New Public Procurement Rules for the Construction Sector

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Recent developments

PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000: PREFERENTIAL PROCUREMENT REGULATIONS, 2017

The Minister of Finance has, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), made the regulations set out in the Schedule.

- The Standard for Infrastructure Procurement and Delivery Management (SIPDM)
- The Public Procurement Framework Act (PPPFA) Regulation
- Alignment of the SIPDM and PPPFA

Nov 2015
The SIPDM regulates the following:

- **the decision making process associated** with procurement and delivery management **through control frameworks and policies** associated with the **assigning of responsibilities** for approving or accepting deliverables or the authorising of a procurement process or procedure;
- **aspects of delivery management**
- **procurement processes, methods and procedures**; and
- **procurement documents**.

### Control framework
- Institutional arrangements
- Demand management
- Acquisition management
- Contract management
- Logistics management
- Disposal management
- Reporting of supply chain management information
- Regular assessment of the SCM performance
- Risk management and internal controls

### Forms of contract
- SANS 10845-1
- SANS 10845-2
- SANS 10845-3
- SANS 10845-4
## Progressive implementation of SIPDM

<table>
<thead>
<tr>
<th>Areas</th>
<th>PFMA</th>
<th>MFMA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Put in place SCM policy</td>
<td>Completed 1 April 2017</td>
<td>Completed 1 July 2017</td>
</tr>
<tr>
<td>Put in place agency agreements, if required</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Apply control frameworks</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Put in place implementation plans</td>
<td>Before 1 April 2018</td>
<td>Before 1 July 2019</td>
</tr>
<tr>
<td>Develop procurement documents in accordance with the SIPDM provisions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Built environment professionals performing designated functions</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**National Treasury Standard for Infrastructure Procurement and Delivery Management (SIPDM) Training and verification examinations**
Constitution

217. (1) When an organ of state . . . . or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

217. (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for categories of preference in the allocation of contracts; and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.

Section 217(2) permits a deviation from the principles of fair, equitable, transparent, competitive and cost effective through the Preferential Procurement Policy Framework Act
Equality versus equity

PPPFA – the specific goals may include—
(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
(ii) implementing the programmes of the Reconstruction and Development Programme
The concept of primary and secondary objectives

Objectives inform decisions that are made regarding investments in infrastructure.

**Primary objectives** relate to the delivery of the product:
- tangible objectives including budget, schedule, quality and performance characteristics required from the completed works, rate of delivery
- intangible objectives including those relating to buildability, relationships, client involvement in the project; end user satisfaction; maintenance and operational responsibilities.

**Secondary objectives** typically relate to what can be promoted through procurement

Secondary procurement **objectives are additional to those associated with the immediate objective of the procurement itself.**

An objective is an aim or a goal. It is something that one's efforts or actions are intended to attain or accomplish.

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**Competing objectives**

- **Time**
- **Cost**
- **Quality / performance**

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**Tension**
Prior to the promulgation of the PPPFA

**BASIC OUTCOME OF THE SOUTH AFRICAN DEPARTMENT OF PUBLIC WORKS’ AFFIRMATIVE PROCUREMENT POLICY**

- Average statistics for period August 1996 to December 1998
  - Average ABE index 27,1%
  - Direct financial premium 0.6%

**10 Point plan – interim policy (Nov 1995)**

- Contract participation goals linked to preference points in the evaluation of tenders
Preferential Procurement Regulations 2001

Points awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals

Preference points stipulated in respect of a tender must include preference points for equity ownership by HDIs.

Over and above the awarding of preference points in favour of HDIs, the following activities may be regarded as a contribution towards achieving goals of the RDP

- The promotion of **South African owned enterprises**, export orientated production to create jobs, **SMMEs**, enterprises located in a **specific province, specific region, specific municipal areas, rural areas**
- The creation of **new jobs** or the intensification of labour absorption
- The empowerment of the **work force**
- The development of **human resources**
- The **upliftment of communities** through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.

PPR 2001 permitted price to be split into price and functionality (undefined)
Quality = means the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs

Evaluate tenders on the basis of financial offer, preference and quality

Quality criteria used in the evaluation of tender offers shall form an integral part of the tender offer and hence the outcome of the procurement. Such criteria shall:

• relate directly to the goods, services or engineering and construction works that are being procured and to matters that cannot directly be expressed in monetary terms;
• be justifiable in terms of projected procurement outcomes;
• enable the most economically advantageous offer to be established; and
• to the extent practicable, be objective and quantifiable.

Quality criteria shall not include matters relating to the basic capability or capacity of the tendering entity to execute the contract.

At least three persons who are fully conversant with the technical aspects of the procurement shall undertake such evaluation.
Preferential Procurement Regulations 2011

“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

CIDB: Quality (functionality)

Quality (Oxford dictionary)
- the standard of something as measured against other things of a similar kind; the degree of excellence of something
- distinctive attribute or characteristic possessed by someone or something

All points allocated to B-BBEE scorecard

"local content" means that portion of the tender price which is not included in the imported content, provided that local manufacture does take place
Specialist work requiring considerable innovation, creativity, and expertise or skill) or work that has a high downstream impact.

Partnering approaches where the scope of work is ill defined when the partners are selected.

Complex work characterized by requirements for higher levels of skills, greater resources or not well-defined inputs and outputs.

Simple/straight-forward/routine work where the tasks/activities are of a straightforward nature in terms of which inputs are relatively well known and outputs can be readily defined.
## Objective criteria - example

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Sub-criteria</th>
<th>Points</th>
<th>Max points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest qualification</td>
<td>National diploma</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>BTech</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BEng</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>MSc</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td></td>
<td>PhD</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Professional registration</td>
<td>Candidate (any category)</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Professional technician</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Professional Technologist</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Professional Engineer</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Years of post graduate experience</td>
<td>1-5 years</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>6-10 years</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td></td>
<td>11-15 years</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td></td>
<td>16-20 years</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td></td>
<td>&gt;16 years</td>
<td>10</td>
<td></td>
</tr>
</tbody>
</table>

Eligibility or quality criteria?
## Evaluating quality in tender offers - example

### Tender data

The quality criteria and maximum score in respect of each of the criteria are as follows:

<table>
<thead>
<tr>
<th>Quality criteria</th>
<th>Subcriteria</th>
<th>Max points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Experience of Principal Consultant</td>
<td>Professional profile in relation to the required service</td>
<td>30</td>
</tr>
<tr>
<td>(key person)</td>
<td>Experience in relation to the required service</td>
<td>30</td>
</tr>
<tr>
<td>Value add</td>
<td></td>
<td>40</td>
</tr>
<tr>
<td>Approach paper</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maximum possible score for quality ($M_s$)</td>
<td></td>
<td>100</td>
</tr>
</tbody>
</table>

Quality shall be scored by not less than three evaluators in accordance with the abovementioned schedules: The minimum number of evaluation points for quality is 60.

Each evaluation criteria will be assessed in terms of five indicators – no response, poor, satisfactory, good and very good. Scores of 0, 40, 70, 90 or 100 will be allocated to no response, poor, satisfactory, good and very good, respectively.

### SIPDM requirement

Quality evaluation by three built environment professionals:

- PrArch
- PrSArchT
- PrEng
- PrTechEng
- PrLArch
- PrLArchT
- PrCPM
- PrCM
- PrQs
Court cases

- Eastern Cape High Court, Grahamstown, in Case No 230/09 “…there is in my judgement nothing offensive either in using quality or functional assessments as an initial threshold requirement, as well as then using them again as part of the second assessment amongst those who passed the threshold. . . . . it does not affect equity requirements (those are met in the BBBEE points allocation); the process remains competitive (not only in relation to price), and effectiveness is enhanced (price and functionality counts).”

- Western Cape High Court, Cape Town, in reportable case No 21158/2012
  I consider that the constitutional imperative that the procurement system be cost-effective, means that functionality must necessarily be taken into account in the adjudication of competing tenders and should not be relegated to a mere qualifying criterion. . . . . The point is simply that functionality should not be ignored in the final adjudication between competing tenders, and should be taken into account within the parameters of the Procurement Act.
2. (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A Preference point system must be followed;
(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific gods as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price . . . . ;
(c) any other acceptable tenders which are higher in price must score fewer points, on a prorata basis . . . . . . .

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to

Establishes principles and not detail
Establishes preference points system
Can score quality in the evaluation of tender criteria

National Treasury Standard for Infrastructure Procurement and Delivery Management
14.1.3 Quality may be evaluated in tender submissions as other objective criteria as provided for in the Preferential Procurement Policy Framework Act in accordance with the provisions of SANS 10845-1.
Functionality and quality – PPR 2017

Preferential Procurement Regulations 2017

Functionality - “the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents”.

These regulations stipulate that functionality must be objective and not be “so low as to jeopardise the quality of the required goods or services or high that it is unreasonably restrictive.”

Accordingly functionality and quality are two different concepts.

Eligibility criteria according to SANS 10845-1 are framed around clause 5.13 of SANS 10845-3 i.e. the possession of the necessary “professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, expertise and personnel, to perform the contract” and the avoidance of conflicts of interest.
Preferential Procurement Policy Framework Act

**Definition in Act**

“acceptable tender” means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.

5.8 Test for responsiveness
Determine, after opening and before detailed evaluation, whether each tender offer that was properly received
a) complies with the requirements of ISO 10845-3,
b) has been properly and fully completed and signed, and
c) is responsive to the other requirements of the tender documents.
A responsive tender is one that conforms . . . . documents, without material deviation or qualification.

SANS ISO 10845-3 Conditions of tender

5.13 Acceptance of a tender offer
Accept a tender offer should it be considered not to present any unacceptable commercial risk, only if the tenderer
a) is not under restrictions. . . ,
b) can, as necessary and in relation to the proposed contract, demonstrate the possession . . . .

*Note:* unacceptable commercial risk to the employer includes unduly high or unduly low tendered rates or amounts in the tender offer.
“The state’s ability to purchase what it needs on time at the right quality and for the right price is central to its ability to deliver on its priorities.”

The Commission also recognises that “public-sector procurement expenditure also needs to be used to drive national priorities such as localisation and economic transformation.”

The NPC acknowledges that economic rent is paid through the procurement system to reduce racial patterns of ownership of wealth and income i.e. there is difference between selling price and the costs to provide the goods or services due to distortions in competition to achieve these objectives.

The NPC states that efforts to “stimulate local procurement should not reinforce higher costs for the public sector and business because this will undermine growth and job creation.”

Cost effectiveness Localisation and economic transformation
**PPR 2017 – instrument: preference**

<table>
<thead>
<tr>
<th>Requirement</th>
<th>SIPDM requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apply a 90 / 10 (&gt; R50 m) or 80 /20 (≤ R50 m) (preference points system depending upon the estimated value of the contract)</td>
<td>Evaluate tenders on the basis of preference and financial offer (Method 3) or preference financial offer and quality (Method 4)</td>
</tr>
<tr>
<td>Award preference points for B-BBEE status</td>
<td></td>
</tr>
</tbody>
</table>

### 80 / 20 points system

<table>
<thead>
<tr>
<th>Difference in ( N_P ) points between ( P ) and ( P_m ) (%)</th>
<th>Multiplier (a) applied to ( P_m ) to tie points (a x ( P_m ))</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>1,0625</td>
</tr>
<tr>
<td>10</td>
<td>1,125</td>
</tr>
<tr>
<td>15</td>
<td>1,1875</td>
</tr>
<tr>
<td>20</td>
<td>1,250</td>
</tr>
</tbody>
</table>

Look at difference in points
The procedure for the evaluation of responsive tenders is Method 3.
The financial offer will be scored using the following formula:
\[ A = (1 - \frac{P}{P_m}) \]
\[ P_m \]
The value of \( W_1 \) is . . . . . . . :*

90 or 80

The procedure for the evaluation of responsive tenders is Method 4.
The total number of tender evaluation points (\( T_{EV} \)) shall be determined in accordance with the following formula:
\[ T_{EV} = f_1 (N_{FO} + N_P) + f_2 N_Q \]
where \( f_1 \) and \( f_2 \) are fractions, \( f_1 \) equals 1 minus \( f_2 \) and \( f_2 \) equals .......
\[ N_{FO} \]
is the number of tender evaluation points awarded for the financial offer . . . and \( W_1 \) equals . . . . . *
\[ N_P \]
is the number of tender evaluation points awarded for preferences . . .
\[ N_Q \]
is the number of tender evaluation points awarded for quality offered. . . .
## Preferencing in tender documents – B-BBEE

<table>
<thead>
<tr>
<th>B-BBEE status level of contributor</th>
<th>Number of preference points</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>90/10 preference points system</td>
</tr>
<tr>
<td>Form not completed or no-complaint contributor</td>
<td>0</td>
</tr>
<tr>
<td>Level 8 contributor</td>
<td>1</td>
</tr>
<tr>
<td>Level 7 contributor</td>
<td>2</td>
</tr>
<tr>
<td>Level 6 contributor</td>
<td>3</td>
</tr>
<tr>
<td>Level 5 contributor</td>
<td>4</td>
</tr>
<tr>
<td>Level 4 contributor</td>
<td>5</td>
</tr>
<tr>
<td>Level 3 contributor</td>
<td>6</td>
</tr>
<tr>
<td>Level 2 contributor</td>
<td>9</td>
</tr>
<tr>
<td>Level 1 contributor</td>
<td>10</td>
</tr>
</tbody>
</table>

Note: Preference points system always applies to all competitively tendered tenders
### PPR 2017 – prequalification for preferential procurement

<table>
<thead>
<tr>
<th>Requirement</th>
<th>SIPDM requirement</th>
</tr>
</thead>
</table>
| A tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender | Eligibility criteria  
Returnable schedule  
Scope of work (constraint to providing the work) if subcontracting |

The pre-qualification criteria for preferential procurement are that only the following may respond to this tender notice and invitation to tender:

- tenderers who are B-BBEE status level … contributors or higher;
- tenderers who are **EMEs or QSE**
- tenderers who undertake to subcontract a minimum of 30% to
  - an EME or QSE or EME or QSE which is at least **51% owned** by
    - black people
    - black people who are youth
    - black people who are women
    - black people with disabilities
    - black people living in rural or underdeveloped areas or townships
    - black people who are military veterans
    - an EME or QSE
  - a co-operative which is at least 51% owned by black people
### PPR 2017 – mandatory subcontracting

<table>
<thead>
<tr>
<th>Requirement</th>
<th>SIPDM requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subcontract if <strong>feasible</strong> a minimum of 30% of the value of the contract for</td>
<td>Eligibility criteria Returnable schedule Scope of work (constraint to providing the</td>
</tr>
<tr>
<td>contracts having a value of R30 million</td>
<td></td>
</tr>
</tbody>
</table>

- tenderers who undertake to subcontract a minimum of 30% to
  - an EME or QSE
  - An EME or QSE which is at least 51% **owned** by
    - black people
    - black people who are youth
    - black people who are women
    - black people with disabilities
    - black people living in rural or underdeveloped areas or townships
    - black people who are military veterans
  - a co-operative which is at least 51% owned by black people
Subcontracting

The term “subcontracting” and “subcontract” is not defined in the Preferential Procurement Regulations 2017. As a result its common English language definition applies.

The Oxford dictionary defines “subcontract” as “employ a firm or person outside of one’s company to do (work) as part of a larger project” or “carry out work for a company as part of a larger project”. The Merriam-Webster dictionary defines a subcontractor as “an individual or business firm contracting to perform part or all of another's contract”.

The construction industry has its own terminology which does not necessarily follow the common meaning of words.

Subcontracting in the context of the Preferential Procurement Regulations is the subcontracting of goods, services and any combination thereof. It should not be narrowly defined as is the case in the construction industry where it is commonly viewed as only being the combination of goods and services.
Compulsory subcontracting above R 30 million

T1.1 Tender Notice and Invitation to Tender

Select one or more

T2.1 List of tender returnables
A sworn affidavit (general or specialised entity) on the relevant form obtained from the DTI website for the proposed subcontractor

C3 Scope of work
Establish requirements for 30% subcontracting

Contract Data
Include low performance damages for substandard performance

Can link to SANS 10845-5, participation of targeted enterprises in contracts

The organ of state is required to make available the list of all suppliers registered on a data base approved by National Treasury to provide the required goods and services in respect of the applicable designated groups from which the tenderer must select a supplier.
The term “feasible” is used in recognition of the fact that it may not always be possible to subcontract in all tenders due to the nature of some tenders. (For instance it may not be possible to sub-contract one piece of machinery that is above R 30 million)

The Central Supplier Database (CSD) has been upgraded to allow bidders/ contractors/ suppliers access to CSD for identification of potential subcontractors from the pool of EMEs or QSEs to advance designated groups.

In the case of construction and built environment sectors, nothing prevents bidders/ contractors/ suppliers to select sub-contractors from the CIDB database who are registered on the CSD for the purposes of compliance with the minimum 30% compulsory sub-contracting provisions.
Balance in Preferential Procurement Regulations

Preference for B-BBEE status and, if necessary
- prequalification criteria relating to specific B-BBEE and enterprise size parameters; and
- compulsory subcontracting.

Section 217(2) permits a deviation from the principles of fair, equitable, transparent, competitive and cost effective through the Preferential Procurement Policy Framework Act

An organ of state may not award a contract to the tenderer scoring the highest number of points unless the price is market related (Permitted to negotiate with tender and second and third tenderers if necessary, failing which to cancel the tender.)
PPR 2017 - Instrument: designated sector for local production

<table>
<thead>
<tr>
<th>Requirement</th>
<th>SIPDM requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provide only local goods or services or locally manufactured goods which meet a stipulated minimum threshold</td>
<td>Eligibility criteria Returnable schedule Scope of work (constraint to providing the work)</td>
</tr>
</tbody>
</table>

**T1.1 Tender Notice and Invitation to Tender**

**T1.2 Tender data**

**T2.1 List of tender returnables**

Local content declaration

**C3 Scope of work**

Establish requirements for local production and content

**Extracts from Local content declaration**

- *The local content shall be measured, declared and verified in accordance with . . . . *
- *The exchange rate used for the calculation of local production and content shall be the exchange rate published by . . . . *
- *The core steel used for the manufacture of the transformer is deemed to be have been sourced locally and is as such exempted from the imported content. . . *
Guidance

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.
Questions

Threat

Opportunity