

Reference number: RCS/C.6

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TREASURY CIRCULAR NO. 1/2023

THE PREMIER

THE MINISTER OF AGRICULTURE

THE MINISTER OF CULTURAL AFFAIRS AND SPORT

THE MINISTER OF EDUCATION

THE MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES

THE MINISTER OF HEALTH

THE MINISTER OF INFRASTRUCTURE

THE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

THE MINISTER OF MOBILITY

THE MINISTER OF POLICE OVERSIGHT AND COMMUNITY SAFETY

THE MINISTER OF SOCIAL DEVELOPMENT

THE SPEAKER: PROVINCIAL PARLIAMENT

THE DEPUTY SPEAKER: PROVINCIAL PARLIAMENT

THE EXECUTIVE AUTHORITY: WESTERN CAPE GAMBLING AND RACING BOARD (MINISTER M WENGER)

THE EXECUTIVE AUTHORITY: WESTERN CAPE NATURE CONSERVATION BOARD (MINISTER A BREDELL)

THE EXECUTIVE AUTHORITY: WESTERN CAPE INVESTMENTS AND TRADE PROMOTION AGENCY (MINISTER M WENGER)

THE EXECUTIVE AUTHORITY: SALDANHA BAY IDZ LICENCING COMPANY (MINISTER M WENGER)

THE EXECUTIVE AUTHORITY: WESTERN CAPE CULTURAL COMMISSION (MINISTER A MARAIS)

THE EXECUTIVE AUTHORITY: WESTERN CAPE LANGUAGE COMMITTEE (MINISTER A MARAIS)

THE EXECUTIVE AUTHORITY: WESTERN CAPE HERITAGE (MINISTER A MARAIS)

THE EXECUTIVE AUTHORITY: CASIDRA (MINISTER IH MEYER)

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WESTERN CAPE GOVERNMENT INTERIM ARRANGEMENTS TO GIVE EFFECT TO THE PREFERENTIAL PROCUREMENT REGULATIONS, 2022

1. PURPOSE

- 1.1 The purpose of this circular is to inform accounting officers and accounting authorities of the need for all procuring entities to adopt preferential procurement policies in terms of the Preferential Procurement Regulations, 2022 (hereafter referred to as PPR 2022, attached hereto as **Annexure A**); and

- 1.2 Communicate the interim arrangements as agreed to by Provincial Cabinet on 14 December 2022 for the Western Cape Government (WCG) as it pertains to PPR, 2022.

2. BACKGROUND AND CONTEXT

- 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, hereinafter referred to as "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 4 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). Activities may be regarded as a contribution towards achieving the goals of the RDP include:
 - a) The promotion of South African owned enterprises;
 - b) The promotion of export orientated production to create jobs;
 - c) The promotion of SMMEs;
 - d) The creation of new jobs or the intensification of labour absorption;

- e) The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
 - f) The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
 - g) The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
 - h) The promotion of enterprises located in rural areas;
 - i) The empowerment of the work force by standardising the level of skill and knowledge of workers;
 - j) The development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and
 - k) The upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.
- 2.6 An organ of state may also allocate points for specific goals other than the goals contemplated in section 2(1)(d) of the PPPFA, provided that such point allocation complies with the procurement policy of the organ of state as contemplated in section 217(2) of the Constitution.
- 2.7 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.
- 2.8 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.
- 2.9 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.
- 2.10 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 INTERIM ARRANGEMENTS 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 via Cabinet Minute 544 of 2022 on 14 December 2022 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 the appropriate executive policy directives and technical reviews have been concluded;
- 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 executive;
- c) Cabinet be regularly kept abreast on any developments and progress on position papers and the review. This should include developments in municipal procurement policies as well as approaches to local content and localization; and
- d) The Provincial Treasury continues to advise provincial departments and entities via Circular on the interim arrangements.

3.2 The interim arrangement for WCG is articulated below:

- a) The status quo will remain, namely 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.
- c) The WCG will maintain the current process as it pertains to the Western Cape Supplier Evidence Bank which serves as a central repository for the required Western Cape Bidding Document (WCBD 6.1) and WCBD 4, in support of this interim policy position.

- d) Procuring institutions must hold in abeyance local production and content requirements for designated sectors when advertising bids and quotations until a viable implementation modality is established. The NT has indicated in the Joint Provincial SCM Forum held on 08 November 2022, that all Local Production and content instructions and circulars issued since 2012 will be withdrawn. To date the PT have not received the formal communique pertaining to the withdrawal of said instructions and circulars. Given the Constitutional Court judgment and the fact that this is no longer a regulatory requirement under the PPPFR 2022, the WCG will no longer apply this requirement as it previously did under the 2017 regulations. PT will re-engage with the Department of Trade, Industry and Competition (dtic) and the NT to clarify how local production and content requirements will be applied post 16 January 2023 and going forward.
- e) Empowerment impact assessments for procurement above R10 million will also similarly be held in abeyance until further guidance is provided by the PT. Note however that the toolkits, and guidance provided with the Proforma Accounting Officer's System issued to departments and public entities in September 2021 may be utilised at the discretion of procuring entities as well as the PT Circulars subsequently issued:

- paragraph 2.4 and 2.6 of Treasury Circular 09 of 2021; and
- Annexure 3: Empowerment impact assessment guide issued via PT Circular 30 of 2021.

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.**" Departments are advised to manage their risk of non-compliance in this regard to avoid irregular expenditure. The Provincial Treasury is seeking further legal advice before taking up a policy position in this regard.

4. REVISED WESTERN CAPE BIDDING DOCUMENT (WCBD) 6.1

4.1 National Treasury issued a revised Standard Bidding Document 6.1 (SBD 6.1) on their website 22 December 2022. The Provincial Treasury reviewed the WCBD 6.1 to align it to the PPR, 2022, SBD 6.1 and the interim arrangement for WCG as endorsed by Provincial Cabinet on 14 December 2022. A synopsis of the key amendments is attached hereto as **Annexure B**.

4.2 Departments and public entities are required to utilise the revised WCBD 6.1 (attached hereto as **Annexure C**) with effect from 16 January 2023.

5. CONFIGURATION ON THE e-PROCUREMENT SOLUTION TO ALIGN TO THE REQUIREMENTS OF THE PPR, 2022

5.1 The preference points system will now apply to all procurement from above the value of R2 000, (i.e., above the current Petty Cash threshold), given that the PPR, 2022 no longer refers to the minimum threshold value of R30 000. The ePS are configured to give effect to this requirement in making provision for preference points. The current ePS templates as it relates to "PRICE" (R2 000 – R10 000 and R10 000 – R30 000) will be reconfigured to make provision for preference points. The minimum advertising periods linked to the relevant procurement threshold remains unchanged.

5.2 Paragraph 5.5.2 (b) of the Provincial Treasury Instructions, 2019 currently states:

"The e-procurement solution must be used for procurements with an estimated value of between R10 000 and R1 000 000. The accounting officer however can lower the threshold value stipulated herein for use of the e-procurement solution if so required."

The above instruction will be amended to give effect to the requirements of the PPR, 2022. Departments and public entities are required to note that all procurement with an estimated value of R10 000 – R1 000 000 must be concluded via the e-procurement solution. The ePS may also be utilised for procurement with an estimated value of between R2 000 – R10 000.

5.3 Where a procuring institution opts not to utilise the ePS for procurement between an estimated value of R2 000 and R10 000 and instead follows a manual process, the procuring institution must source quotations from suppliers that are registered on the Central Supplier Database. The procuring institution must then secure the required governance documents (i.e WCBD 4, WCBD 6.1 and B-BBEE Certificate and/or affidavit) and utilise the calculation spreadsheet herewith attached hereto as **Annexure D**.

5.4 Procuring institutions are required to note that all other ePS business processes as communicated via Treasury Circular 32 of 2021 remains unchanged and applicable.

5.5 In terms of procurement with foreign suppliers, procuring institutions are required to note that:

- a) The CSD requirements as articulated in paragraph 3.3 of National Treasury Instruction 4A states *"transactions concluded through petty cash, sundry payments and foreign suppliers with no local registered entity may be concluded even if the supplier is not registered on the CSD remains applicable."* Procuring institutions may therefore procure from foreign suppliers outside of the ePS as these suppliers are not required to be registered on the CSD and WCSEB.
- b) Where goods and services are procured from foreign suppliers, procuring institution are required to request the foreign supplier to complete the applicable Western Cape Bidding Documents (WCBD 1 and WCBD 4) during the procurement process.
- c) Where goods and services are procured from foreign suppliers with tax obligations in South Africa, proof of their tax compliance status must be obtained from the supplier.
- d) Foreign suppliers with neither South African tax obligations nor history of doing business in South Africa must complete the questionnaire on the SBD1. Where a recommendation for award of a bid to a foreign bidder has been made, accounting officers and accounting authorities must submit the bidder's completed SBD1 to the South African Revenue Service at the following email address: GovernmentInstitute@sars.gov.za. SARS will issue a confirmation of tax obligations letter to the accounting officer or accounting authority confirming whether or not the foreign entity has tax obligations in South Africa.
- e) All procurement transactions as it pertains to foreign suppliers must be reported to the Provincial Treasury via the monthly SCM report.

6. AMENDMENTS TO THE PROVINCIAL TREASURY INSTRUCTIONS, 2019, AOS AND TREASURY CIRCULARS

6.1 The following paragraphs in the PTI's, 2019 will be repealed and replaced with the full review of the PTIs, however in the interim accounting officers and accounting authorities are required to adhere and note that the sections referencing to the PPPFR, 2017 will be replaced with referencing to the PPPFR, 2022.

- a) Page 18, Paragraph 4.6.1 (g) and (h);
- b) Page 19, Paragraph 4.7.4; and
- c) Page 43, Paragraph 11 (d)(i).

6.2 The PT will further conduct a review of the Pro-forma Accounting Officer's System (AOS) and Treasury circulars in order to align to the requirements of the PPR 2022. In the interim, institutions are required to note that, with effect 16 January 2023, the sections referencing to the PPPFR, 2017 as well as reflected in Table 1 below are to be withdrawn and replaced with referencing to PPPFR 2022.

Table 1

Reference	Paragraph
Paragraph 9.2.12 (a-b)	Invitation of price quotations (local production and content and evaluation of bids based on functionality)
Paragraph 10.3.10	WCBD 6.2
Paragraph 10.5.1 to 10.5.4	Bids featuring functionality
Paragraph 10.6	local production and content
Paragraph 10.12	evaluation of bids based on functionality as a criterion
Paragraph 10.11.1 (c)	consideration of any functionality criteria
Paragraph 10.11.3 (b)	Exclusion of Phase 2 of evaluation: where applicable, evaluate functionality compliance with bid specifications and the bidder's ability to perform.
Paragraph 10.13	evaluation of bids based on a stipulated minimum threshold for local production and content
Paragraph 10.16	Subcontracting as a condition of tender
Paragraph 10.17	Sub-contracting after award
Annexure 5	Documented process on the implementation of local production and content requirements

6.3 All Provincial Treasury Circulars issued in respect of Local Production and Content are herewith repealed.

6.4 Functionality, sub-contracting and cancellations of tenders have been omitted from the PPR, 2022 given that they are not provided for in terms of section 2 (1) of the PPPFA. Procuring institutions are required to note that functionality criteria will be dealt with within the ambit of drafting a detailed specification or terms of reference which incorporates the functionality requirements as well as the evaluation criteria. The procuring institution may alternatively incorporate functionality criteria as a general condition as contemplated in section 2 (1)(f) of the PPPFA.

- 6.5 Sub-contracting is an acceptable procurement practice and more so within the construction industry. The WCG has previously utilised an empowerment impact assessment to inform sub-contracting requirements within tender specifications. Whilst empowerment impact assessments were envisaged in the main to address an evidence-led approach when dealing with socio-economic targeting for contracts above R10 million as per Cabinet Minute 87 of 2017, the tool provided by Provincial Treasury may still be utilised when considering subcontracting at the demand management phase when dealing with procurement planning of a tender.
- 6.6 Departments and public entities are required to note and manage any risks associated with sub-contracting. Departments are also required to put in control mechanisms to avoid abuse of the SCM system and ensure compliance to section 217 (1) of the Constitution.

7. FURTHER RESEARCH TO INFORM THE FINAL WCG APPROACH

- 7.1 Further technical research will be undertaken prior to the WCG being able to adopt a final preferential procurement approach that is evidence-based, effective and sustainable. This research will review best practice evidence to establish and develop an appropriate policy response that enables growth, provides appropriate redress, accounts for value for money and enables the desired impact. Any new preferential procurement will be based on an executive policy directive and approved by Cabinet.
- 7.2 The following further actions are currently underway by the PT and will be subjected to further consultation with the Supply Chain Management Forum, the Chief Financial Officers Forum, the SCM Problem Driven Iterative Adaptation (PDIA) working group and the SCM Policy Focus Group:
- a) A technical review on the current procurement system including the benchmarking of international best practice 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;
 - b) A legal review to ensure Constitutional alignment with the provisions as encapsulated in the preferential procurement framework and the supporting regulations as well as certainty on how the forthcoming audit/s will be dealt with from a compliance perspective
 - c) The development of a clear communication plan on WCG position and approach
- 7.3 Regular updates to Provincial Cabinet (caucus) on any developments and progress on position papers and the review. This will include developments on procurement policies as well as local content requirements.

8. REQUEST

- 8.1 Accounting officers and accounting authorities must note the content of this Circular and communicate the requirements to officials under their control for the functions depicted in this Circular;
- 8.2 Departments and public entities are required to note:
- a) Paragraph 14.4 of Annexure B issued via PT Circular 32 of 2021 is herewith repealed;
 - b) All Provincial Treasury Circulars issued in respect of Local Production and Content are herewith repealed; and
 - c) The PT will further conduct a review of the PTI, 2019, Pro-forma Accounting Officer's System (AOS) and Treasury circulars in order to align to the requirements of the PPR 2022.

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

9. ENQUIRIES

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

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HEAD OFFICIAL: PROVINCIAL TREASURY