

Rationale for the Draft Preferential Procurement Regulations, 2022

1. Section 2(1)(b) and (c) of the Preferential Procurement Policy Framework Act, 2000 (the Act) requires that the Minister prescribes by regulation the threshold amounts in which the 80/20 and 90/10 preference point systems must be utilised, as well as the formula to be applied. Section 5(1) of the Act also authorises the Minister to make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act.
2. The draft Preferential Procurement Regulations (the draft Regulations) therefore contain regulations that must be prescribed by the Minister to provide for the threshold amounts in which the 80/20 and 90/10 preference point systems must be utilised, as well as the formula to be applied, as well those regulations which are necessary or expedient to achieve the objects of the Act. Those matters regulated in the Preferential Procurement Regulations, 2017 (2017 Regulations) which are to be contained in the procurement policies determined by organs of state have been omitted from the draft Regulations.
3. To this end, regulations that have been omitted from the draft Regulations are as follows:
 - 3.1 Reference to the use of **B-BBEE status** as a specified goal to be used when allocating preferential points has been omitted. Section 2(1) requires an organ of state to determine its own preferential procurement policy and implement it within a framework described in the Act. Section 2(1)(d) of the Act requires an organ of state to include specific goals in its policy. According to section 2(1)(e) of the Act an organ of state must, in the invitation to submit a tender, clearly specify the specific goals for which a point may be awarded. Using the B-BBEE status level of contributor does not provide for the opportunity to choose specific goals. The application of the B-BBEE Act by organs of state coupled with the limitation it poses on organs of state in determining their own specific goals for each tender suggests that B-BBEE as it was applied in the 2011 and 2017 Regulations would be an overreach, if included in the regulations.
 - 3.2 Regulation 8 of the 2017 Regulations providing for **local production and content** has been omitted since it is, in the view of National Treasury, outside the scope of the Act and of the Minister's regulation-making authority, i.e. *ultra vires*, and could be successfully challenged. The framework, in section 2(1) of the Act, does not provide for local production and content *per se*, but refers to implementing the programmes of the RDP and provides for points to be awarded for specific goals. It does not provide for local production and content to be used as a disqualification criterion.
 - 3.3 Provisions for evaluation on **functionality** have been omitted, since the introduction of functionality in previous iterations of the preferential procurement regulations is an addition which is not provided for in terms of section 2(1) of the Act. In accordance with the Constitutional Court ruling, National Treasury is of the view that although it is necessary to determine quality/functionality when procuring goods and services, it must be left to the organs of state to determine and should not form part of the regulations prescribed by the Minister. Alternatively, it may be prescribed through an Instruction in

terms of section 76 of the Public Finance Management Act (PFMA), or by amending the Municipal Supply Chain Management Regulations under the MFMA, where required, or by adopting in the SCM policies of the municipalities, where permissible (i.e. the broader SCM prescripts).

- 3.4 Regulations providing for **subcontracting after the award of a tender** have been omitted since these do not fall under preferential procurement and are therefore outside the scope of the Act. This could be contained in the procurement policies of organs of state. Alternatively, it may be prescribed through an Instruction in terms of section 76 of the Public Finance Management Act (PFMA), or by amending the Municipal Supply Chain Management Regulations under the MFMA, where required, or by adopting in the SCM policies of the municipalities, where permissible (i.e. the broader SCM prescripts).
- 3.5 Regulations providing for **cancellation of tenders** have been omitted since these do not fall under preferential procurement and are therefore outside the scope of the Act. This could be contained in the procurement policies of organs of state. Alternatively, it may be prescribed through an Instruction in terms of section 76 of the Public Finance Management Act (PFMA), or by amending the Municipal Supply Chain Management Regulations under the MFMA, where required, or by adopting in the SCM policies of the municipalities, where permissible (i.e. the broader SCM prescripts)
- 3.6 Regulations providing for **prequalification for preferential procurement** have been omitted since the Constitutional Court considered these provisions to be not necessary or expedient to be prescribed by the Minister as it should have been left to the organs of state to determine in their preferential procurement policies.
- 3.7 Regulations providing for **subcontracting as a condition of tender** have been omitted since the Constitutional Court considered these to be not necessary or expedient to prescribe by the Minister as it should have been left to the organs of state to determine in their preferential procurement policies.
- 3.8 Regulations providing for the issuance of **circulars and guidelines** have been omitted since there is a requirement for organs of state to determine their own preferential procurement policy. Furthermore, given that local production and content is not contained in the draft Regulations, the need to issue circulars will further reduce significantly. If deemed necessary for guidelines or circulars to be issued, they may be issued without being provided for in regulations, since they are not binding in nature and are merely issued to provide guidance to organs of state.
4. The draft Regulations provide for **new provisions** (not regulated in the 2017 Regulations) and propose to prescribe formulae to be used when allocating preferential points in **tenders to generate income, dispose of or lease assets by an organ of state**. Although in most contracts the state pays for goods and services, which is a cost to the fiscus, the purposeful interpretation of the Act is that the same principles of awarding points for price and specific goals is applicable to disposal and leasing of state assets and other income generating procurement. This requires the current formulae to be provided

for in reverse as an income to the fiscus. In the Supreme Court of Appeal judgment (*Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others* (1306/18) [2020] ZASCA 02 (31 January 2020)) the legal position on the application of the Act (point system) on lease tenders as they were issued by Airports Company South Africa was explained and thus further supports the inclusion of this provision in the draft Regulations.

5. The section on definitions has, accordingly, been adjusted (revised) in line with the aforementioned changes. Terms that have not been defined are ascribed their ordinary meaning.