

# New Public Procurement Rules for the Construction Sector

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# Recent developments

NATIONAL TREASURY

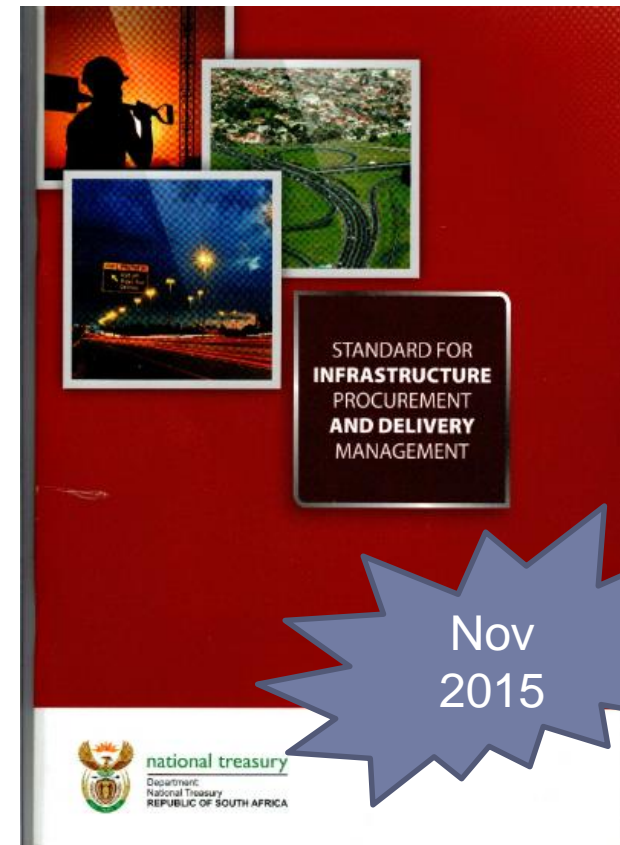
NO. R. 32

20 JANUARY 2017

## 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**



# Standard for Infrastructure Procurement and Delivery Management

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

SANS 10845-1  
SANS 10845-2  
SANS 10845-3  
SANS 10845-4

Forms of contract

# Progressive implementation of SIPDM

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



SIPDM Training



**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



... the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.....



PPPFA Provides a means for tipping the scales in favour of the target group

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.

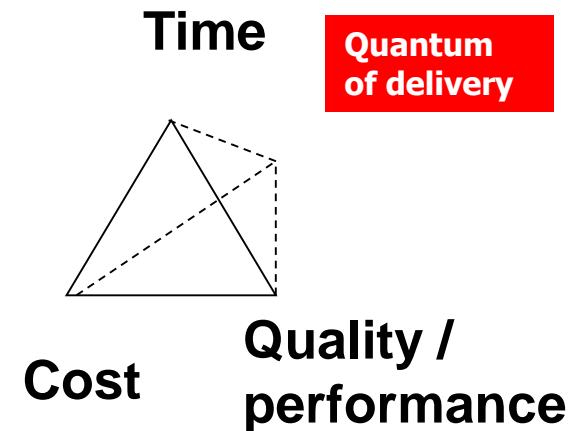
**Primary objectives** relate to the delivery of the product:

- 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.

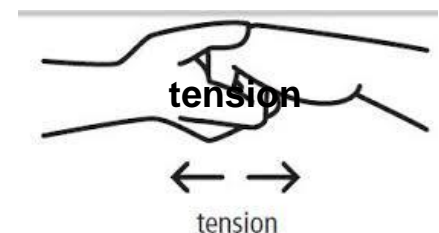
**Secondary objectives** typically relate to what can be promoted through procurement

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

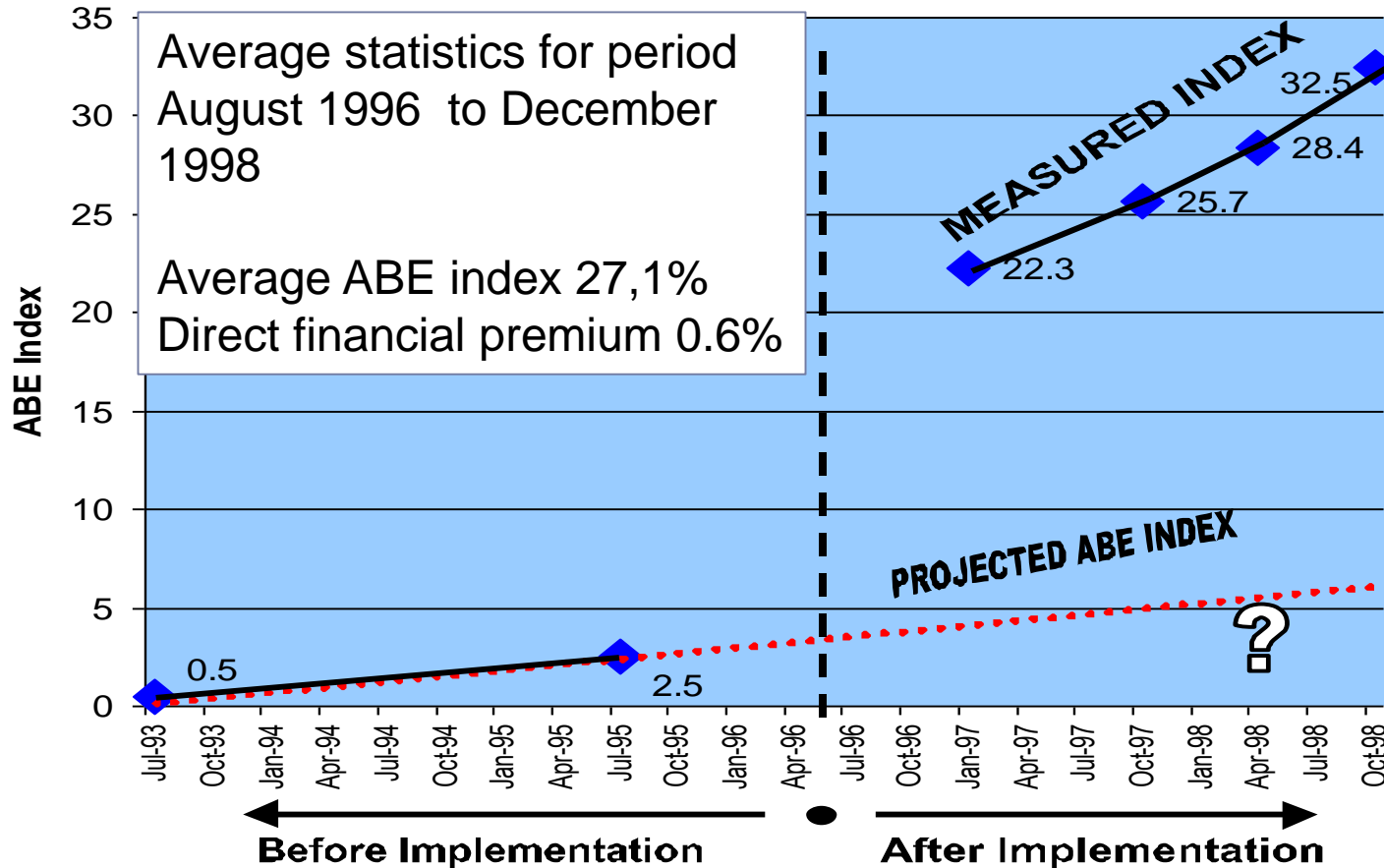


**Competing objectives**



# Prior to the promulgation of the PPPFA

## BASIC OUTCOME OF THE SOUTH AFRICAN DEPARTMENT OF PUBLIC WORKS' AFFIRMATIVE PROCUREMENT POLICY



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)

# Standard for Uniformity in Construction Procurement

**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)



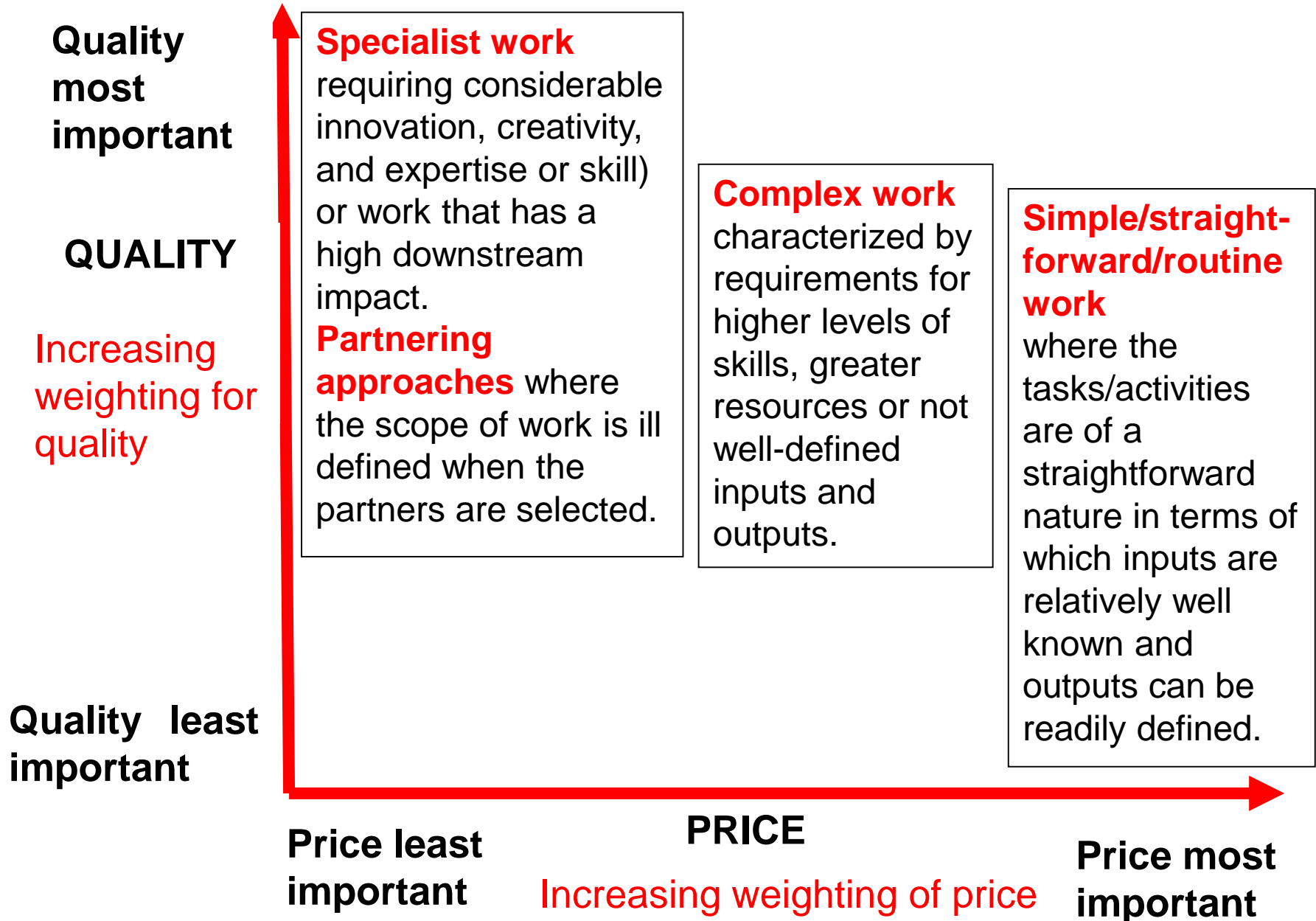
Quality (Oxford dictionary)

- 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

# Quality - SANS 10845-1



## Objective criteria - example

Criteria	Sub-criteria	Points	Max points
Highest qualification	National diploma	1	5 
	BTech	2	
	BEng	3	
	MSc	4	
	Phd	5	
Professional registration	Candidate (any category)	1	4
	Professional technician	2	
	Professional Technologist	4	
	Professional Engineer	5	
Years of post graduate experience	1-5 years	2	10 <b>Eligibility or quality criteria?</b>
	6 -10 years	4	
	11-15 years	6	
	16-20 years	8	
	>16 years	10	

# Evaluating quality in tender offers - example

## Tender data

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

Quality criteria	Subcriteria	Max points
Experience of Principal Consultant (key person)	Professional profile in relation to the required service	30
	Experience in relation to the required service	30
Value add		40
Approach paper		
Maximum possible score for quality ( $M_s$ )		100

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 BBEE 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.*

# Preferential Procurement Policy Framework 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 goods 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.



**Equivalent?**

# 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

# National Planning Commission NDP

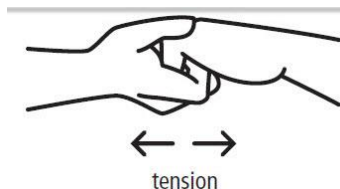
*“The state’s ability to purchase what it needs on time **at the right quality and for the right price** is central to its ability to deliver on its priorities.”*

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.*”

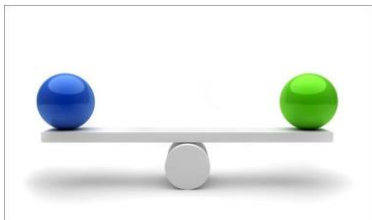
**Cost effectiveness**



**Localisation and economic transformation**

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

**Look at difference in points**



80 / 20 points system	
Difference in $N_p$ points between P and $P_m$ (%)	Multiplier (a) applied to $P_m$ to tie points ( $a \times P_m$ )
5	1,0625
10	1,125
15	1,1875
20	1,250

## Preferencing – Tender Data (SIPDM)

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

B-BBEE status level of contributor	Number of preference points	
	90/10 preference points system	80/20 preference points system
Form not completed or no-complaint contributor	0	0
Level 8 contributor	1	2
Level 7 contributor	2	4
Level 6 contributor	3	6
Level 5 contributor	4	8
<b>Level 4 contributor</b>	5	12
<b>Level 3 contributor</b>	6	14
<b>Level 2 contributor</b>	9	18
<b>Level 1 contributor</b>	10	20

Note: Preference points system always applies to all competitively tendered tenders

# PPR 2017 – prequalification for preferential procurement

Requirement	SIPDM requirement
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

Select one or more

# PPR 2017 – mandatory subcontracting

Requirement	SIPDM requirement
Subcontract if <b>feasible</b> a minimum of 30% of the value of the contract for	Eligibility criteria Returnable schedule Scope of work (constraint to providing the
<ul style="list-style-type: none"><li>• tenderers who undertake to subcontract a minimum of 30% to<ul style="list-style-type: none"><li>○ an EME or QSE</li><li>○ An EME or QSE which is at least <b>51% owned</b> by<ul style="list-style-type: none"><li><input type="checkbox"/> black people</li><li><input type="checkbox"/> black people who are youth</li><li><input type="checkbox"/> black people who are women</li><li><input type="checkbox"/> black people with disabilities</li><li><input type="checkbox"/> black people living in rural or underdeveloped areas or townships</li><li><input type="checkbox"/> black people who are military veterans</li></ul></li></ul></li><li>• a co-operative which is at least 51% owned by black people</li></ul>	



# 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

### Contract Data

Include low performance damages for substandard performance

### C3 Scope of work

Establish requirements for 30% subcontracting

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.

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

## Feasible – National Treasury Guidance

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

3

Preference for B-BBEE status and, if necessary

- prequalification criteria relating to specific B-BBEE and enterprise size parameters; and
- compulsory subcontracting.

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. )



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

# PPR 2017- Instrument: designated sector for local production

Requirement	SIPDM requirement
Provide only local goods or services or locally manufactured goods which meet a stipulated minimum threshold	Eligibility criteria Returnable schedule Scope of work (constraint to providing the work)

## 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. . .*



**national treasury**

Department:  
National Treasury  
REPUBLIC OF SOUTH AFRICA

## **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.

## **IMPLEMENTATION GUIDE**

## **PREFERENTIAL PROCUREMENT REGULATIONS, 2017 PERTAINING TO THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, ACT NO 5 OF 2000**

# Questions



**Threat**



**Opportunity**

