a separate tender for the same tender for which they were bidding as part of the joint venture / consortium / sub-contracting arrangement.

Declarations

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

Remedies

19. (1) An organ of state must, upon detecting that-

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- (a) the B-BBEE status level of contribution / points for specific goals have been falsely claimed or obtained on a fraudulent basis, or
- (b) procurement was abused during the bidding for and execution of the contract,

Then, without prejudice to any other remedy provided for, reject a recommendation for the award of a tender, invalidate the bid(s) for such item(s) offered, and / or terminate the contract in whole or part, and / or restrict the bidder(s) or contractor(s) from conducting business with the public sector for a period not exceeding ten (10) years and / or claim damages from the bidder(s) or contractor(s) concerned.

- (2) The organ of state must inform the National Treasury and relevant provincial treasury in writing of any actions taken in terms of sub-regulation (1).
- (3) (a) National Treasury may request information relating to allegations in terms of sub-regulation (1); and
(b) In the event of such information being requested by National Treasury, the relevant organ of state must submit such information within the timeframe stipulated in the request.

Instructions, circulars and guidelines

- 20. The National Treasury may issue instructions, circulars and guidelines to all organs of state to provide clarity or further detail in respect of any of the issues contained in these regulations.

Repeal of Regulations

- 21. The Preferential Procurement Regulations, 2011, as published in *Government Gazette* No R. 502 of 08 June 2011, are hereby repealed as from

Short title and commencement

- 22. These Regulations are called the Preferential Procurement Regulations, 2015 and shall come into effect on

