

GOVERNMENT NOTICE

DEPARTMENT OF STATE EXPENDITURE

NO. R. 562
5 June 2000

PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000, (ACT NO. 5 OF 2000): DRAFT REGULATIONS

The draft Regulations set out in the Schedule are hereby published for public comments in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000).

Interested persons are invited to lodge written comments on the draft Regulations by not later than 30 June 2000 to:

The Acting Director-General
Department of State Expenditure
Private Bag X 845
PRETORIA
0001

All comments must be marked for the attention of Mr NK Mlamla and may either be posted to the above address or transmitted by fax to (012) 315- 4533 or by e-mail to MlamlaN@dse.pwv.gov.za

REGULATIONS

The Minister of Finance has, under section 5 of the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000), made the regulations contained in the Schedule hereto.

SCHEDULE

1. DEFINITIONS

In these regulations "the Act" means the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000), and any word or expression to which a meaning has been assigned in the Act shall bear the meaning so assigned to it, unless the context indicates otherwise.

"Agent" means an independent institution or individual which has the proxy from another institution or individual from the industry, to independently do business on behalf of or represent such an institution or individual.

"Comparative price" means the price after the factors of non-firm prices against firm prices and all unconditional discounts were taken into consideration.

"Consortia/Joint Ventures" means an association of natural or legal persons for which purpose they combine their expertise, property, capital, efforts, skill and knowledge in a joint venture, to execute the contract.

"Contract" means the agreement that results from the acceptance of a tender.

"Firm prices" are deemed to be the prices that are 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 upon the contractor and demonstrably have an influence on the prices of any, supplies, or the rendering costs of any services, for the execution of the contract.

"Historically Disadvantaged Individuals (HDIs)" means all South African citizens

1. who had no franchise in national elections prior to the introduction of the 1983 and 1993 constitutions;
2. women; or
3. disabled persons.

Persons who obtained South African citizenship after the first democratic election in April 1994, cannot qualify for preference as an HDI.

"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 tenderer or his suppliers or sub-contractors) 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 place of entry as well as transportation and handling charges to the factory in the Republic where the supplies that have been tendered for are manufactured.

"Local content" means that portion of the tender price that is not included in the imported content provided that local manufacture does take place.

"Management" in relation to an organisation. 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.

"Small, Medium and Micro Enterprises (SMMEs)" means as defined in the National Small Business Act, 1996 (Act 102 of 1996).

"Tender" means a written offer on the official tender documents forming part of an invitation to tender.

"Trust" means the arrangement through which the ownership of property of one person is by virtue of a trust instrument made over or bequeathed to the trustee or beneficiaries designated in the trust instrument.

"Trustee" means any person, including the founder of a trust, who acts as trustee by virtue of authority.

2. Subject to the provisions of any Act of Parliament/Provincial Legislation, the application of any preference system shall be done by all organs of state as contemplated in section 1 (iii) of the Act, only in accordance with this Act. No other preference will be allowed and purchasing authorities are not allowed to encompass preferences in any other manner than those prescribed in the regulations.

3. The framework as contemplated in section 2 of the Act must be followed.

4. The determination of the Rand value of the contract must be based on the total/estimated contract value at the time of tender invitation.

5.(1) PREFERENCE POINT SYSTEM: 80/20

For all contracts with a Rand value equal to or below R2,0 million (two million Rand), the following formula must be used to calculate the points for price:

$$P_s = 80 \left[1 - \frac{P_t - P_{min}}{P_{min}} \right]$$

Where P_s = Point scored for price of tender under consideration
 P_t = Rand value of tender under consideration
 P_{min} = Rand value of lowest acceptable tender

(2) PREFERENCE POINT SYSTEM: 90/10

For all contracts with a Rand value above R2,0 million the following formula must be used to calculate the points for price:

$$P_s = 90 \left[1 - \frac{P_t - P_{min}}{P_{min}} \right]$$

Where P_s = Point scored for price of tender under consideration
 P_t = Rand value of tender under consideration
 P_{min} = Rand value of lowest acceptable tender

It must be stipulated in the tender document which point system will be applied to that specific tender.

Should it occur that the application of the 80/20 preference point system was stipulated in the tender documents and the Rand value of any of the tenders received are in excess of R2,0 million, all tenders received must be evaluated according to the 80 /20 preference point system. Should it occur that the application of the 80 /20 preference point system was stipulated in the tender documents and the Rand

value of all the tenders received are in excess of R 2,0 million, the tender must be cancelled and re-invited with the appropriate preference point system encompassed in the tender documents.

Should it occur that the application of the 90/10 preference point system was stipulated in the tender documents and the Rand value of any of the tenders received are less than R2,0 million, all tenders received must be evaluated according to the 90/10 preference system. Should it occur that the application of the 90/10 preference point system was stipulated in the tender documents and the Rand value of all the tenders received are equal to or less than R 2,0 million, the tender must be cancelled and re-invited with the appropriate preference point system encompassed in the tender documents.

Organs of State must therefore ensure that proper planning and calculations of the estimated costs are done prior to prescribing the appropriate preference point system in the tender invitation.

6. GENERAL CONDITIONS

6.1 Should any preference points be allocated for local content it would be applicable to only local manufacturers/suppliers/ service providers residing in South Africa.

6.2 Failure on the part of a tenderer to fill in and / or to sign the declaration will be construed to mean that preference points are not claimed.

6.3 Any organ of State reserves the right to require of a tenderer, either before a tender is adjudicated or at any time subsequently, that the tenderer should substantiate any claim with regard to preference and in any manner required by the organ of State.

6.4 Conditional discounts may not be taken into consideration in the calculation of comparative prices.

6.5 Where different prices are tendered for different periods of the contract, the tender price applicable in respect of a particular period of the contract shall be a firm price if, as regards such period, it conforms to the definition of "firm prices".

6.6 Points scored will be rounded off to the nearest 2 decimal places.

6.7 In the event of equal total points scored, the tender will be awarded to the tenderer scoring the highest number of preference points.

6.8 An agent will, if awarded a tender, be regarded as a contractor and will be liable for all benefits / losses.

7. PRINCIPLES

The following principles must be applied to the preferences during the evaluation of the tenders:

(1)(a) Equity ownership shall be equated to the percentage of an enterprise which is owned by individuals, or in the case of a company, the percentage shares that are owned by individuals who are actively involved in the management and daily business operations of the enterprise and exercise control over the enterprise, commensurate with their degree of ownership at the

closing date of the tender. Should the degree of ownership change after the closing date of the tender the tenderer should notify the relevant organ of State and the tenderer will not be eligible to any preference points.

(b) Where individuals are not actively involved in the management and daily business operations and do not exercise control over the enterprise commensurate with their degree of ownership, preference points for equity ownership may not be claimed for them.

(2) With due consideration of paragraph 7(1)(a) and (b) above, if claims are made for equity ownership for HDIs, it must be considered as follows:

(a) Equity within private companies must be based on the percentage equity ownership.

(b) As public companies are subject to constant change in shareholding, no preference points will be awarded to public companies.

(c) No preference points will be awarded for tertiary institutions

(d) The following formula will be applied to calculate the number of points scored for equity ownership by HDIs:

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

Where NEP is the number of points awarded for equity ownership by HDIs.
NOP is the maximum number of points awarded for equity ownership by HDIs.
EP is the percentage of Equity Ownership by HDIs within the enterprise determined in accordance with paragraph 7(2) (a) to (c),
and

(3)(a) Equity claims for a Trust, as the legal entity, will be allowed only for those persons who are both a trustee and a beneficiary and must be actively involved in the management and daily operation of the Trust. Substantiating documentation is required with regard to trustees thereby validating their appointments.

(b) Equity claims by persons / companies that fall within the definition of an "Agent" will be able to claim preference points if substantiating documents are submitted thereby validating their appointments.

(4) A consortium or Joint Venture (JV) can be entitled to equity ownership in respect of HDIs. Equity claims by Consortia and JVs must be based on the following:

It should be indicated what percentage of the total contract value will be executed by each party in the consortium or JV and the managers from each party must be indicated according to the percentage equity ownership and control as applicable for Private Companies.

Principle: Each consortium or JV member is allowed equity ownership based on that percentage of the contract to be executed by the consortium or JV member.

Total number of points scored for equity ownership for Consortia / JVs must be calculated as per (i), (ii) and (iii) below:

(i) To establish part point entitlement per Consortium/JV member:

$$\text{PPE} = \text{NOP} \times \frac{\text{percentage of contract to be executed}}{100}$$

Where PPE is part point entitlement per Consortium /JV member.
NOP is the maximum number of points awarded for equity ownership for Consortia/JVs.

(ii) To establish consortium/JV member's equity point:

$$\text{CEP} = \text{PPE} \times \frac{\text{EP}}{100}$$

Where CEP is the number of points awarded to the Consortium/JV member,
PPE is part point entitlement per Consortium/JV member (as calculated in (i) above),
and
EP is the percentage equity ownership within the Consortium /JV member.

(iii) Total number of points scored by Consortium / JV (NEP)

NEP = the total of the CEPs [points obtained per Consortium /JV]

Note: The number of points scored for Consortia/JVs [NEP] must be added to the number of points scored for price [Ps] in order to establish the total number of points scored and the contract must then be awarded to the tenderer who scores the highest points, unless objective criteria in addition to the goals justify the award to another tenderer.

8. DECLARATIONS

All tenderers must complete a declaration that:

- (a) the information provided is true and correct;
- (b) the signatory is duly authorised to sign the tender document, and
- (c) documentary proof regarding any tendering issue will be submitted to the satisfaction of the organ of State when called upon to do so.

9. PENALTIES

An organ of State may, should any information furnished be found to be false, act against a contractor and in addition to any other remedy it may have:

- (a) recover all costs, losses or damages incurred or sustained by the organ of State as a result of the contract; and / or
- (b) cancel the contract and claim any damages which the State may suffer by having to make less favourable arrangements after such cancellation; and / or
- (c) impose a penalty not exceeding 5 % of the value of the contract. 1

10. TAX CLEARANCE CERTIFICATE

No contracts will be awarded to tenderers who have failed to submit an original Tax Clearance Certificate from the South African Revenue Services certifying that their taxes are in order or that suitable arrangements have been made with the South African Revenue Service to satisfy them.

11. GOALS

The goals as contemplated in section 2(1)(d)(ii) of the Act, are the goals that inter alia may be prescribed in the tendering conditions as goals to be achieved. Every goal to be achieved must be clearly specified in the tendering conditions. including the method to be used to calculate the points scored for achieving the specified goals.

The goals must be measurable and quantifiable and organs of State must monitor the execution of the tender for compliance.