



**Western Cape  
Government**

Provincial Treasury

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Reference: RCS/C.6

## **TREASURY CIRCULAR NO. 26/2016**

THE PREMIER

THE MINISTER OF ECONOMIC OPPORTUNITIES

THE MINISTER OF COMMUNITY SAFETY

THE MINISTER OF CULTURAL AFFAIRS AND SPORT

THE MINISTER OF EDUCATION

THE MINISTER OF FINANCE

THE MINISTER OF HEALTH

THE MINISTER OF HUMAN SETTLEMENTS

THE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

THE MINISTER OF SOCIAL DEVELOPMENT

THE MINISTER OF TRANSPORT AND PUBLIC WORKS

THE SPEAKER: PROVINCIAL PARLIAMENT

THE DEPUTY SPEAKER: PROVINCIAL PARLIAMENT

THE ACCOUNTING OFFICER: VOTE 1: PREMIER (ADV B GERBER)

THE ACCOUNTING OFFICER: VOTE 2: PROVINCIAL PARLIAMENT (DR G LAWRENCE)

THE ACCOUNTING OFFICER: VOTE 3: PROVINCIAL TREASURY (MR Z HOOSAIN)

THE ACCOUNTING OFFICER: VOTE 4: COMMUNITY SAFETY (MR G MORRIS)

THE ACCOUNTING OFFICER: VOTE 5: EDUCATION (MS P VINJEVOLD)

THE ACCOUNTING OFFICER: VOTE 6: HEALTH (DR B ENGELBRECHT)

THE ACCOUNTING OFFICER: VOTE 7: SOCIAL DEVELOPMENT (DR R MACDONALD)

THE ACCOUNTING OFFICER: VOTE 8: HUMAN SETTLEMENTS (MR T MGULI)

THE ACCOUNTING OFFICER: VOTE 9: ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING (MR P VAN ZYL)

THE ACCOUNTING OFFICER: VOTE 10: TRANSPORT AND PUBLIC WORKS (MS J GOOCH)

THE ACCOUNTING OFFICER: VOTE 11: AGRICULTURE (MS J ISAACS)

THE ACCOUNTING OFFICER: VOTE 12: ECONOMIC DEVELOPMENT AND TOURISM (MR S FOURIE)

THE ACCOUNTING OFFICER: VOTE 13: CULTURAL AFFAIRS AND SPORT (MR B WALTERS)

THE ACCOUNTING OFFICER: VOTE 14: LOCAL GOVERNMENT (MR G PAULSE)

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THE CHIEF FINANCIAL OFFICER: VOTE 2: PROVINCIAL PARLIAMENT (MS N PETERSEN)

THE CHIEF FINANCIAL OFFICER: VOTE 3: PROVINCIAL TREASURY (MR A GILDENHUYS)

THE CHIEF FINANCIAL OFFICER: VOTE 4: COMMUNITY SAFETY (MR M FRIZLAR)

THE CHIEF FINANCIAL OFFICER: VOTE 5: EDUCATION (MR L ELY)

THE CHIEF FINANCIAL OFFICER: VOTE 6: HEALTH (MR A VAN NIEKERK)

THE CHIEF FINANCIAL OFFICER: VOTE 7: SOCIAL DEVELOPMENT (MR JO SMITH)

THE CHIEF FINANCIAL OFFICER: VOTE 8: HUMAN SETTLEMENTS (MR F DE WET)

THE CHIEF FINANCIAL OFFICER: VOTE 9: ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING (MR T GILDENHUYS)

THE CHIEF FINANCIAL OFFICER: VOTE 10: TRANSPORT AND PUBLIC WORKS (MR CR ISMAY)

THE CHIEF FINANCIAL OFFICER: VOTE 11: AGRICULTURE (MR F HUYSAMER)

THE CHIEF FINANCIAL OFFICER: VOTE 12: ECONOMIC DEVELOPMENT AND TOURISM (MS M ABRAHAMS)

THE CHIEF FINANCIAL OFFICER: VOTE 13: CULTURAL AFFAIRS AND SPORT (MS BG RUTGERS)

THE CHIEF FINANCIAL OFFICER: VOTE 14: LOCAL GOVERNMENT (MS B SEWLALL-SINGH)

THE CHIEF EXECUTIVE OFFICER: WESTERN CAPE GAMBLING AND RACING BOARD (MR P ABRAHAMS)

THE CHIEF EXECUTIVE OFFICER: WESTERN CAPE NATURE CONSERVATION BOARD (DR R OMAR)

THE CHIEF EXECUTIVE OFFICER: WESTERN CAPE INVESTMENTS AND TRADE PROMOTION AGENCY (MR T HARRIS)

THE CHIEF EXECUTIVE OFFICER: SALDANHA BAY IDZ LICENCING COMPANY (MR D SOUTHGATE) (ACTING)

THE CHIEF EXECUTIVE OFFICER: WESTERN CAPE CULTURAL COMMISSION (MS J MOLELEKI)

THE CHIEF EXECUTIVE OFFICER: WESTERN CAPE LANGUAGE COMMITTEE (MS J MOLELEKI)

THE CHIEF EXECUTIVE OFFICER: WESTERN CAPE HERITAGE (MS HM DU PREEZ) (ACTING)

THE CHIEF EXECUTIVE OFFICER: CASIDRA (MR M BRINKHUIS)

THE CHIEF EXECUTIVE OFFICER: WESTERN CAPE LIQUOR AUTHORITY (DR L MDUNYELWA)

For information

THE CHIEF FINANCIAL OFFICER: WESTERN CAPE GAMBLING AND RACING BOARD (MR T SWART) (ACTING)  
 THE CHIEF FINANCIAL OFFICER: WESTERN CAPE NATURE CONSERVATION BOARD (MR M BHAYAT)  
 THE CHIEF FINANCIAL OFFICER: WESTERN CAPE INVESTMENTS AND TRADE PROMOTION AGENCY (MR I BLACKIE)  
 THE CHIEF FINANCIAL OFFICER: SALDANHA BAY IDZ LICENCING COMPANY (MR H BONESCHANS)  
 THE CHIEF FINANCIAL OFFICER: WESTERN CAPE CULTURAL COMMISSION (MS B RUTGERS)  
 THE CHIEF FINANCIAL OFFICER: WESTERN CAPE LANGUAGE COMMITTEE (MS B RUTGERS)  
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 THE CHIEF FINANCIAL OFFICER: CASIDRA (MR F VAN ZYL)  
 THE CHIEF FINANCIAL OFFICER: WESTERN CAPE LIQUOR AUTHORITY (MS V LETSWALO)  
 THE SENIOR MANAGER: GOVERNMENT MOTOR TRANSPORT (MR J KOEGELENBERG)  
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 THE DIRECTOR: LOCAL GOVERNMENT BUDGET OFFICE (MR ML BOOYSEN)  
 THE DIRECTOR: LOCAL GOVERNMENT REVENUE AND EXPENDITURE (GROUP ONE) (MR E JOHANNES) (ACTING)  
 THE DIRECTOR: LOCAL GOVERNMENT REVENUE AND EXPENDITURE (GROUP TWO) (MR Z ZONYANE) (ACTING)  
 THE DIRECTOR: LOCAL GOVERNMENT SUPPLY CHAIN MANAGEMENT (MR R MOOLMAN)  
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 THE PROVINCIAL AUDITOR  
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 THE DEPUTY DIRECTOR GENERAL: CORPORATE ASSURANCE, DEPARTMENT OF THE PREMIER (MS H ROBSON)

## **BROAD BASED BLACK ECONOMIC EMPOWERMENT (B-BBEE) REQUIREMENTS IN RESPECT OF ACCEPTING "SWORN AFFIDAVITS" FOR EXEMPTED MICRO ENTERPRISES AND QUALIFYING SMALL ENTERPRISES**

### **1. PURPOSE**

- 1.1 The purpose of this communicate is to inform accounting officers and accounting authorities of the requirements in respect of the submission of Broad Based Black Economic Empowerment (B-BBEE) status level certificates and "sworn affidavits" for Exempted Micro Enterprises (EMEs) and Qualifying Small Enterprises (QSEs) and how these requirements will be implemented within the Western Cape Government (WCG).
- 1.2 To communicate National Treasury Circular 5 of 2016/17 (attached hereto marked "Annexure A").

## 2. BACKGROUND

- 2.1 On issuance of the New B-BBEE Codes (hereafter referred to as "New Codes"), the WCG highlighted certain implementation challenges in its application from a procurement context. Comments and recommendations were provided to the National Treasury requesting a response to the following:
- (a) the conflicting provisions in terms of Preferential Procurement Regulation, 2011 paragraph 10 and paragraphs 4 and 5 of the New Codes;
  - (b) the application of the Preferential Procurement Policy Framework Act, 2000 and its regulations and the New Codes in the procurement environment and the interpretation of the trumping clause in the B-BBEE Act; and
  - (c) the impact of the *Allpay court decision* where it is required that there is a duty on a procuring institution to verify the empowerment credentials of a successful tenderer before awarding a contract in that "substantive empowerment" is required and "not mere formal compliance."
- 2.2 In the interim, whilst awaiting the National Treasury's response to the comments and recommendations made, the Provincial Treasury still required B-BBEE certificates/ letters from suppliers but also accepted affidavits where accreditation agencies/ accounting professionals were not allowed to issue B-BBEE certificates/ letters.
- 2.3 The National Treasury considered the comments and recommendations made by the WCG and clarified the inconsistencies in the New Codes and the Preferential Procurement Regulations via engagements with Provincial Treasury officials and Circular 5 of 2016/17, concluding that "sworn affidavits" must be accepted as evidentiary proof of a bidder's B-BBEE claims as prescribed in the New Codes.
- 2.4 In light of the above, the Provincial Treasury met with the Department of the Premier and resolved that:
- (a) the WCG will comply with the documentary evidence requirements set out in the New Codes and accept "sworn affidavits" when allocating preferential procurement points for empowerment to bidders as communicated by the National Treasury via Circular 5 of 2016/17;
  - (b) this approach will assist the WCG to reduce red tape in the public procurement environment;
  - (c) this approach will allow more bidders to bid for tenders, and, amongst other things, improve economic growth in the Province; and

- (d) appropriate steps would be taken to reduce the risk of fraud and to make sure that fraudulent conduct is prosecuted and offenders brought to book.

### **3. WAY FORWARD**

3.1 The evidentiary requirements to assess the B-BBEE contributor level as per the New Codes are:

- (a) An EME must submit a valid, original affidavit confirming annual turnover and level of black ownership or an affidavit issued by Companies Intellectual Property Commission (CIPC);
- (b) A QSE that is less than 51 per cent (50% or less) black owned must be verified in terms of the QSE scorecard issued via Government Gazette No. 38766 on 6 May 2015 and submit a valid, original or a legible certified copy of a B-BBEE Verification Certificate issued by a verification agency accredited by SANAS or a Registered Auditor approved by IRBA;
- (c) a QSE that is at least 51 per cent black owned must submit a valid, original affidavit confirming turnover and level of black ownership as well as declare its empowering status by selecting one of the five criteria detailed in paragraph 3.3 of amended code series 400: measurement of the enterprise and supplier development element of the Codes of Good Practice; and
- (d) a large enterprise must submit a valid, original or legible certified copy of a B-BBEE Verification Certificate issued by a verification agency accredited by SANAS or a Registered Auditor approved by IRBA.

3.2 Paragraph 2.8 and paragraph 4 of National Treasury Circular 5 of 2016/17 speaks to the evidentiary requirements to support B-BBEE claims of specialised enterprises.

Paragraph 2.7 speaks to instances in the New Codes where an EME is required to submit a B-BBEE certificate.

Institutions are required to read the National Treasury Circular in conjunction with the New Codes to ensure the correct application of the requirements. A synopsis of the requirements is attached hereto marked Annexure B. This will also be managed via the WCSD.

3.3 The Minister of Trade and Industry issued a notice of clarification via Notice 396 of 2015, stating that all B-BBEE verifications conducted using the financial year ending 30 April 2015 can be verified using the Old Codes (Gazette No 29617). This implies that a certificate issued by a registered auditor, accounting officer (as contemplated in section 60(4) of the Close Corporation Act, 1984) or an accredited verification agency is still acceptable in the instance mentioned above.

- 3.4 Referring to the Constitutional Court's sentiments in the *AllPay* case, it is critical that the WCG bid documents include a statement making it clear that any bidder found by the WCG to have acted fraudulently in claiming preferential procurement points for empowerment will be charged with fraud. The Provincial Treasury has aligned the WCBD 6.1 (a) and (b) to the current requirements as well as to make provision for the risk clauses as it relates to fronting, fraud and corruption (attached hereto marked Annexure C).
- 3.5 Suppliers will be notified by ARIBA prior to expiry of its EME certificate/letter or B-BBEE certificate in respect of QSEs that a "sworn" affidavit will be accepted by the WCG in the instances prescribed in the New Codes. The supplier will also be required to complete the revised version of the WCBD 6.1 (a) and (b).
- 3.6 Should an institution procure from a supplier that is not registered on the WCSD (provided the necessary approval has been granted), the relevant WCBD 6.1 must be completed by the supplier and submitted to the institution together with a "sworn" affidavit. The institution must confirm that the level of turnover and percentage of black ownership is declared on the "sworn" affidavit and in the case of QSEs, the empowering status must be declared. An example format of an affidavit can be found on the Department of Trade and Industry's website (<http://www.thedti.gov.za/>).
- 3.7 The relevant WCBD 6.1 [(a) or (b)] must be included in all bid documents and "sworn affidavits" must be considered in the evaluation process provided that it meets the requirements that the level of turnover and percentage of black ownership is declared on the "sworn" affidavit and in the case of QSEs, the empowering status is declared. An example format of an affidavit can be found on the Department of Trade and Industry's website (<http://www.thedti.gov.za/>). Institutions may utilise the attached checklist (Annexure D) when accepting a "sworn" affidavit to ensure that it meets the requirements of the New Codes.
- 3.8 Section 13O (2) of the B-BBEE Amendment Act, 2013 states that a B-BBEE verification professional or any procurement officer or other official of an organ of state or public entity who becomes **aware** of the commission of or any attempt to commit, any offence referred to in subsection (1) (that refers to misrepresentation) and fails to report it to an appropriate law enforcement agency, is guilty of an offence and is liable to a fine or imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment.

Institutions should note that this Section in the B-BBEE Amendment Act clearly indicates that the official must have been **aware** of an attempt to commit an offence and has failed to report it to an appropriate law enforcement agency. An official cannot be held liable if it fails to detect any such attempt, given that there is no mechanism to verify the averments made in the affidavit specifically as it relates

to black ownership. Institutions should also note that the risk clauses included in the WCBD 6.1(a) and (b) is an attempt to safeguard the institution against any risk.

#### **4. REQUEST**

4.1 Accounting officers and accounting authorities are requested:

- (a) to bring the content of this circular to the attention of all relevant officials within their respective institutions; and
- (b) to note that National Treasury Circular 5 of 2016/17 repeals the Circular on the Issuance and Validity of the B-BBEE Status Level Certificates in respect of EMEs dated 29 February 2012 and the Circular on Acceptance of Sworn Affidavits in terms of the amended B-BBEE Codes dated 2 September 2015.



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**NADIA EBRAHIM**

**DIRECTOR: PROVINCIAL GOVERNMENT SUPPLY CHAIN MANAGEMENT**

**DATE:** 24 June 2016