

FREQUENTLY ASKED QUESTIONS AND GENERIC ANSWERS: PREFERENTIAL PROCUREMENT REGULATIONS, 2022.

No.	Question	Generic Answer
1.	Why was it necessary to review the Preferential Procurement Regulations 2017?	The Constitutional Court, in the matter between the Minister of Finance v Afribusines NPC, ruled that the Minister exceeded his powers when prescribing the 2017 Regulations; the Minister has rectified the concerns raised in the Constitutional Court judgement with the Preferential Procurement Regulations, 2022 (PPR, 2022) in that the PPR 2022 prescribe what is necessary or expedient as directed by Section 5 of the Preferential Procurement Policy Framework Act (PPPFA).
2.	Broad-Based Black Economic Empowerment (B-BBEE) is no longer used to claim preference points, instead specific goals are used; is this not taking transformation initiatives backwards?	It may be viewed as taking transformation backwards from what most bidders have been accustomed to when bidding for state contracts, however, it is important to ensure that the regulations are consistent with the founding legislation, the PPPFA in this regard. Until the PPPFA is repealed preference points must be claimed on specific goals decided by the organ of state rather than the B-BBEE score card. Enterprises are required to comply with B-BBEE as determined by the B-BBEE Act and the Codes of Good Practice, as these prescripts are not limited to public procurement only.
3.	Why are organs of state expected to use specific goals when allocating points for preference; and why can B-BBEE status level of contributor not be used as a specific goal in the allocation of preference points?	Section 2(1) requires an organ of state to determine its own preferential procurement policy and implement it within a framework envisaged in the PPPFA and reference in the PPPFA to specific goals is with respect to what is contained in section 2(1)(d)(i) and (ii). If a specific goal is not located in section 2(1)(d)(i), then for it to be included in the tender document, it must be provided for in section 2(1)(d)(ii), under the programmes of the Reconstruction and Development Programme (RDP). In terms of section 2(1)(e) of the PPPFA an organ of state must, in the invitation to submit a tender, clearly specify/ stipulate the specific goals for which a point/s may be awarded. Using the B-BBEE status level of contributor does not provide for the opportunity to choose specific goals, because instead of points being awarded for the individual specific goals that an organ of state chooses to advance in the tender documents, a point is simply allocated based on the overall B-BBEE status level of contributor at which a tenderer is assessed. Consequently, to use B-BBEE status level of contributor in the way that it was applied in the 2017 regulations would not be

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		<p>consistent with what is provided for in section 2(1)(d)(i) and (ii) of the PPPFA and the Preferential Procurement Regulations, 2022.</p> <p>Organs of state are urged to familiarise themselves with what is contained in that extensive RDP document so that they can extract specific goals from that document that may be included in their policies and promoted in the tender documents.</p>
4.	Local content requirements have also been removed; what would be the impact of this on the President's Economic Recovery Plan?	<p>When the reasoning of the Constitutional Court judgment was taken into consideration in its entirety, it became apparent that it was necessary to omit local production and content to align with the empowering legislation. The framework, in section 2(1) of the Act, does not specifically refer to local production and content <i>per se</i>, but refers to implementing the programmes of the Reconstruction and Development Programme. It furthermore provides for points to be awarded for specific goals and not for local production and content to be used as a disqualification criterion as it was done in the 2017 Preferential Procurement Regulations.</p> <p>Organs of state may still promote local manufactured products as part of the goals of Reconstruction and Development Programme by allocating preference points if or until there is an Act which gives effect to it in a manner similar to the 2017 Regulations.</p>
5.	Organs of state will decide which goals to promote in a tender and this will make things difficult for tenderers to prepare for government tenders; is it possible for the National Treasury and the Minister to direct organs of state in terms of the PFMA or MFMA or by means of a Guideline on what goals must be included in the tender documents in line with	<p>No, the Act places the power to decide on which goals to be used in the tender on the organs of state; the National Treasury or the Minister may not issue a directive which contradicts the founding legislation.</p>

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	government's transformation objectives?	
6.	Will the SBD 6.1 and MBD 6.1 be revised to take into account the revised PPR, 2022?	The Standard Bidding Documents (SBD 6.1 and MBD 6.1) have been amended in line with the changes brought about by the PPR, 2022 and have been uploaded on the Office of the Chief Procurement Officer website on the following link: http://ocpo.treasury.gov.za/Buyers_Area/Pages/Standard-Bidding-Forms.aspx
7.	Since there is no longer a prescribed minimum value for the 80/20 system, can an organ of state, in its own policy prescribe the minimum value?	In terms of section 2(1) of the PPPFA, an organ of state must determine its preferential procurement policy and implement it within the framework prescribed. The word "prescribed" is defined to mean prescribed by regulation made under section 5, and section 5 of the PPPFA empowers the Minister to make regulations. Therefore, organs of state are not empowered to prescribe threshold values for the application of the PPPFA, only the Minister of Finance is empowered to do so. The PPPFA provides for the 80/20 preference points system to apply in respect of an invitation for a tender with a Rand value equal to or below R50 million, inclusive of all applicable taxes. Consequently, where there is no tender* invited, for example in the case of petty cash purchases, the 80/20 preference points system will not apply. <i>* "tender" includes price quotations as per the definition of "tender" in the PPR2022</i>
8.	How should organs of state evaluate a tenderer that does not meet the tender requirements for the specific goals promoted in the tender document, or who is unable to provide proof for the points claimed under that specific goal?	The tender submitted must be evaluated in terms of the preference points system and the specific goals stipulated in the tender document. Points will be allocated in accordance with the point allocation stipulated in the MBD 6.1 / SDB 6.1. Where a tender does not qualify for the preference point for a specific goal or fails to provide proof for the preference points claimed for a specific goal, the tender may be awarded zero (0) points for that specific goal.

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9.	On the issue of breaking deadlock in scoring, the PPR, 2022 is only talking about 2 scenarios: What will happen if the tender has functionality, are we not allowed to use such functionality as a criterion to break deadlock as it was previously stipulated in PPR, 2017	Given that provisions for evaluation on functionality have been omitted from the PPR, 2022, 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, it then follows that its use in the breaking of deadlock cannot be prescribed by the regulations either. In terms of the PPPFA, an invitation to tender must indicate which specific goals will be advanced in the tender and how points will be allocated for each specific goal. Therefore, should it happen that there is a deadlock, the same goals will be used to break the deadlock before drawing of lots.
10.	Are institutions able to appoint multiple suppliers even with the application of the PPPFA as the reading of the PPPFA implies that only one tenderer can be appointed for each tender.	In the matter (<i>South African Container Stevedores (Pty) Ltd v Transnet Port Terminals</i>), the court confirmed that it is acceptable for an organ of state to award more than one bid and thus conclude multiple contracts on a single call for tenders where the bid documents allow such award. The court furthermore held that this is allowed under the bid adjudication process contemplated in the Preferential Procurement Policy Framework Act 5 of 2000 (“PPPFA”). Significantly, the court held that such multiple awards are not in conflict with the requirement in section 2(1) (f) of the PPPFA, which states that “the contract must be awarded to the tenderer who scores the highest points”. With reference to the Interpretation Act 33 of 1957, the court held that the singular word “tenderer” in this provision must be read to include the plural so that the section indeed allows for contracts to be awarded to more than one tenderer. Therefore, it is important that an organ of state stipulates in the tender document if it will be awarding the tender to more than one tenderer, and how the award will be made.
11.	How should an organ of state deal with the preference points system where the tender has no need for	Section 2(1) of the PPPFA stipulates that “an organ of state must determine its preferential procurement policy and implement it within the following framework”, which means that it is a requirement for the organ of state to have a preferential procurement policy and give effect to it in

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	specific goals. Is it possible to ignore the 10 or 20 points?	<p>accordance with the framework stipulated in the Act. Therefore, it is not possible for an organ of state to ignore the preference points, except where the organ of state has applied for an exemption in terms of section 3 of the PPPFA.</p> <p>Furthermore, organs of state should be cognisant that government considers procurement a strategic lever for the transformation of the South African economy, and should therefore be actively identifying opportunities for advancing government’s transformation agenda when contracting for goods and services.</p>
12.	Are premiums (11.11% and 25%), still applicable?	<p>The premium for preferential procurement is inherent in the formulae that are stipulated in section 2(1)(b)(i) and (ii) of the PPPFA, where the premium for the 80/20 preference points system is calculated as $(20/80) \times 100 = 25\%$; and the premium for the 90/10 preference points system is calculated as $(10/90) \times 100 = 11.11\%$.</p> <p>However, it should be noted that organs or state should negotiate for fair market prices when considering a tender for award to ensure that when organs of state contracts for goods and services, it is cost effective and attains value for money in line with section 217(1) of the Constitution.</p>
13.	The Act states that “specific goals <i>may</i> include”, does this mean that there may be other goals?	<p>Section 217(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides for organs of state to implement policies that provide for categories of preference in the allocation of contracts and for protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. However, section 217(3) of the Constitution constrains organs of state to implement preferential procurement policies in line with national legislation, which must prescribe a framework within which those preferential procurement policies referred to in section 217(2) must be implemented. The PPPFA is that national legislation.</p> <p>Reference in the PPPFA to specific goals is with respect to what is contained in section 2(1)(d)(i) and (ii). Section 2(1)(b)(i) and (ii) refer to the “specific goals as contemplated in paragraph (d)”. Consequently, the organ of state does not have the liberty to pursue specific goals outside of what</p>

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		is provided for in section 2(1)(d)(i) and (ii). Therefore, whatever specific goal(s) organs of state choose to include in their tender document would need to find its location in these aforementioned provisions. If a specific goal is not located in section 2(1)(d)(i), then for it to be included in the tender document, it must be located in section 2(1)(d)(ii), under the programmes of the RDP.
14.	What happens to bids that are to be advertised after 16 January 2023, but the organ of state is still developing their policy? In other words, does the SCM policy need to be in place and approved by 16 January 2023?	<p>The organ of state runs the risk of incurring irregular expenditure, as defined in the MFMA and PFMA if it procures without a preferential policy in place. In terms of section 2(1) of the PPPFA, the organ of state must determine its preferential procurement policy and apply it within the framework stipulated in section 2(1) of the Act. Therefore, the preferential procurement policy of the organ of state is the precursor to what is to be specified in the tender document.</p> <p>Furthermore, from a practical perspective, should the organ of state invite tenders without determining its preferential procurement policy, there may be a lacuna, as the institution will have no specific goals determined in its preferential procurement policy which may be used as a basis for stipulating the specific goals. This could consequently lead to legal challenges as the specific goals which would be included in the tender invitation would not be in terms of an approved preferential procurement policy.</p>
15.	Since functionality evaluation criteria have been excluded from the PPR, 2022, does it mean that procuring institutions are not allowed to use functionality in its evaluation process?	It should be noted that it is still important for organs of state to include functionality in their tenders in order to test if tenderers have the capacity and capability to deliver goods/ services as required by the organ of state. "Functionality" was removed from PPR, 2022 since in the assessment done by the National Treasury it was not necessary or expedient for the Minister to prescribe functionality in Preferential Procurement Regulations, as it forms part of the broader supply chain management, and is not a construct of Preferential Procurement per se. An instruction was issued for comment to organs of state which includes some provisions that were left out in PPR, 2022 which may be prescribed in terms of PFMA or MFMA. Those provisions include functionality, cancellation of tenders and negotiating a fair market-price. Therefore, functionality is an integral part of the evaluation process.

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16.	Is it possible to provide examples of “objective criteria” that must be applied by an organ of state when it evaluates tenders?	<p>As institutions are aware, section 2(1)(f) of the Act states that the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraph (d) and (e) justify the award to another tenderer. Section 2(1)(f) is clear that a tender must be awarded to the tenderer who scores the highest points; therefore, objective criteria may only apply in addition to those mentioned in Section 2(1)(d) and (e), which, by deductive reasoning, would be in exceptional cases.</p> <p>It is therefore the responsibility of each organ of state to determine those exceptional cases where objective criteria will be invoked. It should be noted that Section 2(1)(f) may not be invoked in order to undermine a tenderer who scores the highest points but should only be applied in those instances where it is necessary and in accordance with the institution’s preferential procurement policy, which policy has to be determined by the organ of state and not National Treasury.</p>