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REGULATORY

Significant changes to government/parastatal procurement regulations promote Broad Based Black Economic Empowerment

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INTRODUCTION

The PPPFA regulations apply to procurement by "Organs of State" which include national and provincial Government departments, municipalities, Parliament, provincial legislatures and various parastatals including Eskom.

THE NEW REGULATIONS

In terms of the new regulations price remains the dominant basis on which procurement decisions must be made. This is done through the so called 80/20 and 90/10 principles whereby 80% or 90% of the total points awarded to a tenderer depend on price and 20% or 10% of the points awarded may depend on non price considerations like the tenderer's rating for broad based black economic empowerment ("BBBEE"). However in terms of the new regulations, the 80/20 principle will now apply to tenders under R50 million. Previously the threshold was R1 million so this is a significant change as non price considerations (including BBBEE) will be more important for such tenders. The 90/10 principle will apply to tenders above R50 million.

Another significant change in the new regulations is the explicit authorisation for prequalification criteria for tenders. Tenders may now contain a specific tendering condition that only one or more of the following tenderers may respond –

- a tenderer with a stipulated minimum BBBEE status;
- an Exempt Micro Enterprise ("EME") or Qualifying Small Enterprise ("QSE"). These terms are defined in the codes of good practice on black economic empowerment ("Codes") issued in terms of the Broad Based Black Economic Empowerment Act ("BBBEE Act"). EMEs are firms with an annual total revenue of R10 million or less and QSEs are firms with an annual total revenue of between R10 million and R50 million;
- a tenderer subcontracting a minimum of 30% to various EMEs or QSEs including EMEs or QSEs which are at least 51% owned by black people (including youth, black women, black people with disabilities, black people living in a rural or undeveloped area or township and/or military veterans).

The importance of this change is that a tender which fails to meet the prequalification criteria may be rejected upfront from consideration. The new regulations accordingly explicitly allow a "set aside" of tenders for firms with a certain BBBEE status and/or small and medium sized enterprises.

It is important that the prequalification criteria permitted for BBBEE is based on the BBBEE status of a firm. This is determined in terms of the Codes by reference not only to black ownership but to the firm's scores for management control, skills development, enterprise and supplier development and socio economic development. The practice of some parastatals like Eskom of imposing a prequalification criteria based solely on black ownership (for example a minimum 51% black shareholding) as opposed to BBBEE status, is not authorised by the new regulations. Black ownership targets in the Codes are 25% (plus one vote) and only 25 points (out of a total of 118 points) are available for a firm's black ownership score. The approach in the new regulations is consistent with the principles underlying the BBBEE Act which seeks to promote broad based empowerment which is not restricted to black ownership only.

The PPPFA Act provides that a contract must be awarded to the tenderer who scores the highest points unless "objective criteria" justify the award to another tenderer. The term "objective criteria" is unfortunately not defined in the Act and this has led to several issues of interpretation. The Act stipulates that the "objective criteria" must be "in addition to" criteria relating to contracting with historically disadvantaged persons or implementing the programme of the 1994 Reconstruction and Development Programme. As BBBEE (which covers black ownership) is taken into account during the application of the 80/20 or 90/10 principle, it is arguable that the "objective criteria" cannot include criteria relating to the level of black ownership of a tenderer. The new regulations however make it clear that if "objective criteria" will be applied in a tender, this must be stipulated in the tender document. This will allow firms to assess the risk upfront that a tenderer with the highest score (following the application of the 80/20 or 90/10 principle) may not be awarded the tender.

CONCLUSION

The new regulations are in line with the Government's policy to use State/parastatal procurement as a more effective means of supporting BBBEE and small and medium sized businesses. Earlier proposals included that the 80/20 and 90/10 principle be replaced by a 70/30 principle as well as increasing the threshold for the principles to R100 million. The new regulations follow a healthy debate on (and seek to find a compromise between) the need for State/parastatal procurement to obtain "value for money" and also to promote BBBEE and other industrial policy goals. Firms contracting with Government and parastatals need to carefully consider the new regulations and prepare themselves for when the regulations take effect on 1 April 2017.

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