

PREFERENTIAL PROCUREMENT REGULATIONS

Act

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SCHEDULE

PART ONE

DEFINITIONS AND APPLICATION

1 Definitions

In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act bears the same meaning, and-

'**Act**' means the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000);

'**Agent**' means a person mandated by another person ('the principal') to do business for and on behalf of, or to represent in a business transaction, the principal, and thereby

acquire rights for the principal against an organ of state and incur obligations binding the principal in favour of an organ of state;

'Comparative price' means the price after the factors of a non-firm price and all unconditional discounts that can be utilised have been taken into consideration;

'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;

'Contract' means the agreement that results from the acceptance of a tender by an organ of state;

'Disability' means, in respect of a person, a permanent impairment of a physical, intellectual, or sensory function, which results in restricted, or lack of, ability to perform an activity in the manner, or within the range, considered normal for a human being;

'Firm price' is 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 a 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;

'Historically Disadvantaged Individual (HDI)' means a South African citizen-

(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993) ('the Interim Constitution'); and / or

(2) who is a female; and / or

(3) who has a disability:

Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI;

'Management' in relation to an enterprise or business, means an activity inclusive of control and performed on a daily basis, by any person who is a principal executive officer of the company, by whatever name that person may be designated, and whether or not that person is a director;

'Non-firm prices' means all prices other than 'firm' prices;

'Person' includes reference to a juristic person;

'Rand value' means the total estimated value of a contract in Rand denomination which is calculated at the time of tender invitations and includes all applicable taxes and excise duties;

'Small, Medium and Micro Enterprises (SMMEs)' bears the same meaning assigned to this expression in the National Small Business Act, 1996 (Act 102 of 1996);

'Sub-Contracting' means the primary contractor's assigning or leasing or 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;

'Tender' means a written offer or bid in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services or goods;

'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;

'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.

2 Application

(1) Despite anything to the contrary contained in any law, these Regulations apply to organs of state as contemplated in section 1(iii) of the Act.

(2) An organ of state contemplated in subregulation (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.

(3) An organ of state may deviate from the framework contemplated in section 2 of the Act in respect of a pre-determined tariff based professional appointments.

PART TWO

PREFERENCE POINT SYSTEM, EVALUATION OF TENDERS, AWARDING OF TENDERS NOT SCORING HIGHEST POINTS, CANCELLATION AND RE-INVITATION OF TENDERS

3 The 80/20 preference point system

(1) The following formula must be used to calculate the points for price in respect of tenders/procurement with a Rand value equal to, or above R30 000 and up to a Rand value of R500 000. Organs of state may, however, apply this formula for procurement with a value less than R30 000, if and when appropriate:

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

Where

Ps	=	Points scored for price of tender under consideration
Pt	=	Rand value of offer tender consideration
P min	=	Rand value of lowest acceptable tender

(2) A maximum of 20 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in subregulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

4 The 90/10 preference point system

(1) The following formula must be used to calculate the points for price in respect of tenders/procurement with a Rand value above R500 000:

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

Where

Ps	=	Points scored for price of tender under consideration
Pt	=	Rand value of tender under consideration
Pmin	=	Rand value of lowest acceptable tender

(2) A maximum of 10 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in subregulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

5 The 80/20 preference point system for the sale and letting of assets.

(1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value equal to, or above R30 000 and up to a Rand value of R500

000 and which relate to the sale and letting of assets. Organs of State may, however, apply this formula for sales and letting of assets with a rand value less than R30 000, if and when appropriate:

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

Where

P _s	=Points scored for price of tender under consideration
P _t	=Rand value of tender under consideration
P _h	=Rand value of highest acceptable tender

(2) A maximum of 20 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in subregulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

6 The 90/10 preference point system for the sale and letting of assets

(1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value above R500 000 and which relate to the sale and letting of assets:

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

Where

P _s	=Points scored for price of tender under consideration
P _t	=Rand value of tender under consideration
P _h	=Rand value of highest acceptable tender

(2) A maximum of 10 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in subregulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

7 Stipulation of preference point system to be used

An organ of state must, in the tender documents, stipulate the preference point system which will be applied in the adjudication of tenders.

8 Evaluation of tenders on functionality and price

(1) An organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price.

(2) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value equal to, or below, R500 000, not exceed 80 points.

(3) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value above R500 000, not exceed 90 points.

(4) When evaluating the tenders contemplated in this item, the points for functionality must be-calculated for each individual tenderer.

(5) The conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication.

(6) The points for price, in respect of a tender which has scored the specified number of points contemplated in subregulation (5) must, subject to the application of the evaluation system for functionality and price contemplated in this regulation, be established separately and be calculated in accordance with the provisions of regulations 3 and 4.

(7) Preferences for being an HDI and / or subcontracting with an HDI and / or achieving specified goals must be calculated separately and must be added to the points scored for functionality and price.

(8) Only the tender with the highest number of points scored may be selected.

9 Award of contract to tender not scoring the highest number of points

Despite regulations 3.(4), 4.(4), 5.(4), 6.(4) and 8.(8), a contract may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points.

10 Cancellation and re-invitation of tenders

(1) In the event that, in the application of the 80/20 preference point system as stipulated in the tender documents, all tenders received exceed the estimated Rand value of R500. 000, the tender invitation must be cancelled.

(2) In the event that, in the application of the 90/10 preference point system as

stipulated in the tender documents, all tenders received are equal to, or below R500 000, the tender must be cancelled.

(3) An organ of state which has cancelled a tender invitation as contemplated in subregulations (1) and (2) must re-invite tenders and must, in the tender documents, stipulate the preference point system to be applied.

- (4) 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 need for the goods or services tendered for; or
 - (b) funds are no longer available to cover the total envisaged expenditure; or
 - (c) no acceptable tenders are received.

PART THREE

DUTY TO PLAN, GENERAL CONDITIONS, PRINCIPLES, DECLARATIONS, PENALTIES, TAX CLEARANCES AND TENDER GOALS

11 Duty to plan for invitation of tenders

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 or goods for which an invitation for tenders is to be made;
- (b) determine the appropriate preference point system to be utilised in the evaluation of the tenders; and
- (c) determine the deliverables or performance indicators in terms of which a person awarded a contract will be assessed.

12 General conditions

(1) An organ of state may, in the adjudication of tenders, give particular consideration to procuring locally manufactured products. Preferences in this regard may be accommodated within the ambit of the Act's 80/20 or 90/10 point systems. For specific industries (identified by the Department of Trade and Industry), where the award of tenders to local manufacturers are of critical importance, such tenders may be advertised with a specific tendering condition that only locally manufactured products will be considered. Should preference points be awarded for local manufacturing and/or content, the award of such points must be clearly specified in the tendering conditions.

(2) Only a tenderer who has completed and signed the declaration part of the tender documentation may be considered for preference points.

(3) An organ of state may, before a tender is adjudicated or at any time, require a tenderer to substantiate claims it has made with regard to preference.

(4) An organ of state must, when calculating comparative prices, take into account any discounts which have been offered unconditionally.

(5) A discount which has been offered conditionally must, despite not being taken into account for evaluation purposes, be implemented when payment is effected.

(6) In the event that different prices are tendered for different periods of a contract, the price for each period must be regarded as a firm price if it conforms to the definition of a 'firm price'.

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

(8) 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 specified goals. Should two or more tenders be equal in all respects, the award shall be decided by the drawing of lots.

13 Principles

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

(2) The equity ownership contemplated in subregulation (1) must be equated to the percentage of an enterprise or business owned by individuals or, in respect of a company, the percentage of a company's shares that are owned by individuals, who are actively involved in the management of the enterprise or business and exercise control over the enterprise, commensurate with their degree of ownership at the closing date of the tender.

(3) In the event that the percentage of ownership contemplated in subregulation (2) changes after the closing date of the tender, the tenderer must notify the relevant organ of state and such tenderer will not be eligible for any preference points.

(4) Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership.

(5) Subject to subregulations (1), (2), (3) and (4), all claims made for equity ownership by an HDI must be considered according to the following criteria:

- (a) Equity within private companies must be based on the percentage of equity ownership;
- (b) Preference points may not be awarded to public companies and tertiary institutions;
- (c) The following formula must be applied to calculate the number of points for equity ownership by an HDI:

$$NEP = NOP \times \frac{EP}{100}$$

Where

NEP	=	Points awarded for equity ownership by an HDI
NOP	=	The maximum number of points awarded for equity ownership by an HDI
EP	=	The percentage of equity ownership by an HDI within the enterprise or business, determined in accordance with subregulations (1), (2), (3) and (4).

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(6) Equity claims for a Trust may only be allowed in respect of those persons who are both trustees and beneficiaries and who are actively involved in the management of the Trust.

(7) Documentation to substantiate the validity of the credentials of the trustees contemplated in subregulation (6) must be submitted to the relevant organ of state.

(8) A Consortium or Joint Venture may, based on the percentage of the contract value managed or executed by their HDI members, be entitled to equity ownership in respect of an HDI.

(9) The number of points scored for a Consortium or Joint Venture must be added to the number of points scored for achieving specified goals.

(10) The points contemplated in subregulation (9) must be added to the points scored for price, in order to establish the total number of points scored.

(11) Subject to regulations 9 and 10, the contract must be awarded to the tender which scores the highest points.

(12) A person awarded a contract as a result of preference for contracting with, or providing equity ownership to, an HDI, may not subcontract more than 25% of the value of the contract to a person who is not an HDI or does not qualify for such preference.

14 Declarations

A tenderer must, in the stipulated manner, 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.

15 Penalties

(1) An organ of state must, upon detecting that a preference in terms of the Act and these Regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.

(2) An organ of state may, in addition to any other remedy it may have against the person contemplated in subregulations (1)-

- (a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
- (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
- (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and

- (d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.

16 Tax clearance certificate

No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Service ('SARS') certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS.

17 Specific goals

(1) The tendering conditions may stipulate that specific goals, as contemplated in section 2(1) (d) (ii) of the Act, be attained.

(2) The stipulation contemplated in subregulations (1) must include the method to be used to calculate the points scored for achieving specific goals.

(3) Over and above the awarding of preference points in favour of HDIs, the following activities may be regarded as a contribution towards achieving the goals of the RDP (published in *Government Gazette* 16085 dated 23 November 1994):

- (a) The promotion of South African owned enterprises;
- (b) The promotion of export orientated production to create jobs;
- (c) The promotion of SMMEs;
- (d) The creation of new jobs or the intensification of labour absorption;
- (e) The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
- (f) The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
- (g) The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
- (h) The promotion of enterprises located in rural areas;
- (i) The empowerment of the work force by standardising the level of skill and knowledge of workers;
- (j) The development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and
- (k) The upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.

(4) Specific goals must be measurable and quantifiable and organs of state must monitor the execution of the contract for compliance with such goals.

18 Short title

These regulations are called the Preferential Procurement Regulations, 2001