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TREASURY CIRCULAR MUN NO. 1/2023

THE MAYOR, CITY OF CAPE TOWN
THE MAYOR, WEST COAST DISTRICT MUNICIPALITY
THE MAYOR, MATZIKAMA MUNICIPALITY
THE MAYOR, CEDERBERG MUNICIPALITY
THE MAYOR, BERGRIVIER MUNICIPALITY
THE MAYOR, SALDANHA BAY MUNICIPALITY
THE MAYOR, SWARTLAND MUNICIPALITY
THE MAYOR, CAPE WINELANDS DISTRICT MUNICIPALITY
THE MAYOR, WITZENBERG MUNICIPALITY
THE MAYOR, DRAKENSTEIN MUNICIPALITY
THE MAYOR, STELLENBOSCH MUNICIPALITY
THE MAYOR, BREEDE VALLEY MUNICIPALITY
THE MAYOR, LANGEBERG MUNICIPALITY
THE MAYOR, OVERBERG DISTRICT MUNICIPALITY
THE MAYOR, THEEWATERSKLOOF MUNICIPALITY
THE MAYOR, OVERSTRAND MUNICIPALITY
THE MAYOR, CAPE AGULHAS MUNICIPALITY
THE MAYOR, SWELLENDAM MUNICIPALITY
THE MAYOR, GARDEN ROUTE DISTRICT MUNICIPALITY
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THE MAYOR, HESSEQUA MUNICIPALITY
THE MAYOR, MOSSEL BAY MUNICIPALITY
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THE MAYOR, OUDTSHOORN MUNICIPALITY
THE MAYOR, BITOU MUNICIPALITY
THE MAYOR, KNYSNA MUNICIPALITY
THE MAYOR, CENTRAL KAROO DISTRICT MUNICIPALITY
THE MAYOR, LAINGSBURG MUNICIPALITY
THE MAYOR, PRINCE ALBERT MUNICIPALITY
THE MAYOR, BEAUFORT WEST MUNICIPALITY

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IMPLEMENTATION OF THE PREFERENTIAL PROCUREMENT REGULATIONS, 2022 BY MUNICIPALITIES AND MUNICIPAL ENTITIES

1. PURPOSE

1.1 The purpose of this circular is to:

- (a) advise municipalities and municipal entities that Section 2(1) of the Preferential Procurement Act requires that *'an organ of state must determine its Preferential Procurement Policy' for implementation and adoption by 16 January 2023;*
- (b) communicate the interim approach adopted by the Western Cape Government (WCG); and
- (c) outline considerations for municipalities and municipal entities to contemplate in developing their own approach to preferential procurement.

2. BACKGROUND

2.1 **Section 217(1)** of the Constitution requires that: *"When an organ of state ... contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."* **Section 217(2)** indicates that this *"does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination."* **Section 217(3)** requires that *"National legislation must prescribe a framework within which the policy referred to subsection (2) must be implemented."*

2.2 The Preferential Procurement Policy Framework Act, 2000 (No. 5 of 2000, "the PPPFA") was enacted to give effect to the requirements of section 217(3). If an organ of state exercises its discretion to determine a preferential procurement policy, then such organ of state, must implement such policy in accordance with the prescribed framework as described under section 2(1a) -(g) and 2(2) of the PPPFA.

2.3 The PPR 2022 was promulgated via Government Gazette 47452 on 04 November 2022 with an effective date of 16 January 2023. These Regulations were developed pursuant to Section 217(3) of the Constitution and Section 5(1) with the Preferential Procurement Policy Framework Act (No 5 of 2000), and subsequent to the Constitutional Court judgment of February 2022 which declared the 2017 Preferential Procurement Regulations invalid. The PPR 2022 prescribes:

- a) the thresholds that would determine when the 80/20 or 90/10 preference point system would be applicable; and
- b) the formula which must be applied to calculate preference points.

2.4 The 2022 Regulations, amongst others requires that an organ of state must, in its tender documents, stipulate:

- a) the applicable preference point system as envisaged in the regulations; and
- b) the specific goals in the invitation to submit the tender for which points may be awarded, and proof of the claim of such goals.

- 2.5 Specific goals referred to in the Regulations are as contemplated in section 2(1)(d) of the Act which may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender and disability and including the implementation of the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16 085 dated 23 November 1994 (RDP).
- 2.6 Given that the PPR 2022 have now streamlined what is envisaged by the PPPFA, specific goals must only be dealt with within the parameters of the 20 and 10 points available for award as preference points, as specified in the Act, within the 80/20- and 90/10-points scoring system.
- 2.7 Section 2(1)(e) of the PPPFA requires that any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender.
- 2.8 Section 2(2) of the PPPFA further states that any specific goals contemplated in subsection (1)(e) must be measurable, quantifiable and monitored for compliance.
- 2.9 The Provincial Treasury has also concluded an impact assessment of the PPR 2022 from which the following additional key amendments were identified:
- a) No threshold of R30 000 is applicable;
 - b) No prescribed evidence applicable for claiming of points or specific goals albeit proof of claim for points allocated must be submitted;
 - c) A new provision has been introduced that prescribes the use of the preference point (i.e., 80/20 or 90/10) formula for the invitation of tenders to generate income or to dispose of or lease assets; and
 - d) National Treasury have indicated that they will be withdrawing Local Content Instructions.

3. WESTERN CAPE GOVERNMENT (WCG) INTERIM ARRANGEMENTS FOR PROVINCIAL DEPARTMENTS TO GIVE EFFECT TO THE PPR 2022

- 3.1 The Provincial Cabinet, in noting that organs of state may develop their own preferential procurement policies in terms of section 5 of the PPPFA, and in providing executive guidance on the WCG's way forward in response to the PPR 2022, approved that:
- a) In order to ensure stability in the current procurement system post 16 January 2023, the WCG will in the interim continue to utilise the preferential procurement goals contemplated in section 2 (1)(d) of the PPPFA and that the relevant B-BBEE scorecards (i.e., a B-BBEE certificate / sworn affidavit as supporting evidence provided by bidders to claim preference points) as specified in the Broad-Based Black Economic Empowerment Act (No. 53 of 2003, hereafter B-BBEE Act) be accepted as supporting evidence to claim preference points, until appropriate the executive policy directives and technical reviews have been concluded; and
 - b) A technical review be undertaken, on the current procurement system in defining a legal way forward in the province that focuses on value for money, appropriate redress and reforming the current procurement system over time, informed by policy directives from the executive.
- 3.2 The interim arrangement for WCG is articulated below for departments:
- a) The utilisation of the B-BBEE point scoring will continue to be used to give effect to the requirements of section 2 (1) (d)(i) of the PPPFA in that it:

- i) Provides an established basis on which to allocate points for preference to persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - ii) Gives effect to at least two of the RDP goals (i.e., the promotion of South African owned enterprises and the promotion of SMMEs); for each tender process invited that uses B-BBEE certification as a means of claiming preference points;
 - iii) Is able to be measurable, quantifiable and monitored for compliance; and
 - iv) Supports compliance with National Treasury Regulation, 2005 paragraph 16A3.2 (c) that requires that a supply chain management system referred to in paragraph 16A.3.1 must amongst others be consistent with the PPPFA and the B-BBEE Act.
- b) Bidders will be required to submit an accredited B-BBEE certificate or sworn affidavit as evidence and in order to claim the points in respect of 20 points (80/20) and 10 points (90/10). Should a bidder fail to submit an accredited B-BBEE certificate or sworn affidavit, the bidder may only score points for price in terms of the 80/90 points. No points will be allocated for preference.

3.3 The PPR, 2022 introduces a new provision which prescribes a preference point formula (i.e., for the 80/20- or 90/10-points scoring system) for the invitation of tenders to generate income or to dispose of or lease assets. Tender for income-generating contracts is defined in the PPR, 2022 as: *“a written offer in the form determined by an organ of state in response to an invitation for the origination of income-generating contracts through any method envisaged in legislation that will result in a legal agreement between the organ of state and a third party that produces revenue for the organ of state, and **includes, but is not limited to, leasing and disposal of assets and concession contracts, excluding direct sales and disposal of assets through public auctions.**”* Provincial departments and entities have been advised to manage their risk of non-compliance in this regard to avoid irregular expenditure.

4. CONSIDERATIONS FOR MUNICIPALITIES AND MUNICIPAL ENTITIES IN RESPONDING TO THE PREFERENTIAL PROCUREMENT REGULATIONS, 2022

4.1 The PPR 2022 requires municipalities and municipal entities that seek to implement preferential procurement to develop their own Preferential Procurement Policy in terms of Section 2(1) of the PPPFA before 16 January 2023.

4.2 Various discussions, facilitated by the Provincial Treasury (PT), have been held in anticipation of the PPR, 2022. These included workshops on 25-26 April 2022 and on 01 November 2022 with all SCM Managers and District CFO's, the subsequent establishment of a SCM Governance Workstream (Workgroup) and a briefing to the Municipal Managers Forum on 4 November 2022. These engagements, while recognising the discretionary authority of procuring entities, emphasised that municipalities and municipal entities should consider the following matters in developing their own approach to preferential procurement:

- a) Their capacity and readiness to give effect to significant changes to procurement systems, particularly during this interim period. A risk-adjusted, planned and sequenced approach will assist balance their readiness and capacity building needs and to carefully identify, assess, refine and develop specific goals, if any, for preferential procurement, while mitigating governance and audit risks.
- b) Good SCM practices require that procuring entities follow proper demand management requirements with the appropriate market, supplier and commodity research undertaken prior

to it setting specific goals within the tender process. This must be evidence-led through proper Empowerment impact assessments / feasibility assessments undertaken at the procurement planning stage of the demand management process are important tools to ensure that any specific goals are quantifiable as well as measurable, as required by Section 2(2) of the PPPFA.

- c) Any specific goals for preferential procurement must be dealt with within the parameters of the 20 and 10 points specified in the Act for preference points within the 80/20- and 90/10-points scoring system.

4.3 The PT will continue to support municipalities with the implementation of the Preferential Procurement Regulations and the subsequent municipal Preferential Procurement policies, including the sharing of approaches across municipalities. Municipalities and municipal entities are encouraged to further consult and discuss implementation requirements of the Preferential Procurement Policies and Preferential Procurement Regulations, 2022 within their respective districts.

5. WAY FORWARD FOR PREFERENTIAL PROCUREMENT POLICIES

5.1 As an interim measure, municipalities are encouraged to adopt a cautious and, to the extent possible, uniform approach to the determination of their procurement frameworks. This is intended to ensure that the appropriate redress and value for money is attained that must be evidence-led as well as, as an immediate consideration focus on stability in the systems as well as building the requisite technical capabilities within municipalities to responsibly implement policy requirements.

5.2 Municipalities and municipal entities should note that the WCG will, as an interim measure, pursue the preferential procurement goals contemplated in S 2(1)d of the PPPFA through the relevant B-BBEE scorecards as specified in the Broad Based Black Economic Empowerment Act, 2003 (B-BBEE Act) and Codes of Good Practice, be accepted as supporting evidence to claim preference points. This is aimed at ensuring the stability of the current procurement system post 16 January 2023, pending a review and executive policy directives.

5.3 Significant opportunities exist over the medium term to strengthen SCM approaches, systems and practices, and capabilities. It remains important that preferential procurement policies are not developed in isolation of the broader SCM system and strategy and support the principles on which future reforms will be implemented. These focus on value for money (which entails getting the right product at the right time and right place), redress, reforming the current procurement system over time, and achieving appropriate alignment Preferential Procurement Policies between the Provincial and Local spheres. These opportunities include:

- a) **Strategic Procurement** that leverages economies of scale and value chain improvements, SMME development and job creation, and commodity-based procurement strategies. This requires a procurement system that is premised on effective planning, strategic purchasing, and sound contract management across the whole organization that sustains a focus on value for money.
- b) **Governance and Capacitation** to ensure that a resilient governance platform is sustained with a primary focus on service delivery. This requires skilful SCM staff (CFO office and officials involved with SCM activities) to ensure that the regulatory and policy environment enables enhanced service delivery. The PT will assist municipalities with the Municipal Insight Performance Reporting in order to enhance transparency and accountability and make sustainable procurement choices. Initiatives that will be driven through this approach include assisting with the designing and drafting of procurement strategies and framework agreements for specific commodities unique to each district and evaluating the SCM trends and their impact on the municipal resources committed.

- c) **Digital transformation of SCM** to connect procurement planning to actual procurement processes whilst strengthening governance and reporting. The Office of the Chief Procurement Office (OCPO) is developing an SCM digital strategy applicable to all organs of state to enable improved SCM performance.

5.4 In pursuing these opportunities, the PT and the SCM Governance Workgroup will continue to share information on interim and final approaches adopted by procuring authorities in the province. Municipalities and Municipal entities will also be regularly updated on any developments and progress on WCG technical papers. This PT and SCM Governance Workgroup will also strengthen relationships with other stakeholders such as international bodies and academia.

6. REQUEST

6.1 Accounting Officers must note the content of this Circular and communicate the requirements to officials under their control for the functions depicted in this Circular; and

6.2 The requirements as articulated in this Circular will take effect from **16 January 2023**.

6.3 Municipalities and municipal entities are advised to utilise the revised MBD 6.1 with effect from **16 January 2023** in support of its preferential procurement policy and to meet the compliance requirements of the 2022 regulations.

7. ENQUIRIES

7.1 All enquiries in respect of this circular or any other enquiries in respect of procurement must be directed to: SupplyChainManagement.HDMFMA@westerncape.gov.za

8. ANNEXURES

8.1 Preferential Procurement Regulations 2022 (Annexure A)

8.3 Revised Municipal Bidding 6.1 Document (Annexure B)

MR D SAVAGE

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