



NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

DRAFT NEDLAC REPORT ON THE PREFERENTIAL PROCUREMENT REGULATIONS

1. BACKGROUND

1.1 The Social partners at the Trade and Industry Chamber agreed to convene a Task Team which would consider:

- 1.1.1. Review of Preferential Procurement legislation.
- 1.1.2. Section 3.7 of the Framework Response to the Global Economic Crisis.
- 1.1.3. IPAP 2 actions

2. SCOPE OF THIS REPORT

2.1. This report deals with the alignment of the Preferential Procurement Policy Framework Act and its Regulations with the Broad Based Black Economic Empowerment Act and its related Codes of Good Practice and the review of the preferential procurement regulations to promote local production and manufacture.

2.2. Constituencies noted that the current quantum of points in the point system would have to be retained as an interim measure as this may not be amended through regulations on the understanding that this will be reviewed as part of the forthcoming review of the Act.

3. PROCESS AT NEDLAC

Government tabled the Preferential Procurement Regulations, 2010 pertaining to the Preferential Procurement Policy Framework Act: no. 5 of 2000 at Nedlac on 13 May 2010.

3.1. The Task Team convened meetings on the following dates:

08 July 2009

01 September 2009

20 November 2009

07 December 2009

13 May 2010

22 June 2010

3.2. The following documents were submitted:

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| Annexure 2: | Documents submitted by Government <ul style="list-style-type: none">• Revised interim Preferential Procurement Regulations (April 2010)• Revised interim Preferential Procurement Regulations (June 2010)• Preferential Procurement Task Team – Government response (June 2010) |
| Annexure 3: | Documents submitted by Business <ul style="list-style-type: none">• Business report on Preferential Procurement Regulations 2010 pertaining to the Preferential Procurement Policy Framework Act: no. 5 of 2000 |
| Annexure 4: | Documents submitted by Labour <ul style="list-style-type: none">• Labour Comments on the Preferential Procurement Legislation to the Preferential Procurement Task Team, 4 December 2009.• Labour response to the draft Preferential Procurement Regulations, version December 2009 & June 2010 |

4. AREAS OF AGREEMENT

Regulation 1: Definitions

4.1. Constituencies agreed on the definitions as set out in the June 2010 version of the regulations and quoted below:

4.1.1. **“Designated sector or sub-sector / industry”** means a sector or sub-sector/

industry that has been designated for local production where only locally produced goods, services or works or locally manufactured goods that meet the minimum threshold requirement for local production and content, will be considered;

“Imported content” means that portion of the tender price represented by the cost of components, parts or materials which have been or are still to be imported (whether by the supplier or its subcontractors) and which costs are inclusive of the costs abroad, plus freight and other direct importation costs such as landing costs, dock dues, import duty, sales duty or other similar taxes or duties at the South African port of entry.

‘Local content’ means that portion of the tender price which is not included in the imported content provided that local manufacture does take place.

4.1.2. Constituencies agreed that the emphasis was on the location of production not on the origin of the company; provided that the company sources its labour locally as far as possible.

4.2. Regulation 2: Application of the Regulations

4.2.1. Constituencies agreed on the application of the regulations to organs of state as contemplated in the June 2010 version of the draft regulations.

4.3. Regulation 8: Cancellation and re-invitation of tenders

- 4.3.1. Constituencies noted the alleged abuse during cancellation and re-invitation of tenders, the cost implications to tenderers and confidentiality breaches.
- 4.3.2. Constituencies therefore agreed that these issues will be addressed in form of practice notes and guidelines. These must include expanding the definitions aimed at promoting local content on a sectoral basis, which should take into account prevailing local capacity as well as incentives to increase them.

4.4. Regulation 9: Local production and content

- 4.4.1. Constituencies agreed on the concept of designation of specific industries, sectors and sub-sectors by **the dti**; as set out in the June 2010 version of the regulations including the issuing of instructions and guidelines on implementation to all organs of state. Such instructions and guidelines will take account of sectoral characteristics.
- 4.4.2. Constituencies agreed that **Government** would ensure that transparency and inclusivity prevailed during engagements that the dti would hold on proposals to designate sub-sectors, as well as on the instructions and guidelines issued by the Treasury.

4.5. Review of the Act

- 4.5.1. Constituencies noted Government's acknowledgement that there was a need for an action plan and timelines for the finalisation of the comprehensive review of the Act.
- 4.5.2. Constituencies agreed that as soon as the current process of alignment has been finalised, a draft programme of action will be presented at the Chamber, for consideration. This draft programme of action will also include the activities in reference to procurement set out in IPAP2.

- 4.6. Constituencies noted that designation of sectors may take some time and that in the meantime preference for locally manufactured goods will remain discretionary for many products. Constituencies therefore agreed that the designation of sectors and products must be expedited in consultation with social partners.

5. AREAS OF DISAGREEMENT

5.1 The Exclusion of RDP Goals and the Implications for Local Manufacture

- 5.1.1. An over-arching substantive concern for Labour relates to the fact that when viewed as whole, the draft regulations provide little meaningful relief for addressing the promotion of locally manufactured goods in sectors that are not designated in terms of draft regulation 9(1).
- 5.1.2. The draft regulations exclude RDP goals, which fall under “Specific goals” in the Preferential Procurement Policy Framework Act and in terms of which localisation receives emphasis under the current procurement system. The RDP goals were refined in terms of the 2001 regulations to identify 11 factors that would contribute to these goals, some of which include:
- a) The promotion of South African owned enterprises
 - b) The promotion of export-orientated production to create jobs
 - c) The creation of new jobs and the intensification of labour absorption
 - d) The promotion of enterprises located in a specific province, region or municipal area
 - e) Promotion of enterprises in rural areas
- 5.1.3. Accordingly Labour strongly disagrees with Government’s assertion that the RDP goals are accommodated in the seven (7) elements of the B-BBEE balanced scorecard, which instead are narrowly limited to management control, employment equity, skills development, preferential procurement, enterprise development, and socio-economic development initiatives. These seven elements are not qualified to emphasise job creation or regional imperatives in the promotion of local content in the manner reflected in the 2001 regulations. As this is the part of the regulations that would cater for local content in relation to non-designated sectors, this

would likely result in locally produced goods being subordinated in favour of imports especially where such imports are able to show greater compliance with B-BBEE Codes. It is Labour's view that elements of the current point system emphasising the RDP goals, as expanded in the 2001 regulations, should have been incorporated in this respect. The failure to do so will result in the regulations being ultra vires in respect of the Preferential Procurement Policy Framework Act, which NEDLAC is not empowered to agree to.

5.1.4 Government takes note of Labour's concern and acknowledges that the process of designation of sectors and sub-sectors may take longer. To this end, Government suggests that the process of designation should be fast-tracked and that the dti must publish together with these Regulations a criteria for measuring local content. The proposal to replace the word "may" with "must" for non-designated sectors may result in unintended consequences in that, in the absence of a criteria this may lead to potential abuse and distortion to the economy, as designation will be completely unstructured and a free for all.

5.1.5 Government takes note of this concern and acknowledges that local content may not have been made a specific element of the scorecard. However, Government is of the view that the provision for designation of sectors by the dti is a substantial improvement.

5.2. Regulation 4: BBEE and Regulation 9(3) and lack of emphasis on local content in respect of products that are not designated (also taking into account RDP goals)

5.2.1. Labour raised concerns that while the latest draft regulations outline how points will be determined for B-BBEE compliance in terms of the score card, there is no corresponding provision to determine the points for local production. As such regulations do not reflect a mechanism for implementation, which would be dependent on quantifying points based on the percentage of local production. This would affect all products that will not have the benefit if being designated in terms of regulation 9(3). Combined with the exclusion of the RDP goals, this will have the effect of

further subordinating local production in favour of B-BBEE. In all likelihood the majority of locally produced goods/services will not be designated in terms of regulation 9(3). Labour is not opposed to B-BBEE but believes that the objectives of promoting local content should have precedence.

- 5.2.2. Labour disagrees with Government that, sub-regulation 9(4) would address their concern as the provision merely afforded a State entity discretion to require local tenders only. Preferring local production would therefore not be mandatory.
- 5.2.3 Government is of the view that local content has been given priority in that it has been made a pre-qualification criteria. Bidders not meeting the minimum threshold for local content/production will be disqualified. Therefore, Government proposes that the word “may” should be retained, because there would be instances where local capacity may not be existent.
- 5.2.4 Government is of the view that some of the concerns raised by Labour and Business would be addressed in the comprehensive review. However, it is not entirely correct to assume that B-BBEE is given priority over local production and manufacture. In terms of the draft Regulations, local production and manufacture is a mandatory pre-requisite. To the extent that the dti has developed clear measurement for local content, organs of state, when inviting bids, would be required to apply such minimum threshold for local production and manufacture as a mandatory requirement.

5.3. B-BBEE as a tie-breaker

- 5.3.1. Labour raised concerns regarding sub regulation 11(5), which outlines the process in instances when two or more tenders score equal points. The successful tender would be determined by using B-BBEE compliance as a tie-breaker. Further if after having considering this and functionality (if it was a requirement) all tenders are still equal, the successful tender would be decided by drawing lots.

- 5.3.2. This approach is extremely problematic since local content or production would have been a more appropriate tie-breaker. In fact the above approach would allow a higher scoring B-BBEE importer to succeed over a local producer who has a lower B-BBEE score, thereby subordinating the creation of local jobs.
- 5.3.3. Drawing of lots is a rare occurrence unless of course bidders are colluding. However, there is no objection in using local content as a breaker provided it is applied to only non-designated sectors, subject to the dti's measurement criteria. .

Business:

- 5.3.4. Business agrees with Labour that the risk for non-designated products is that tenderers for such products will be superseded by the B-BBEE points, which could result in preference being given for imported goods.
- 5.3.5. Business also believes that the RDP criteria referred to in 5.2.5 above are not all covered by the B-BBEE score card and that relatively high points could be achieved by a fully empowered importer, which is not what the RDP criteria intend.
- 5.3.6. Business also agrees with Labour that section 9(4) is discretionary and thus may not always be implemented.

5.4. Decent work

- 5.4.1. Labour is of the view that the Regulation's failure to address the concerns that successful tenders should take into account compliance with decent work is problematic and should be addressed; at least on the basis of compliance with labour legislation relating to minimum standards and also, wage determinations must be taken into account when adjudicating tenders.
- 5.4.2. While Business recognises the policy commitments in respect of decent work, it does not believe that demonstration of compliance should be required in these regulations as contemplated in this proposal. Business

does not support the principle of using one law to enforce compliance with another.

5.4.3. Government proposed that a clause to the effect that bidders are required to be compliant with the requirements of all other applicable legislation, such as LRA, Basic Conditions of Employment Act, Employment Skills Development Act and Skills Development Levies Act. This would have to be implemented in the form of a “self declaration” in the standard bidding document (SBD) which will form part of the evaluation process.

5.4.4 In order to address this concern a clause to the effect that bidders are required to be compliant with the requirements of all other applicable legislation, such as LRA, Basic Conditions of Employment Act, Employment Skills Development Act and Skills Development Levies Act, may be included. This would have to be implemented in the form of a “self declaration” in the standard bidding document (SBD).

6. CONCLUSION

This report therefore concludes considerations at Task Team level on Preferential Procurement Regulations, 2010 pertaining to the Preferential Procurement Policy Framework Act: No. 5 of 2000 and is tabled for consideration by the Chamber/Chamber Convenors.

