

## Preferential Procurement Regulations and Functionality

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# 1. Preferential Procurement Regulations 2017

The *Preferential Procurement Regulations 2017* have been gazetted on 20 January 2017. The regulations were initially promulgated in 2001 and revised in 2011 thus making this the second revision since the initial promulgation.

The revision of the *Preferential Procurement Regulations of 2011* was influenced by the need to empower certain categories (Small Medium and Micro Enterprises (SMME) also classified as EMEs or QSEs, Co-operatives, Township and Rural enterprises) through procurement. This was a product of social dialogue on the New Growth Path (NGP), wherein government and social partners signed a Local Procurement Accord on 31 October 2011. To this end, a commitment was made by government to leverage public procurement.

The revised regulations are also aligned to President Jacob Zuma's pronouncement in his 2015 State of the Nation Address, wherein he said, that government will set-aside 30% of appropriate categories of State procurement for purchasing from SMMEs or co-operatives as well as township and rural enterprises. Also, giving impetus/ incentive to the NGP. The highlights of the revision are:

- Introducing the prequalification criteria, which allows the advancement of these selected categories of people, by limiting competition to only amongst themselves. This restricts the inclusion of well-established companies, unless they meet further requirements of subcontracting to these groups, should they (established company) be successful. (Refer to regulation 4).
- Acknowledging that in the main, that high value tenders in the region of R30 million and above tend to be awarded to established companies, due to economies of scale and affordability, leaving out categories of aspiring businesses. The revised regulations require all those, with the ability to deliver the required service, to demonstrate the element of subcontracting to the categorised groups at a tendering stage. (Refer to regulation 9).
- Addressing the outcry of the categorised groups, who felt that the threshold of R1 million is too insignificant for them to grow to a level of established companies. Current regulations have increased to R50 million. This now gives smaller companies a greater chance to compete in the economy, in a meaningful way. (Refer to 6 & 7)

Commenting on the release of the regulations, the Finance Minister said that the regulations aim to use public procurement as a lever to promote socio-economic transformation, empowerment of small enterprises, rural and township enterprises, designated groups, and the promotion of local industrial development. He said this is in line with the current dialogue on inclusive economic growth in South Africa.

## **2. Planning, stipulation of preference point system to be utilized and the determination of designated sectors**

It is important to know that when you respond to a tender there are certain guidelines that Government Officials need to follow to evaluate your tender. According to the Implementation Guide – Preferential Procurement Regulations, 2017, pertaining to the Preferential Procurement Policy Framework Act, Accounting Officers and Accounting Authorities of all public entities listed in Schedules 2, 3A, 3B, 3C and 3D to the PFMA and municipal entities must comply with the rules and guidelines stipulated below.

Prior to the invitation of bids, Accounting Officers and Accounting Authorities are required to:

- Properly plan for the provision of services, works or goods in order to ensure that the resources that are required to fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price, place and that the quantity and quality will satisfy those needs.
- As far as possible, accurately estimate the costs for the provision of the required services, works or goods. This is to determine and stipulate the appropriate preference point system to be utilized in the evaluation and adjudication of the bids and to ensure that the prices paid for the services, works and goods are market related. Estimated costs can be determined by conducting an industry and commodity analysis whereby prospective suppliers may be approached to obtain indicative market related prices that may be utilized for benchmarking purposes. Based on the findings, the relevant preference point system (80/20 or 90/10) to be utilized for the evaluation of the bid must be stipulated in the bid documents.
- Determine whether the services, works or goods for which an invitation is to be made have been designated for local production and content in terms of Regulation 8 of the Preferential Procurement Regulations. This will entail the inclusion of a specific condition in the bid documents that only locally produced services, works or goods or locally manufactured goods with a stipulated minimum threshold for local production and content will be considered. This will subsequently have a direct impact on the evaluation of the bid.

Sometimes one gets the feeling that not all Accounting Officers and Accounting Authorities necessarily follow these procedures. But now you know, and you can hold them to these rules and regulations.

### 3. Functionality in Tenders

The Preferential Procurement Policy Framework Act 2017 establish the rules according to how Government Entities must evaluate tenders. The Preferential Procurement Regulations of 2017 takes it a step further and gives guidance on how to specifically award points according to certain criteria such as B-BBEE and Price.

Government Entities have developed a system called “Functionality” or “Technical Criteria” to enhance the system and to ensure that the Enterprises with the best **ability** are evaluated according to the Preferential Procurement Regulations. This is a safety measure built into the system to keep the Enterprises with no ability but with the lowest price out from winning a tender. Private Sector Entities have, although slightly modified, also adopted the same system. For a better understanding, we will name Government Entities and Private Sector Entities one as **Procuring Entities**.

It is just fair that a Request for Quotation or Competitive Bid (Tenders) is awarded to the Enterprise with the best ability. Otherwise no contract awarded will be executed correctly, according to specifications and on time.

An Enterprise’s ability to execute a Request for Quotation or Competitive Bid is measured through its ability to perform. This ability to perform can be measured in many ways of which the following are common:

- Experience.
- Human Resources.
- Financial Resources; and
- Goods or Services delivery capability.

The first three is easy to understand and easy to proof. It is the fourth item, Goods or Services delivery capacity that many Enterprises struggle with. Procuring Entities must ensure that when procuring goods and/or services from an Enterprise that it will be done:

- Timeously.
- Correctly as per specifications; and
- Continuously.

This can only be proofed if an Enterprise has the necessary infrastructure to deliver the goods and/or services required.

## 4. Functionality Scoring Rules

The *Preferential Procurement Regulations 2017* makes provision for new Functionality Scoring rules.

It is stipulated in the *Preferential Procurement Regulations 2017*, that the evaluation criteria should be objective, giving enterprises a fair shot at being able to advance to the next phase of evaluation, namely Price and B-BBEE.

Most tenders are evaluated on Functionality, but an Organ of State will indicate in the tender documents how the tender will be evaluated.

The tender document will normally specify the evaluation standards for measuring functionality. It will also state the following:

- The points available for each criterion and, if any, each sub-criterion.
- The minimum qualifying score needed to advance. Usually the threshold is between 65% and 85% out of 100%.

All tenders achieving less than the minimum qualifying score will be declared non-responsive and will not qualify to be evaluated on Price and B-BBEE.

When an Organ of State sets the minimum qualifying scores for Functionality, the scores should:

- Not be generic.
- Be determined **separately** for each tender.
- Not be so low that it jeopardises the quality of the required goods/services.
- Not be so high that they are impossible to attain.

All tenders that score the minimum qualifying score for functionality must be evaluated further, in terms of Price and B-BBEE as stated by the preference point systems in accordance with the *Preferential Procurement Regulations 2017*.

## 5. How do I pass the functionality / technical criteria evaluation?

Here are 10 tips on how to pass the Functionality test:

1. You must realize that the Functionality test in a tender is nothing else but the section where you **advertise** your goods and / or services. Responding to tenders it is a focussed marketing opportunity. You get the opportunity to focus your marketing one specific buyer who is in desperate need of procuring goods and / or services such as what you are offering. Ensure to make the most of it!
2. You earn points during the Functionality test. Before you start responding to tenders go to the Functionality section. Scan the criteria to see if you will **earn enough points** to go through to the next round of evaluation. It does not make sense to waste time and money on a tender response if you are not going to pass the Functionality test.
3. Ensure that you respond to a tender that is **related to the business you are in**. You will not be successful in bidding for something that you have no experience of.
4. Use the **exact phrasing** or wording in your tender response that is used in the tender document. This makes it easier for the Evaluation Committee to find what they are looking for in your tender response.
5. Use the exact **same format** that the tender document uses in your response on Functionality. If the Functionality in the tender document is in a table then try and use a table as well in your response.
6. Your items under Functionality must be in the **same order** as that in the tender document. Do not swap items around. You want to make it as easy as possible for the Evaluation Committee to find what they are looking for.
7. **Do not over sell** your business. This might seem weird saying this, but many Enterprises have a range of goods and / or services that they sell. Evaluation Committees are only interested in the goods and / or services that they want to procure. Giving them too much information at the wrong time might prevent them from finding the right information.
8. **Be visual!** In today's world everything is about visual effects. We look at mobile screens, computer screens and big screen televisions. Heck, even your car has a screen it these days! Ensure that your tender response, especially when it comes to Functionality, has some photos in it. Put photos in of your product as well as photos of your Enterprises' people. If you use machinery in your business, then showing it of is always a clever idea. At the end of the day the photos that you put into your tender respond must add value to your tender response. Obviously, the photos must be relevant to the tender requirements.
9. **Be honest** in your functionality response. Remember that a tender is binding and if you cannot execute the contract you might find yourself in legal battles if you have won the tender, but you cannot execute the tender.
10. Finally, you must remember that your tender response is going be evaluated by a person such as you and me. Also remember that your tender response is not going to be the only tender response to that specific tender. So, **make it easy** for the people on the Evaluation Committee to find and score your Functionality items.

If you follow these tips and tricks you will have a better chance in be successful at bidding.

## 6. Evaluation of Functionality and Technical criteria

The tender processes in South Africa are governed by:

- The Preferential Procurement Policy Framework Act.
- Preferential Procurement Regulations, 2017.
- National Treasury's Supply Chain Regulations.
- General Procurement Guidelines.

According to these Acts and Regulations, Competitive Bids – as tenders are legally called in South Africa – are measured on Functionality.

The Functionality test evaluate bidders on various aspects of the contract to establish if the bidder has the capabilities to execute the contract or not. If an Enterprise's tender response does not pass the Functionality test, it cannot be measured on Price and B-BBEE. Enterprises that respond to tenders must ensure that they will pass the Functionality test to advance.

During the functionality test the bidder must score a set minimum number of points out of 100. After the Preferential Procurement Regulations 2017, and specifically paragraph three, were implemented it makes tenders much more transparent. Previously it had been a struggle to determine how many points one can score on specific functionality criteria.

A threshold of 75 out of the 100 is usually set, but this can be higher or lower, depending on the Organ of State. Only those bidders that reach the minimum threshold, which can be anything between 60 and 90 points out of a possible 100 points, will advance to the next phase, namely the Preference Points Scoring system (Price and B-BBEE). All tenders achieving less than the set threshold will be declared non-responsive and will not qualify to be evaluated on B-BBEE and Price.

Each Functionality criteria that will be evaluated, will have a weighting in points. The weighting of each functionality criteria will be dependent on the importance of the criteria in the contract. Most functionality criteria include:

- Track record and Experience: The Procuring Entity – either Public or Private Sector – wants to know how many years' experience the bidders have in executing similar contracts providing the goods and/or services you are proposing. The more experience you have the better. This indicates to the Organ of State that you have been providing the goods and/or services for a period and that you are experienced in your field of expertise.
- Recourses: Human Resources: The bidder must indicate if it has the human workforce, with the necessary experience and expertise to successfully comply with the requirements of the contract.
- Financial capabilities: Procuring Entities are hesitant to award a contract to anyone who does not have the required capital available to successfully execute the contract.
- Technology: Do you have the necessary systems, for instance machinery/vehicles/software to execute the contract
- Usually the Procuring Entity will require other Functionality criteria that are specific to the goods or services that they want to procure. For example: if the Procuring Entity

needs a construction company, the bidder will have to be registered with the Construction Industry Development Board or CIBD for short. If the bidder is not registered with the CIBD then the bid response will be marked as non-responsive.

- Can you add value to the goods and/or services that the Organ of State require? Is there any other information you deem relevant to your proposal? If yes, provide details. If you, for example, are selling tables and you offer a table made from wood and steel, it would be better than another supplier that offers plastic tables. Obviously, your tables would be of a higher quality.

It is especially important to elaborate as much as possible on the technical criteria of your response. In meeting the technical criteria of any tender, you will be ensured that your enterprise advances to the next phase of evaluation.

To learn more about this and many other tender conditions attend our “Become a Tender Expert” 2-Day workshops/**webinars** presented in Johannesburg, Pretoria, Durban, Port Elizabeth, and Cape Town. Book and pay online at <https://howtotender.co.za/tender-expert-form/>

Contact us at [estelle@howtotender.co.za](mailto:estelle@howtotender.co.za) should you require more information.

*You can also purchase a Tender Manual (Handbook) on our website <https://howtotender.co.za/> which is a step by step guide how to respond to a South African Tender. It includes examples of completed SBD forms.*