



public works

Department:  
Public Works  
REPUBLIC OF SOUTH AFRICA

# CHALLENGES RELATING TO TRANSFORMATION LEGISLATION IN THE BUILT ENVIRONMENT

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PURPOSE

# PURPOSE

- To highlight the **current impediments of implementing** the Preferential Procurement Regulations, 2017 issued in terms of section 5 of the Preferential Procurement Policy Framework Act, Act Number 5 of 2000 (PPPFA) specifically pertaining to the implementation of the 30% SMME sub-contracting requirement and **to provide a feasible method of implementation that would reduce the number of non-responsive bids and ultimately speed up project implementation and service delivery.**

## BACKGROUND

The implementation of the regulation as is, is however problematic which results in **more bidders** being **non-responsive**, bids **awarded at higher cost** and **community unrest** (project stoppages) whereby the **lives of all parties involved on the project is at risk** because of labour and SMME unrest that **culminates into extensive delays** at a **cost** to the department (State)

For ease of reference the clauses have been have been directly copied from the implementation guideline of the Preferential Procurement Regulations (2017) that specifically relates to the 30% sub-contracting:

# REGULATION

“The regulation states that if feasible to contract above R 30 million, an organ of state must apply sub-contracting to advance designated groups”. –

The term “feasible” is used in recognition of the fact that it may not always be possible to subcontract in all tenders due to the nature of some tenders. (For instance it may not be possible to sub-contract one piece of machinery that is above R 30 million)

Institutions must therefore identify procurement opportunities for designated groups where compulsory sub-contracting must be applied to all contracts/ projects above R30 million

# REGULATION

Tenders must be advertised with a condition that tenderers who fail to comply with this requirement would be disqualified.

Institutions must conduct market or industry research to identify level of transformation in the sector or commodity, role players and their B-BBEE status level and availability of EMEs or QSEs who may be eligible for sub-contracting.

The Central Supplier Database (CSD) has been upgraded to allow bidders/ contractors/ suppliers access to CSD for identification of potential subcontractors from the pool of EMEs or QSEs to advance designated groups

# REGULATION

Tenderers or contractors must submit proof of sub-contracting arrangement between the main tenderer and the subcontractor. Proof of sub-contracting arrangement may include a sub-contracting agreement between main tenderer and the subcontractor.

The responsibility for inclusion of compulsory sub-contracting clause in the tender rests with the institution.

The responsibility to sub-contract with competent and capable subcontractors rests with the main contractor/ supplier.

# REGULATION

The contract will be concluded between the main contractor and the institution, therefore, the main contractor and not the sub-contractor would be held liable for performance in terms of its contractual obligations.

Tenders that do not meet sub-contracting requirements are considered as being not acceptable tenders and must be disqualified and may not be considered for further evaluation or award.

The report containing the list of potential subcontractors may be drawn by accessing the following link: [www.csd.gov.za](http://www.csd.gov.za)

## FACTS

The **regulation is welcomed by all and is necessary to transform the industry and uplifting previously disadvantaged to promote all inclusive economic growth.** This is also not something new to DPW as many years ago bidders tendered a Contract Participation Goal (CPG) to employ emerging contractors which exceeded expectations on most of our projects.

Treasury also indicated that all the SMMES must be **fully compliant up to the date of award and issuing the letter of acceptance.** Bidders are deemed to be **non-responsive if any number of the SMMEs are non-compliant.** The department is not entering into a contract with the **SMMEs but the main contractor.**

# CHALLENGES

This requirement also brings about two problems.

**Firstly the extended tender periods of 60 days is deemed too short** as the main bidder must *source fully compliant SMMEs who are registered on the CSD and the CIDB and who are active as well as tax matters being in order.* In principle this is correct but in reality this is not easily achieved as most of the **Level 1 to 4 SMMEs are not active as they did not have work or do not have the funds to obtain a Tax Clearance Certificate due to being in arrears.** The result is that bidders are then **forced to pay tax moneys on behalf of the SMMEs in order to be compliant without knowing whether in fact the project will be awarded to them. This is an unfair practice.**

# CHALLENGES

The **second problem** is that any one of the SMMEs may become non-compliant between the date of evaluating the bid and final award which will then render the **bid non-responsive upon which the evaluation process must start all over again.**

Insisting on having to **enter agreements with SMMEs at tender stage** is totally unpractical. The reasons being:

- Why insist on agreements and the list of SMME sub-contractors at **tender stage if it is bound to change** and the level of achievement will only be determined upon completion of the project?

# CHALLENGES

Agreements are entered with SMMEs creating expectations while not knowing which bidder will be successful. The SMMEs incur vast amounts of cost to be reregister and to become active hoping that they will be getting some work.

**SMMEs also do not want to enter into agreements** with all the prospective bidders and disadvantage good capable bidders.

In the event of awarding a bid to a bidder who has not sourced SMMEs from the “right area” or group it is guaranteed that there will be **labour unrest and the projects are brought to a standstill by the local communities resulting** in huge financial costs to the State

# CHALLENGES

**It is unfair to expect the bidder to enter into agreements with SMMEs prior to the invitation of bids** or even *just prior to award for that matter as in most instances the SMMEs service's will only be required after 6 months up to 3 years after the commencement of the work. Furthermore the SMME may not even be in business any more, may become non-compliant or be over committed at the time when their services are required.*

It is estimated that 30% to 50% of SMMEs will be changed during the construction period for the same reasons as mentioned above or due to poor workmanship.

# RECOMMENDED CHANGES

1. The aim of the regulation is to transform the construction industry while uplifting the previously disadvantaged. Inadvertently the regulation is impeding the implementation of projects due to the vast number of non-responsive bids resulting in missed employment opportunities either as direct labour, as SMMEs or as suppliers.
2. Sub-contracting should not be a responsiveness criteria and
3. All sub-contracting should be implemented after or post award.

# RECOMMENDED CHANGES

4. Enforcing the rule of having to enter into agreements at tender stage boils down to a form of nominated sub-contracting which brings about its own challenges. The bidder then reserves the right to only use the SMMEs with whom they entered into agreements. In reality, the local community and SMME forums will not allow this to happen and the bidder will be forced to source other SMMEs which nullifies the requirement for having to submit details and agreements prior to tender as a responsiveness criteria. **It is therefore recommended that the 30% sub-contracting must be a condition of tender and which could be managed post award through a transparent process.**

**THANK YOU**

HI KHENSILE