

# INDUCTION TO KWAZULU- NATAL PROVINCIAL GOVERNMENT

The revised Preferential Procurement  
Regulations, 2022

PRESENTED BY:

OCPO - SCM POLICY  
AND LEGAL

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**national treasury**

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REPUBLIC OF SOUTH AFRICA



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# Background

The Preferential Procurement Regulations, 2017 (the 2017 Regulations) were promulgated in January 2017 with an effective date of 01 April 2017.



The 2017 Regulations sought to give effect to an announcement made by the then President in the State of the Nation Address in 2015. The President stated that ***GOVERNMENT WILL SET-ASIDE 30% OF APPROPRIATE CATEGORIES OF STATE PROCUREMENT FOR PURCHASING FROM SMMEs, COOPERATIVES, AS WELL AS TOWNSHIP AND RURAL ENTERPRISES.***



To give effect to this pronouncement, these regulations were introduced:

Regulation 4: Prequalification criteria for preferential procurement

Regulations 9: Subcontracting as a condition of tender

# Background Cont..

Regulations 3, 4 and 9 were successfully challenged through a court process that started in the Pretoria High Court and ended in the Constitutional Court.

The judgement overview:

- a. Regulations 4 and 9 were an important part of achieving Section 217(2) of the Constitution,
- b. the majority judgement felt that it was not necessary or expedient for the Minister to prescribe the impugned regulations.
- c. Section 2(1) of the Act vested the power to determine preferential procurement policy with an organ of state;
- d. what the Minister did by prescribing Regulations 4 and 9 amounted to the determination of preferential procurement policy.

# 1. RATIONALE FOR THE REVISED PREFERENTIAL PROCUREMENT REGULATIONS

- 1.1 As a point of departure in revising the preferential procurement regulations, NT had to take into account the rationale provided by the Constitutional Court in the Minister of Finance//Afribusiness (now Sakeliga) matter.
- 1.2 Consequently, the revised regulations provide for amounts and formula that must be prescribed by regulation in terms of s2(1)(b) & (c) of the Act and **only** matters that may be necessary/expedient to prescribe in order to achieve objects of the Act.
- 1.3 The above approach has its mandate in Section 2(1)(b) and (c) of the Preferential Procurement Policy Framework Act, 2000 (the Act), which require 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. Overview of the content of the revised Preferential Procurement Regulations, 2022

2.1 Key changes to the regulations since the 2011 and 2017 regulations are the following **omissions**:

2.1.1. Reference to the use of **B-BBEE status level of contributor** 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.

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.

Although specific goals will be used to allocate preference points, B-BBEE remains a legislated policy of government and compliance with its requirements is still important. Organs of state must comply with Section 10(b) of the B-BBEE Act when developing their preferential procurement policies.

## Overview of the content of the revised Preferential Procurement Regulations, 2022 continued...

2.1.2. Regulation 8 of the 2017 Regulations providing for **local production and content** has been omitted since it is 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.

Notwithstanding the aforesaid, It is important that organs of state support government's initiatives on development and sustaining the local manufacturing base until a uniform policy is adopted through an appropriate legislative framework. To this end, organs of state should identify within the RDP document if there are goals that support local manufacturing or industrialization in order to cater for those goals as part of their preferential procurement policy and specific goals in the tenders.

The RDP document may be accessed via the following link:  
<https://www.gov.za/sites/default/files/governmentgazetteid16085.pdf>

## Overview of the content of the revised Preferential Procurement Regulations, 2022 continued...

Other provisions that have been omitted since they are not provided for in the terms of section 2(1) of the PPPFA are the following:

- 2.1.3 Provisions for evaluation on **functionality**;
- 2.1.4 Regulations providing for **subcontracting after the award of a tender; negotiation of a fair market price; and cancellation of tenders**;
- 2.1.5 Regulations providing for **prequalification for preferential procurement and subcontracting as a condition of tender**;
- 2.1.6 Regulations providing for the **issuance of circulars and guidelines**

It should be noted that an instruction and circular is being considered to provide for provisions relating to functionality, cancellation of tenders and negotiation of a fair market price under the broader SCM prescripts issued under the PFMA and MFMA.



## Overview of the content of the revised Preferential Procurement Regulations, 2022 continued...

- 3) The revised 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.
- 4) 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.

## Specific provisions contained in the revised Preferential Procurement Regulations, 2022

- 1) The final changes that have been agreed upon after review of the public comments and vetting by the legislation unit and the Office of the State Law Advisor are as follows:
  - 1.1 **Regulation 1: Definitions:**

The following definitions are added (or modified) to the list of definitions:

    - a) **“highest acceptable tender”** means a tender that complies with all specifications and conditions of tender and that has the highest price compared to other tenders;
    - b) **“lowest acceptable tender”** means a tender that complies with all specifications and conditions of tender and that has lowest price compared to other tenders;
    - c) **“price”** means an amount of money tendered for goods or services, and includes all applicable taxes less all unconditional discounts;
    - d) **“specific goals”** means specific goals as contemplated in section 2(1)(d) of the Act which may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender and disability including the implementation of programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;

## Specific provisions contained in the revised Preferential Procurement Regulations, 2022 continued...

### 1.1 Regulation 1 continued: Definitions:

The following definitions are added (or modified) to the list of definitions:

- e) **“tender”** means a written offer in the form determined by an organ of state in response to an invitation to provide goods or services through price quotations, competitive tendering process or any other method envisaged in legislation;
- f) **“tender for income-generating contracts”** means a written offer in the form determined by an organ of state in response to an invitation for the origination of income-generating contracts through any method envisaged in legislation that will result in a legal agreement between the organ of state and a third party that produces revenue for the organ of state, and includes, but is not limited to, leasing and disposal of assets and concession contracts, excluding direct sales and disposal of assets through public auctions.

## Specific provisions contained in the revised Preferential Procurement Regulations, 2022 continued...

### 1.2 Regulation 3: Identification of preference point system:

Unlike in the 2011 and 2017 regulations, the 10 or 20 points for preference are allocated on the basis of specific goals and not on the B-BBEE status level of contributor, in line with the framework set out in the PPPFA, as well as in accordance with the Constitutional Court judgment. Also, provision has been made in this regulation for the allocation of preference points in tenders for income-generating contracts. Regulation 3 reads as follows:

- (1) An organ of state must, in the tender documents, stipulate—
  - (a) the applicable preference point system as envisaged in regulations 4, 5, 6 or 7;
  - (b) the specific goal in the invitation to submit the tender for which a point may be awarded, and the number of points that will be awarded to each goal, and proof of the claim for such goal.

## Specific provisions contained in the revised Preferential Procurement Regulations, 2022 continued...

### 1.2 Regulation 3: Identification of preference point system:

- (2) If it is unclear whether the 80/20 or 90/10 preference point system applies, an organ of State must, in the tender documents, stipulate in the case of—
- (a) an invitation for tender for income-generating contracts, that either the 80/20 or 90/10 preference point system will apply and that the highest acceptable tender will be used to determine the applicable preference point system; or
  - (b) any other invitation for tender, that either the 80/20 or 90/10 preference point system will apply and that the lowest acceptable tender will be used to determine the applicable preference point system.

## Specific provisions contained in the revised Preferential Procurement Regulations, 2022 continued...

### 1.3 Regulation 4: 80/20 preference point system for acquisition of goods or services with Rand value equal to or below R50 million:

(a) The PPPFA provides for the 80/20 preference point system to apply to contracts equal to or below a prescribed amount. It therefore **does not allow for a minimum threshold** value to be prescribed. The text in regulation 4 was thus aligned to accord with the wording in the PPPFA. Regulation 4, consequently, states as follows:

The following formula must be used to calculate the points out of 80 for price in respect of an invitation for a tender with a Rand value **equal to or below** R50 million, inclusive of all applicable taxes...

As can be seen, the regulations **no longer state** "...with a Rand value **equal to or above R30 000 and up to** R50 million"

(b) Furthermore, reference is made in final revised regulations to specific goals and not B-BBEE status level of contributor, for the reasons mentioned earlier in the presentation. Therefore, the 20 points will be allocated for specific goals and not for the B-BBEE status level of contributor.

## Specific provisions contained in the revised Preferential Procurement Regulations, 2022 continued...

### 1.4 Regulation 5: **90/10 preference point system for acquisition of goods or services with Rand value above R50 million :**

This provision is similar to regulation 4, except that the points for specific goals amount to 10 points in total and 90 points are allocated to price.

## Specific provisions contained in the revised Preferential Procurement Regulations, 2022 continued...

### 1.5 Regulation 6 and 7: **80/20 and 90/10 preference point system for tenders to generate income or to dispose of or to lease assets**

This is a new provision that was not in the previous iteration of the regulations, as explained in the earlier slides.

Essentially, this provision allows for the formulae for the 80/20 and 90/10 preference point system to be applied in reverse. For example, in the 80/20 preference point system, the formula would be applied as follows:

$$Ps = 80 \left( 1 + \frac{Pt - Pmax}{Pmax} \right)$$

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmax = Price of highest acceptable tender.



## Specific provisions contained in the revised Preferential Procurement Regulations, 2022 continued...

### 1.6 Regulation 8: Criteria for breaking deadlock in scoring

After careful consideration of the public comments, the version that was published for comment has been retained; consequently, there are no changes to this provision.

### 1.7 Regulation 9: Remedies

This regulation has been modified to ensure that it remains within the scope of section 2(1)(g) of the PPPFA. Provisions that were deemed to go beyond the scope of what is provided for in the PPPFA have been removed.

## Specific provisions contained in the revised Preferential Procurement Regulations, 2022 continued...

- 1) The final changes that have been agreed upon after review of the public comments and vetting by the legislation unit and the Office of the State Law Advisor are as follows:

### 1.8 Regulation 10: Repeal of regulations

This regulation repeals the 2017 Regulations in their entirety, including any designation circulars or instructions saved under the 2017 Regulations.

Any tender advertised before 16 January 2023 must be dealt with in terms of PPR, 2017.

### 1.9 Regulation 11: Short title and commencement

This regulation contains the short title and proposes that the regulations take effect on 16 January 2023.

## Way forward / Implementation support

1. Besides the roll-out that will take place in the provinces and with National Departments and public entities, and other stakeholders, NT, OCPO will also provide other support, where necessary, for example, developing an Implementation Guide and Frequently Asked Questions (FAQs).
2. These FAQs and Implementation Guide will be developed after engaging with stakeholders in the induction sessions to get a sense of the issues that require clarity.

**THANK YOU**