CHAPTER 8 – PREFERENTIAL PROCUREMENT

“Governments failure to legislate favourably and decisively for a meaningful affirmative procurement policy would be a betrayal of the democracy for which people had died.” - (Mathiane, 2000:1).

8.1 INTRODUCTION

As discussed in paragraph 4.4 of this thesis, institutions such as the RAU are not truly autonomous from the state. Indeed, should one consider the broader definitions for public institutions of higher education, it is evident that such institutions are organs of state and perform the services of public bodies. In addition, public higher education institutions receive large amounts of funding from Government.

These facts put institutions such as the RAU in a unique position in that they need to decide whether they will be challenged by Government policy, reform measures and steps taken to uplift society at large.

In this respect, the challenge is particularly large in relation to procurement.

The purpose of this chapter is to discuss procurement reform in the broader South African context and to review Black Economic Empowerment. The Preferential Procurement Policy Framework Act and Preferential Procurement Regulations will also be discussed in detail. Specific plans on why and how preferential procurement must be introduced at the RAU will also be presented.
8.2 CONSTITUTIONAL PREFERENTIAL PROCUREMENT

Paragraph 3.2 of this thesis detailed section 217 of the Constitution of South Africa.

The particular section set out that goods and services must be procured in a system that is fair, equitable, transparent, competitive and cost-effective. In addition this section of the Constitution also explains that organs of state may provide for preference treatment in the awarding of contracts. Such preference measures targets those disadvantaged by unfair discrimination, without specifying the groups of persons that should receive such preferential treatment (South Africa, 1996:s 217).

The Preferential Procurement Policy Framework Act that created the framework for preferential procurement by organs of state was more specific in its description for those that should receive preferential treatment. Section 2 (1) (d) makes reference to the historically disadvantaged by unfair discrimination on the basis of race, gender and disability (South Africa, 2000).

The Preferential Procurement Regulations expand on this definition by defining “disability” and “historically disadvantaged individuals”.

Disability is defined as (Department of Trade and Industry, 2001:par 1):

“…in respect of a person, a permanent impairment of a physical, intellectual, or sensory function, which results in restricted, or lack of, ability to perform an activity in the manner, or within the range, considered for a human being”.

Historically disadvantaged individual (hereafter HDI) is defined as (Department of Trade and Industry, 2001:par 1):

“…means a South African citizen –

(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) (“the Interim Constitution”); and / or
Clearly, Government’s focus in respect of preferential procurement legislation is on individuals other than white males.

The assumption that redress is targeted at the advancement of particular categories of individuals is not a whole reflection of procurement reform as Government’s view on public procurement reform in South Africa is much wider.

### 8.3 PROCUREMENT REFORM IN THE SOUTH AFRICAN CONTEXT

The post apartheid Government has expounded clear views on the role that public procurement reform may play in South Africa (South Africa, 1997:par. 1.1):

> “Public sector procurement has a major impact on the South African macro economy, both in terms of consumption and investment spending. As such, public sector procurement can be used as a toll by government to achieve economic ideals, including certain social-economic objectives. At the same time, an effective and efficient procurement system will permit government to deliver the quality and quantity of services demanded by its new constituency in accordance with the Reconstruction and Development Programme principles and other policy objectives.”

Government’s view on how procurement reform in the public sector has to be used in order to achieve socio-economic objectives within the ambit of good governance is set out in detail in the Green Paper on public sector procurement reform in South Africa.

A few of the principles of the Green Paper will be set out below and commented on in relation
to the policies, procedures and documents presented in Part B of this thesis:

- The principles of good governance must be upheld and included in any procurement policy (South Africa, 1997:Executive summary):
  - Addressed in the procurement policy document presented in Part B of this thesis.
  - Specific principles such as integrity have been included in the purchasing policy as discussed in chapter 7 of this thesis.
  - Mirrors the views of council, the audit committee and the management committee that good governance, accountability and responsibility are critical to the financial well-being and financial management of the RAU.

- Uniformity in tender procedures, policies and control measures (South Africa, 1997:par 2.3.2):
  - Since the commencement of this project, the RAU has had a comprehensive uniform set of tender procedures, policies and control measures in place that have been approved and disclosed in the RAU procurement policy. Procedures have worked well in practice and contracts are based, as far as possible, on tender specifications.

- Uniformity in contract documentation and contract options (South Africa, 1997:par 2.4):
  - Since 1999, the standard RAU tender document (and short-form tender document and application form) has been used consistently, even in the case of industry specific contracts. For example, industry specific specifications such as those contained in the JBCC building contracts are issued, but in conjunction with the RAU application form in order to ensure that comprehensive information about tenderers are obtained.
  - Tender documents state that tender specifications may, at the option of the RAU, become the contract between a successful tenderer and the RAU. Tender specifications are written in much detail and are scrutinized in detail in order to consistently apply this principle. After the awarding of tenders, contracts are, therefore, in place without delay.

- Procurement reform should facilitate the development of small, medium and micro and very small enterprises (hereafter SMME’s) particularly those owned and operated by previously disadvantaged persons, an increase in the volume of work available to the poor and in the income generation of marginalized sectors of society and affirmative action to address deliberate marginalisation from economic, political and social power
of black people, women and rural communities and to empower communities and individuals from previously disadvantaged sectors of society (South Africa, 1997:par 3.1.5);

- The development of Black Economic Empowerment through procurement reform will be addressed in this chapter and the promotion of SMME business in chapter 9 of this thesis.

- Tenders could be awarded on a point scoring system in terms of a development objective/price mechanism. Development objective points could be awarded for exceeding targets in respect of the use of local resources, use of targeted labour, use of SMME’s, employment generated, or the degree to which the tendering enterprise has embraced equity shareholding and affirmative action principles (South Africa, 1997:par 3.4.4).

- The specific point system that will be used by the RAU will be set out in this chapter and has been included in the procurement policy.

Procurement reform must be dealt with in the context of (South Africa, 1997:par 1.3):

- The need for value for money;
- The need to eliminate corruption in the procurement process;
- The need for contractors to have “good standing” insofar as their tax and service charge obligations are concerned;
- Implementation of systems of control and accountability;
- Uniformity in procedures, policies, documentation and contract options; and
- Effective monitoring and reporting.

Procurement reform is clearly hinged on targeted procurement. Targeted procurement may be defined as (Watermeyer, 1998:3):

“…an innovative form of procurement which has recently been developed in South Africa by the Procurement Task Team to provide employment and business opportunities for marginalized individuals and communities, enables social objectives to be linked to procurement in a fair, transparent, equitable, competitive and cost effective manner.”

Procurement reform is not limited to individuals. Government procurement reform also pays
specific attention to the development of SMME’s and affirmative procurement (South Africa, 1997:par 3.1.5) that refers largely to Black Economic Empowerment.

The promotion of small business in South Africa, as a form of procurement reform, has received a lot of attention as SMME’s represent an important vehicle to address the challenges of job creation, economic growth and equity (South Africa, 1995:3).

The White Paper on small business development issued in 1995, stated that there were more than 800 000 small, medium and micro enterprises in South Africa, absorbing about a quarter of the labour force of 15 million people (South Africa, 1995:7).

Government has recently re-emphasized the important role that small business can play in the South African economy. The cabinet has decided to hold special talks on job creation and will give the presidency a direct hand in building Black Economic Empowerment through small businesses (Leviev-Sawyer, 2001).

Black Economic Empowerment has in itself also been a focal point of socio-economic redress. However, Black Economic Empowerment has not been truly successful yet in South Africa. Numerous problems such as fronting, the use of complicated special purpose vehicles and pyramid group structures have clouded the huge potential that lies in empowerment. In addition, progress from the side of Government and from black business may be perceived to be slow in developing definitive guidelines for Black Economic Empowerment. Most initiatives have been voluntary from “Big Business”, resulting in rather uncoordinated approaches.

Black Economic Empowerment is still seen in some quarters as a culture of obligation on the part of non-black economic deal participants and a feeling of entitlement from black empowerment businesses, rather than a situation where legitimate commercial relations will develop (Thöle, 2001:3).

The promotion of SMME’s through procurement reform will be dealt with in chapter 9 of this thesis.

Black Economic Empowerment will be dealt with below. However, it must be emphasized
that procurement reform measures at the RAU will target all HDI’s and not only black people.

8.4 BLACK ECONOMIC EMPOWERMENT IN SOUTH AFRICA

Black Economic Empowerment (hereafter BEE) has been a particular focus of South African society since 1994. Although a lot of effort and emphasis has been placed on the advancement of BEE, results achieved to date have not been dramatic.

In practice, the extent to which BEE organization exist in South Africa, is worrisome. For example, a November 2000 Sunday Times survey on ALSI 40 companies’ performance and empowerment revealed that out of a total of 621 directors, only 11% were black and only 4% were female (Sunday Times, 2000:2).

Statistics published in South African Smart Investor state that black companies (including groups with “a significant black influence”) controlled 5.3% of the total market capitalization of the Johannesburg Stock Exchange in 2000. This percentage is down from 5.7% in 1999 and 9.6% in 1998 (Anthony, 2001:4).

The number of black-owned companies on the Johannesburg Securities Exchange fell from a peak of 43 in 1996, to 26 in 2000 and only 10 percent of the country’s top earners are black (Mseteka, 2001:7).

Based on extensive research conducted about tendering and procurement in South Africa, relatively few continued success stories exist in practice in the private sector.

For example, consider only two recent reports in daily newspapers reflecting some of the negative aspects that will be quoted below.

“MGX had not allowed the employees of its empowerment partner Motswedi to work on a National Census 2001 contract, which the information technology (IT) company had won because of its empowerment credentials, according to Keith Fletcher
and other former staff members of Motswedi.

Chris Hills, the chief executive of MGX, said “a few” Motswedi employees had been involved and MGX was “absolutely not” using Motswedi as a front.

However, Pali Lethola, the statistician general with Statistics SA who looks after the National Census project, said it had been his concern that MGX had won the contract with its black empowerment credentials but that no Motswedi employees had been involved in the project to date” (Bonorchis, 2001:1).

“The flaws in the thinking behind empowerment became apparent on Friday as Metropolitan disappeared from the JSE Securities Exchange to be replaced by New Africa Capital (NAC), which does not have a significant black shareholder block.

NAC is essentially Metropolitan under a new name and freed from the New Africa Investment Limited (Nail) control structure. Metropolitan could claim to be a black empowerment group because Nail, which itself was deemed to be black owned, held a controlling stake.

The black empowerment status was granted despite the fact that Nail’s controlling stake was achieved through a torturous process that involved pyramid companies and low-voting N shares. It was a cumbersome structure that abused minority shareholders’ rights.

On Friday this empowerment veil was peeled away and the reality of Metropolitan’s shareholder status became apparent. Nail has a 5 percent stake in NAC. A variety of other entities that could claim to be black shareholders and had held Metropolitan shares will continue to have NAC shares.”

“Doyle is adamant that the group fits a genuine definition of black empowerment. Not only is there a significant black shareholder profile, but 90 percent of NAC’s employees are black, two-thirds of the executive directors are black, 35 percent of senior executives are black and most of its suppliers and customers are black.

An empowerment analyst said at the weekend that if NAC ceased to be defined as a black empowerment group it would signal the need to overhaul the definition of black empowerment, rather than a need to overhaul NAC’s shareholder profile” (Crotty, 2001:6).
In addition, large Government procurement and licensing transactions have not been unflawed; the protracted awarding of the third cellular license and the much reported on weapons transactions to name but two.

The awarding of the cellular license was associated with reports on conflicts of interests (Bidoli, 1999:1) and at one stage a high court interdict prevented the Minister of Communications from awarding the license as there was sufficient grounds to suspect the tender process to be flawed (Mabuza, 2000:1).

At the time of the awarding of a R30 billion arms procurement contract, the auditor-general issued a report to parliament that detailed that insufficient attention had been paid to potential conflicts of interest, questionable criteria that had been used for selecting the successful bidder and that performance criteria were inadequate (Ensor, 2000:1).

BEE is a subject that elicits regular public response and is often written about in the popular press. Below, find pertinent facts about BEE from popular literature collected over the past two years, to perhaps set the scene before the BEE advancement measures at the RAU will be discussed.

Advantages or reasons to support BEE:

- BEE has never been a poverty alleviation program or, strictly speaking, a form of employment equity. It is part of a macro-economic strategy for growth and economic transformation;
- Employment equity, as a facet of BEE, is responsible for ensuring more black professionals and workers are brought into the economy;
- A non-racial elite is the surest way to promote a market economy;
- Unless proactive steps are taken to provide previously disadvantaged people with opportunities to advance themselves, the economic inequalities of the past are likely to persist;
- Unless a sufficiently large pool of skills is generated from within the country’s own population, higher sustainable growth is unattainable;
- Expanded diverse supplier bases will be established;
- Increased competitiveness and lower prices;
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- Pro-active participants in BEE initiatives can gain a competitive advantage over competitors;
- Positive public image;
- Reducing risk of punitive government legislation; and
- Reinforcement of a commitment to social development.

Criticism against BEE include:
- BEE merely enriches an elite;
- BEE is turning into a short-term program to build the bank balances of a few individuals;
- BEE appears to have been pursued from a top-down angle and has been unsuccessful in transmitting the benefits of economic empowerment beyond the fortunate few to the broader populace;
- It has not been fully appreciated that the path to successful empowerment is through appropriate education, training and management experience;
- Foreign investors have come to see BEE effected through ownership changes in fancy financial deals as conducive to nepotism and bribery;
- Employment equity has arguably taken the focus of many corporations off their main task of functioning efficiently and generating satisfactory profits. Much managerial time is now spent drawing up elaborate equity plans which can not be monitored effectively by the authorities;
- Empowerment has been regarded as a social tax, something institutions have to pay to get on with their own businesses;
- Fronting and cash-flow crises are abound;
- Banks regularly have to absorb losses after empowerment transactions fail; and
- The existence of the token black syndrome or “rent-a-black” syndrome.

Some of the negative perceptions associated with BEE are:
- Black companies require too much special treatment;
- BEE companies cannot compete on price;
- Quality and service is bad;
- Black companies are not reliable;
- Purchasing departments are too busy to implement the strategy; and
• Mentoring is required.

Although there are certainly very many negative perceptions that are associated with BEE, this does not mean that there has not been redress or at least steps in the right direction.

Government has taken the lead in respect of public procurement from BEE organizations. Between July and September 2000, five of South Africa’s nine provinces bought over 75% of their procured services from black-owned companies according to statistics from the Department of State Expenditure (Haffajee, 2000).

Much of the progress made in this respect relates to the implementation of some form of preferential treatment within a points system for the awarding of tenders. The application of the points system stems from the Preferential Procurement Policy Framework Act that will be discussed below.

BEE obviously has a number of angles or facets that it takes on that may be incorporated in a procurement policy.

For example, the results of employment equity, whether stated formally in an employment equity plan or not, may be regarded as BEE. This view is supported by persons such as Reuel Khoza, a founder member of the Black Management Forum. Mr Khoza’s view is that although corporate South Africa is unwilling to involve black management in the mainstream business world, the number of black managers countrywide has increased (African News Service, 2001). However, the submission of an Equity Plan is not voluntary as opposed to the extent to which the plans are implemented. Over-emphasis on equity plans should be guarded against in a preferential procurement plan. Rather, actual employment numbers in management and executive director categories should receive more attention.

A second facet of BEE is the emphasis placed on SMME’s. Specifically those SMME’s operated by previously disadvantaged individuals.

The third facet of BEE relates to procurement of goods and services from “black owned” organizations through preferential treatment such as that described in the Preferential Procurement Policy Framework Act and accompanying Regulations.
Apart from the promulgation of the Preferential Procurement Policy Framework Act, there has been no other legislation of BEE. Members of the Black Business Council have been very critical of this state of affairs and are advocating that BEE legislation be passed (Moti, 2001:5).

However, the writing of a blueprint for BEE is a formidable exercise (Anon., 2001:1).

To date there has been a lot of debate on how many facets BEE must have and what a clear definition of BEE should be. In this regard, the Black Economic Empowerment Commission has played a huge (albeit delayed) role in presenting guidelines and definitions.

### 8.5 BLACK ECONOMIC EMPOWERMENT COMMISSION REPORT

The Black Economic Empowerment Commission (hereafter BEECOM) Report is the most definitive document (and in essence the only definitive document) on BEE that has been published in South Africa.

Although the writing of the report proceeded at a snails pace and at some point it was though that the commission itself had lost steam (Anon., 2001:1), the issue of the report was in many respects the answer to the challenge to black business to come up with a strategy that would outline its role in boosting empowerment rather than being dependent solely on Government to respond to the challenge.

The terms of reference for the study and research undertaken by the Commission on BEE were:

- An inquiry into the structure and functions of the regulatory and legislative environment aimed at facilitating BEE within the context of national economic transformation;
- Research and evaluation conducted to investigate the nature, forms and outcomes of BEE in both the public and private sectors;
- A detailed investigation into the nature and form of economic empowerment initiatives pertaining specifically to business transactions;
• An examination of the trickle-down effect of empowerment initiatives in the private and public domain on the quality of life of ordinary disadvantaged South Africans;
• The development of benchmarks and criteria as to what would constitute meaningful and sustainable empowerment initiatives in both private and public domains;
• The compilation of pronouncements on the efficacy, long-term consequences and benefit of empowerment initiatives and processes to date; and
• The formulation, popularization and implementation of monitoring and evaluation mechanisms against which empowerment initiatives and transactions will be assessed (BEECOM, 2001:A letter to the Black Business Council).

The Report of over seventy pages will not be summarized in detail below. The documentation below will be restricted to issues pertinent to procurement.

Some of the relevant points that should be highlighted are:
• BEE must be people-centred and must impact on the lives of those purposefully and systematically excluded from the economy (BEECOM, 2001:2);
• BEE must be aimed at redressing the imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa’s financial and economic resources to the majority of its citizens (BEECOM, 2001:2); and
• The key components of the Integrated National BEE Strategy include:
  ▪ An Investment for growth Accord between business, labour and Government aimed at reaching agreement on a concrete strategy to lift the country’s levels of fixed investment and economic growth;
  ▪ The design and implementation of an Integrated Human Resources Development (HRD) Strategy;
  ▪ The implementation of the Integrated Sustainable Rural Development Strategy and the creation of an agency to streamline and co-ordinate funding and other initiatives in rural areas, including land reform;
  ▪ A National Procurement Agency located within the Department of Trade and Industry aimed at transforming the public and private sector procurement environment;
  ▪ A National Black Economic Empowerment Act which will be enabling legislation
aimed at creating uniformity in policy and establishing the necessary institutional support and instruments with which to drive the BEE strategy. The Act should define BEE and set uniform guidelines that will facilitate deracialisation of economic activities in the public and private sectors;

- An Empowerment Framework for Public Sector Restructuring that outlines empowerment principles to be followed;
- An enabling framework aimed at improving access to finance for households and businesses through disclosure and reporting requirements in the banking sector and targets to encourage service delivery and the enhancement of existing state capacity in the Post Bank;
- Recommendations on the streamlining and co-ordination of public sector funding initiatives through a National Empowerment Funding Agency (Nefa);
- Recommendations on building the capacity of business structures especially black business structures; and
- The strategy incorporates national targets to be met by the stakeholders (BEECOM, 2001:8).

BEECOM proposes that the following (measurable and annually reviewable) targets to be achieved within a period of ten years guide the Integrated National BEE Strategy (black women have to account for 35% of all targets listed below and disabled people 5%) (BEECOM, 2001:8):

- At least 30% of productive land should be in black hands, including individuals and collective enterprises;
- Black equity participation in each sector of the economy should be increased to at least 25% including individuals and collective enterprises. Equity participation refers to ownership measured in terms of economic interest in each sector over the period specified. Where equity is near to 25% continued efforts must be made to increase the equity by an additional 25%;
- Black people (including businesses and collective enterprises) should hold at east 25% of the shares of companies listed on the JSE;
- At least 40% of non-executive and executive directors of companies listed on the JSE should be black;
- At least 50% of state owned enterprise (hereafter SOE) and Government procurement at
national, provincial and local levels, should go to black companies and collective enterprises;

- At least 30% of these companies should be black-owned small and medium enterprises (hereafter SME’s);
- At least 30% of private procurement (for companies with more than 50 employees) should go to black-owned companies, including SME’s and collective enterprises;
- At least 40% of senior and executive management in private sector companies (with more than 50 employees) should be black;
- The national HRD strategy should ensure that black people comprise at least 40% of the number of people in the professions and in professional training;
- The national HRD strategy should ensure that the country’s Higher Education & Training system should increase the participation rate to 20%;
- At least 50% of borrowers (by value) on the loan book of National Development Finance Institutions should be black-owned companies and collective enterprises;
- In the event of restructuring, at least 30% of the equity of restructured SOEs should be owned by black companies and collective enterprises;
- At least 30% of long-term contracts and concessions (private - public - partnerships) within the public sector should incorporate black-owned companies and collective enterprises up front;
- At least 40% of Government incentives to the public sector should go to black companies; and
- The banking sector and Government should agree on targets with respect to accessibility of financial services (Community Reinvestment) that should ensure an increase in advances to black entrepreneurs, SMEs and black households in rural and urban areas.

Negative aspects associated with higher education and training (hereafter HET) was highlighted, such as the fact that higher education continue to display apartheid era staff patterns, and that throughputs are still low (BEECOM, 2001:14).

Specific recommendations are listed that affects HET (BEECOM, 2001:17):

- Measures to ensure that the HET systems substantially increase its output of black graduates, especially in fields of science, information technology, business and engineering. Incentives and penalties need to be employed to steer the system towards
this goal;

• Clear output targets for each of the country’s universities and technikons. These targets will be set according to the requirements of the national HRD strategy;
• Penalties to be imposed on those institutions that fail to meet targets. These penalties will be linked to the current subsidy formula;
• Incentive schemes for the HET system to enter into creative partnerships with secondary schools; and
• Programmes designed to promote entrepreneurship.

In respect of affirmative procurement, the following points are worth noting:

• Institutionalising a formula, such as that done in the Preferential Procurement Policy Framework Act, will not eradicate obstacles in the way of increasing black participation in the economy (BEECOM, 2001:31);

• Government procurement initiatives have encountered a number of difficulties (BEECOM, 2001:31-32):
  ▪ It is difficult to estimate what portion goes to small and medium businesses and black entrepreneurs because of poor, and in many instances, non-existent monitoring and evaluation of contract awards;
  ▪ Government only tracks procurement by the State Tender Board and Provincial Tender Boards. Most departments enter into their own contracts, which are not monitored;
  ▪ At local government level no estimates are available and few have mechanism in place to effectively monitor procurement spent;
  ▪ Although SOE’s are now able to report on procurement spend relating to black companies, numerous definitions are used, making assessment difficult;
  ▪ Government departments use different definitions of BEE resulting in extreme difficulty in evaluating figures;
  ▪ There are major institutional weaknesses within tender board, procurement offices and Government departments along with a chronic lack of the appropriate skills required to procure effectively;
  ▪ There is a weak approach to contract and supplier management, resulting in inappropriate evaluation at all stages of the contract cycle; and
  ▪ Partly as a consequence of poor contract management, the procurement process is
still unfriendly towards SME’s.

- The Preferential Procurement Policy Framework Act is inadequate as an instrument to achieve Government objectives in the procurement arena (BEECOM, 2001:32);
- A national procurement agency (hereafter NPA) should be established in the Department of Trade and Industry that must ensure the transformation of the procurement system into one rooted in effective supply development and contract management (BEECOM, 2001:32);
  - The NPA must set policy guidelines and targets for all Government departments, national, provincial and local, and SOE’s. It should monitor performance against the set targets and build capacity within Government;
  - The Preferential Procurement Policy Framework Act should be substantially amended to bring it inline with the integrated national BEE strategy. The Act should also be amended to allow for the establishment of the NPA;
  - Government departments could still use centralized purchasing agencies to reap the benefits of bulk buying and to ensure uniformity in systems. Centralised agencies could be constituted at provincial and local level as is currently being piloted in Gauteng;
  - Procurement targets and set-sides for black companies and SMEs for all Government organs and SOEs should be designed. There are various options that could be pursued, including setting aside a minimum percentage of contracts for black companies to perform. Another route is to set aside certain contracts in their totality only for black groupings;
  - Special attention needs to be paid to local Government structures given the high level procurement spend. Uniform guidelines need to be set;
  - A system of contract cessions needs to be designed to enable entrepreneurs to fund initial contract activities through provision of contract guarantees;
- An accreditation unit should be established as a joint venture between the public and private sectors, with a mission to stimulate private sector procurement from black suppliers and to broaden ownership structures (BEECOM, 2001:32-33);
  - The unit should be incorporated into the NPA and it should establish a national database of black suppliers;
  - The unit should encourage the private sector to procure from black companies by providing accreditation of these companies. The unit should also provide an appraisal of the capacity of black suppliers. This appraisal could guide
Government support to SMEs;

- The unit could also provide an empowerment accreditation for any company that submits an empowerment report to it. Incentives for submitting reports to the unit could include Presidential awards for outstanding performers, recognition of rating in adjudication procedures undertaken by State and SOE tenders and licenses, publication of results in an accreditation register and positive sentiments from clients and consumers;

- Uniform adjudication criteria, guidelines and targets should be set at a national level to be applied by all Government institutions (BEECOM, 2001:33); and

- A National Procurement Framework must incorporate a definition of BEE and of a black company; it must be applicable to all Government organs and SOEs (BEECOM, 2001:33); and

- A new system of preference for qualifying companies should be increased to a maximum of 20% (BEECOM, 2001:33).

In order to assist in the creation of uniformity in the tender system, the following analysis and a definition was documented (BEECOM, 2001:33-34).

- The first issue that was considered was whether priority should be given to control or ownership:
  
  - According to the BEECOM, control is not directly related to ownership. Control has strategic importance because it can contribute to the deracialisation of the political economy. However, control in itself cannot be the most important indicator since it is only useful insofar as it can be used to achieve BEE objectives, including the deracialisation of business ownership.
  
  - There is, therefore, an emerging consensus that ownership (as measured by economic interest), rather than control, is the key indicator to evaluate success in deracialising business ownership. It is an unambiguous indicator and refers to a situation where the BEE company has paid for its full portion of an equity stake;

  - The evaluation of a funding mechanism should focus on how long it will take to achieve this objective and the manner in which this will be attained. This is because most black companies do not meet this stringent (economic interest) criterion because they do not have the funding required. There are numerous funding structures to achieve this (economic interest) objective to varying degrees;
They do not require third party (e.g. bank or financial institution) funding. The BEE company that does not have to give away the bulk of the financial benefits to a third party funder. The full economic interest will eventually accrue to the BEE company. These models can, ideally, be combined with voting pool arrangements to ensure that the BEE company has a meaningful influence, which is at least commensurate with the equity stake;

For this reason, in such cases the BEE company should be regarded as having an economic interest. Where an option model has to be combined with third party funding, for example, in licensing and concessions where new projects have to be financed, the same could apply and the criterion should, again, be how fast the equity (and voting rights) will translate into economic interest;

Other models, for example N shares, pyramids and special purpose vehicles do not have built-in mechanisms to match the voting interest with full economic interest. Such arrangements can, however, enhance black influence and control in strategic sectors of the economy and do not deserve outright condemnation;

Black influence in the form of board positions and minority equity stakes remain an important instrument towards achieving the objectives of BEE. This suggests that special purpose vehicles should continue to play a role in the BEE funding arena because, as stated before, board positions and minority stakes can contribute towards deracialisation of the political economy; and

The financing instruments used should reflect attempts to achieve the kind of optimal capital structure that is commensurate with empowerment objectives, i.e. reasonable term structure of the loans at affordable interest rates. This is importantly not only as a way of lowering uncompetitive and historically generated barriers to entry but more significantly to ensure sustainability of the black business projects.

BEECOM also proposes the following definitions to be applied by the public and private sector in initiatives aimed at deracialisation of ownership. However, it is important to note that the definitions relate to procurement through the tender system (BEECOM, 2001:34):
Black company
One that is 50.1% owned and managed by black people. Ownership refers to economic interest. Management refers to executive directors. A black company should receive an “A” rating for Accreditation purposes, allowing it to qualify for set-asides and a 15% price preference.

Black empowered company
One that is at least 25.1% owned and managed by black people. Ownership refers to economic interest. Management refers to executive directors. This is whether the black company has control or not. Such a company should receive a “B” rating for accreditation purposes, allowing it to qualify for set-asides and a 10% price preference.

Black influenced company
Is one 5-25% owned and managed by black people. Such company should receive a “C” rating for accreditation purposes and a 5% price preference. Such a company would not qualify for set-asides.

Engendered company
Is one with at least 30% representation of black women within the black equity and management portion. Companies in any of the above three categories, with at least 30% representation, will receive another 5% price preference. Therefore an “engendered black company” will get a 20% price preference.

The BEECOM preferential treatment measures are clearly substantial if one considers the price preference allowed for a relatively small shareholding and management participation. This is contrast sharply with Government’s Preferential Procurement Regulations that expounds that the formula to be applied to calculate the number of points for equity ownership for historically disadvantaged individuals (HDI’s) is (Department of Trade and Industry, 2001:11):

\[
\text{NEP} = \text{NOP} \times \frac{EP}{100}
\]
Where: \[ \text{NEP} = \text{Points awarded for equity ownership by HDI's} \]
\[ \text{NOP} = \text{The maximum number of points awarded for equity ownership by an HDI} \]
\[ EP = \text{The percentage of equity ownership by an HDI within the enterprise or business.} \]

To qualify for any of the preferences and ratings as envisaged in the BEECOM report, companies must submit a number of regulatory documents and policies such as South African Revenue Services returns, Employment Equity Plans and proof of adherence to bargaining Council Agreements.

The BEECOM recommended that that Integrated National BEE Strategy should be adopted as a cabinet approved policy position. President Mbeki is currently studying the document.

The BEECOM proposed that Government promulgates a “Black Economic Empowerment Act”, which should define BEE and establish necessary infrastructure and support. Among others, the envisioned legislation must provide for the promulgation of regulations dealing with targets to be met by the public sector over a period of time. This view is supported by the Black Business Council who is of the opinion that black organizations could not pursue mergers and unity until there was deliberate and legislated BEE (Moti, 2001:5).

The BEECOM report does not provide an example or examples of a points system that may be used such as that referred to by the Preferential Procurement Policy Framework Act, evidently because of criticism of this Act. Rather price preferencing percentages and set-aside targets are put forward for tenders.

In the mean time, Government published the final Regulations for the implementation of the Preferential Procurement Policy Framework Act.
8.6 THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT

In terms of section 217 of the Constitution and in light of the definition of the RAU as an organ of state, the principle of preferential treatment in respect of procurement will also apply to the RAU and had to be incorporated in the RAU procurement policy together with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness.

In terms of section 217 (3) of the Constitution, national legislation must prescribe a framework within which the policy of preferential procurement may be implemented.

Government has indeed provided this framework in the promulgation of the Procurement Policy Framework Act. Although the Act was promulgated in 2000, it only came into operation in August 2001.

The Preferential Procurement Policy Framework Act is applicable to organs of state that are defined in section 1 (iii) as (South Africa, 2000):

- National and provincial departments as defined in the Public Finance Management Act;
- A municipality as contemplated in the Constitution;
- A constitutional institution defined in the Public Finance Management Act;
- Parliament;
- A provincial legislature; and
- Any other institution or category of institution defined as an “organ of state” in section 239 of the Constitution and recognized by the Minister by notice in the Government Gazette as an institution to which the Act applies.

Clearly that last part of the definition applies to the RAU, but only if the necessary Gazetting takes place. In order to confirm that there had been no Gazette that stated that the RAU would have to comply with the Preferential Procurement Policy Framework Act, this author spoke to an official at the Department of Trade and Industry, Mr Jeyral Soobramanian who confirmed that the Act was not applicable to the RAU as no Gazetting had taken place.

However, during the course of this project this author convinced the management committee,
audit committee and council of the RAU to give a commitment to BEE and SMME promotion through preferential procurement on the lines of the Preferential Procurement Policy Framework Act.

This commitment in itself is evidence of the wider transformation at the RAU and fact that the RAU wishes to play its role as a good corporate citizen within the South African context. After all, the institution is the educator of tomorrow’s leaders and it is fitting that the institution sets an example in respect of economic redress.

In terms of this Preferential Procurement Policy Framework Act, an organ of state must determine its preferential procurement policy and implement it within a framework in which (South Africa, 2000:s 2):

- A preference point system must be applied in the awarding of tenders;
- Specifically, a 90/10 point system must apply to transaction amounts above a certain threshold, with the lowest acceptable tender scoring 90 points;
- Specifically, an 80/20 point system must apply to transaction amounts above a certain threshold and below another, with the lowest acceptable tender scoring 80 points;
- In both cases, other more expensive tenders must score relatively fewer points on a pro rata basis;
- In both cases the remaining 10 and 20 points may be allocated for the achievement of specific goals;
- Specific goals may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability or the implementation of programs associated with the Government’s Reconstruction and Development Program;
- Any such goals must be communicated in advance to tenderers; and
- The tenderer scoring the highest points will be awarded the tender.

The Act itself does not provide guidance in respect of the value of transactions that should be subjected to a points system, nor the ratio of points to be awarded for price and other factors or a comprehensive list of suitable factors. Guidance is given through the Preferential Procurement Regulations issued in 2001.
8.7 PREFERENTIAL PROCUREMENT REGULATIONS FOR THE RAU

The Preferential Procurement Guidelines apply to specific organs of state as contemplated in section 1 (iii) of the Preferential Procurement Policy Framework Act presented in paragraph 8.6. This section in the Act includes (in subsection (f)), any other institution or category of institutions included in the definition of an “organ of state” in section 239 of the Constitution and recognized by the Minister by notice in the Government Gazette as an institution to which this Act applies.

Although it is clear from the evidence presented elsewhere that the RAU is an organ of state, the second proviso of a notice in the Government Gazette has not been met. However, given the commitment on the part of the RAU to promote BEE and SMME, the Regulations, although in somewhat altered form will be applied at the RAU.

The release of the final Regulations has created consistency across state procurement. Although the various provincial and state tender boards have applied different ratios over the past year or two, the regulations make the situation very clear.

There is still great debate between Government and black business groups about the ratios and values that have been published in the Regulations. The draft regulations published in 2000 envisaged an 80:20 division for the preferential point system for all contracts up to R2 million. The final regulations reduced the 80:20 ceiling to R500 000. For tenders above R500 000, a 90:10 formula will be used. The lowering of the threshold for the 80/20 rule has elicited negative responses in that the formula would not address the problems of the previously disadvantaged (Mathiane, 2000:5).

However, the Guidelines are the only clear base on which to build preference rules. Some of the most important aspects of the Regulations will be discussed below. In each case, the extent (if any) to which the RAU will deviate from the Regulations will be stated.
The regulations are applicable to all tenders in respect of procurement and the sale and letting of assets.

<table>
<thead>
<tr>
<th>Regulation</th>
<th>Regulation section number</th>
<th>Deviation from Regulations?</th>
</tr>
</thead>
<tbody>
<tr>
<td>The regulations are applicable to all tenders in respect of procurement and the sale and letting of assets.</td>
<td>• Heading to Part 2 • Heading to Part 3 • S 3 • S 4 • S 5 • S 6 • S 7 • S 8 • S 9 • S 10 • S13 • Etc.</td>
<td>Applied to tenders dealt with by the tender committee. Not applicable to transactions presented to the procurement committee. Tender committee has necessary independence and resources to apply preferential procurement.</td>
</tr>
<tr>
<td>An 80/20 point system will apply to procurement tenders and tenders for the sale and letting of assets above R30 000 and up to a Rand value of R500 000.</td>
<td>• S 3</td>
<td>An 80/20 point system will apply to all tenders dealt with by the tender committee up to R500 000. In other words, tenders from R250 001 to R500 000 will fall under this system. Lower value procurement will not attract preferencing at the RAU.</td>
</tr>
<tr>
<td>A formula is to be used to calculate the points for price.</td>
<td>• S 3</td>
<td>None.</td>
</tr>
<tr>
<td>Regulation</td>
<td>Regulation section number</td>
<td>Deviation from Regulations?</td>
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<tr>
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</tr>
<tr>
<td>A maximum of 20 points may be awarded to a tenderer for being an HDI and/or subcontracting with an HDI and/or achieving other stipulated goals.</td>
<td>• S 3</td>
<td>None. Slightly different criteria will apply that is generally more progressive than that in the Regulations.</td>
</tr>
<tr>
<td>A 90/10 point system will apply to procurement tenders and tenders for the sale and letting of assets above R500 000.</td>
<td>• S 4</td>
<td>A 90/10 point system will apply to all tenders dealt with by the tender committee above R500 000. Totally in line with Regulations.</td>
</tr>
<tr>
<td>A formula is to be used to calculate the points for price.</td>
<td>• S 4</td>
<td>None.</td>
</tr>
<tr>
<td>A maximum of 10 points may be awarded to a tenderer for being an HDI and/or subcontracting with an HDI and/or achieving other stipulated goals.</td>
<td>• S 4</td>
<td>None. Slightly different criteria will apply that is generally more progressive than that in the Regulations.</td>
</tr>
<tr>
<td>In the points system for procurement, only the tenderer with the highest number of points scored may be selected, unless a contract may, on reasonable and justifiable grounds, be awarded to a tenderer that did not score the highest number of points.</td>
<td>• S 3, 4, 5, 9</td>
<td>None.</td>
</tr>
</tbody>
</table>
Historically disadvantaged individuals mean South African citizens (unless the persons became South African citizens after 1993) who:

- Due to apartheid policy had no franchise in elections prior to 1983 (in other words citizens other than those classified as “white”);
- Is female;
- Has a disability, meaning a permanent impairment of physical, intellectual or sensory function, which results in restricted, or lack of, ability to perform an activity in a manner, or within a range, considered normal for a human being.

<table>
<thead>
<tr>
<th>Regulation</th>
<th>Regulation section number</th>
<th>Deviation from Regulations?</th>
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</thead>
<tbody>
<tr>
<td>Historically disadvantaged individuals mean South African citizens (unless the persons became South African citizens after 1993) who:</td>
<td>• S 1 (f)</td>
<td>None.</td>
</tr>
<tr>
<td></td>
<td>• S 1 (h)</td>
<td></td>
</tr>
<tr>
<td>It is possible to evaluate tenders on functionality and price. If so, the tender invitation must state these facts clearly. The total points combined for the evaluation of functionality and price is 80/90 depending on the point system used. The tender invitation may specify that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication.</td>
<td>S 8</td>
<td>None. However, the meaning of functionality is explained as well as when functionality will apply.</td>
</tr>
</tbody>
</table>
### Regulation

<table>
<thead>
<tr>
<th>Regulation</th>
<th>Regulation section number</th>
<th>Deviation from Regulations?</th>
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</thead>
<tbody>
<tr>
<td>The basis for determining whether the 80/20 or 90/10 points system is in use, is the estimated value of a contract in Rand denomination which is calculated at the time of tender invitations and includes all applicable taxes and excise duties. In the event that, in the application of a tender scored on the 80/20 basis, all tenders exceed R500 000, the tender must be cancelled. The same applies if all tenders received are below R500 000 and the 90/10 point system was used. In both cases tenders must be re-invited.</td>
<td>S 10</td>
<td>None.</td>
</tr>
<tr>
<td>An organ of state may, prior to the award of a tender, cancel the tender if due to changed circumstances, there is no longer need for the goods or services tendered for or funds are no longer available to cover the total envisaged expenditure or no acceptable tenders are received.</td>
<td>S 10</td>
<td>None.</td>
</tr>
<tr>
<td>Prior to making an invitation to tender, the deliverables or performance indicators in terms of which a person awarded a contract will be assessed need to be determined.</td>
<td>S 11</td>
<td>None. The deliverables will form part of the tender specification.</td>
</tr>
<tr>
<td>Points scored must be rounded off to the nearest 2 decimals.</td>
<td>S 12</td>
<td>None.</td>
</tr>
<tr>
<td>Regulation</td>
<td>Regulation section number</td>
<td>Deviation from Regulations?</td>
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</tr>
<tr>
<td>Equity ownership points for HDI’s must be equated to the percentage of an enterprise or business owned by individuals or, in respect of a company, the percentage of a company’s shares that are owned by individuals, who are actively involved in the management of the enterprise or business and exercised control over the enterprise, commensurate with their degree of ownership at the closing date of the tender.</td>
<td>S 13 (1)</td>
<td>Management by HDI’s as envisaged in the BEECOM report will also be taken directly into consideration. More progressive than Government Regulations.</td>
</tr>
<tr>
<td>Preference points may not be awarded to public companies and tertiary institutions.</td>
<td>S 13 (5)</td>
<td>None.</td>
</tr>
<tr>
<td>A formula will be used to calculate the number of points for equity ownership by an HDI.</td>
<td>S 13 (5)</td>
<td>None. The same type of formula will be applied to executive management by an HDI.</td>
</tr>
<tr>
<td>A person awarded a contract as a result of preference for contracting with, or providing equity ownership to, an HDI, may not subcontract more than 25% of the value of the contract to a person who is not an HDI or does not qualify for such preference.</td>
<td>S 13 (12)</td>
<td>None.</td>
</tr>
<tr>
<td>No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Services certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS.</td>
<td>S 16</td>
<td>None.</td>
</tr>
<tr>
<td>Regulation</td>
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</tr>
<tr>
<td>Tendering conditions may stipulate that specific goals relating to the RDP be attained. However, the specific goals must be measurable and quantifiable and organs of state must monitor the execution of the contract for compliance with such goals (section 17 (4)). Over and above the awarding of preference points for HDI’s, the following activities may be regarded as relating to specific goals, such as:</td>
<td>S 17</td>
<td>The main business of the RAU must dictate whether points can be awarded for specific goals. Also, the points system needs to be applied as consistently as possible and should limit the monitoring required. In addition, cognizance must be taken of the fact that very few tenders relate to long term projects. Within the framework of limited procurement resources, preferencing should be wholly implementable.</td>
</tr>
<tr>
<td>• The promotion of South African owned enterprises.</td>
<td></td>
<td>• Valid, but very general criteria. Difficult to monitor. No points awarded. Problems will be communicated to tender committee. Preferencing will come via HDI channel companies in respect of technology procurement.</td>
</tr>
</tbody>
</table>
**Regulation** | **Regulation section number** | **Deviation from Regulations?**
--- | --- | ---
- The promotion of export oriented production to create jobs. | | • Not directly relevant to RAU business. No points awarded. Difficult to monitor.
- The promotion of SMME’s. | | • Valid criteria in most cases due to relative size of the RAU expenditure annually. Incorporated in 10 and 20 points. Also relevant given the RAU’s geographical location. A detailed discussion will follow in chapter 9 of this thesis.
- The creation of new jobs or the intensification of labour absorption. | | • Not directly relevant to the RAU business. No points awarded. Only exception is in respect of procurement for new developments outside existing the RAU premises at which time that criteria will be incorporated in the evaluation criteria. E.g. the building of a new RAU school in a rural area that may create new jobs.
<table>
<thead>
<tr>
<th>Regulation</th>
<th>Regulation section number</th>
<th>Deviation from Regulations?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province.</td>
<td></td>
<td>• Not directly relevant to the RAU business. No points awarded. Only exception is in respect of procurement for new developments outside existing RAU premises at which time that criteria will be incorporated in the evaluation criteria. E.g. the building of a new RAU school in a rural area.</td>
</tr>
<tr>
<td>• The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region.</td>
<td></td>
<td>• Not directly relevant to the RAU business. No points awarded. Only exception is in respect of procurement for new developments outside existing RAU premises at which time that criteria will be incorporated in the evaluation criteria. E.g. the building of a new RAU school in a rural area.</td>
</tr>
<tr>
<td>Regulation</td>
<td>Regulation section number</td>
<td>Deviation from Regulations?</td>
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</tr>
<tr>
<td>• The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area.</td>
<td></td>
<td>• Not directly relevant to the RAU business. No points awarded. Only exception is in respect of procurement for new developments outside existing RAU premises at which time that criteria will be incorporated in the evaluation criteria. E.g. the building of a new RAU school in a rural area.</td>
</tr>
<tr>
<td>• The promotion of enterprises located in rural areas.</td>
<td></td>
<td>• Not directly relevant to the RAU business. No points awarded. Only exception is in respect of procurement for new developments outside existing RAU premises at which time that criteria will be incorporated in the evaluation criteria. E.g. the building of a new RAU school in a rural area.</td>
</tr>
<tr>
<td>Regulation</td>
<td>Regulation section number</td>
<td>Deviation from Regulations?</td>
</tr>
<tr>
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<td>---------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>• The empowerment of the work force by standardizing the level of skill and knowledge of workers.</td>
<td></td>
<td>• May be applicable in very few cases such as technological empowerment of all RAU employees, but then it will be part of the tender specifications that all tenderers have to adhere to. Will not be awarded points as criteria for tenderers. Part of core business philosophy of RAU.</td>
</tr>
<tr>
<td>• The development of human resources, including by assisting in tertiary and other advanced training programs, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills.</td>
<td></td>
<td>• Not awarded specific points. Very difficult to monitor. Case already made that preference point system should be implemented easily. In cases where the criteria may be of relevance, it will rather be encompassed in the tender specifications and will form part of the entire project.</td>
</tr>
<tr>
<td>• The upliftment of communities through, but not limited to, housing, transport, schools and charity organizations.</td>
<td></td>
<td>• Not awarded specific points. Limited application in RAU.</td>
</tr>
</tbody>
</table>

**TABLE 8.1 – APPLICATION OF REGULATIONS AT THE RAU**
The full set of Regulations has been taken into account in the writing of the Tender Evaluation Criteria that has been developed for the RAU. These criteria have been incorporated in the purchasing policy document that will be presented in Part B of this thesis.

In addition, cognizance was taken of the procurement aspects incorporated in the BEECOM report.

In essence there are four major differences between the Preferential Procurement Regulations and the Tender Evaluation Criteria written for the RAU.

Firstly, the number of preference criteria as set out in the Regulations have been limited to those that are applicable to the business of the RAU and those that may be monitored easily, as monitoring of the achievement of the specific goals is an essential part of the application of the Regulations. In this respect the practicality of preferencing has weighed more than expanding a system to include numerous preferencing categories.

Secondly, the BEECOM report suggestion that executive management by HDI’s should be taken into consideration in respect of preferencing has been incorporated in the RAU rules. This step is much more progressive than any of the preferencing criteria in the Regulations and shows great commitment to economic redress from the management committee and council.

Thirdly, the issue of functionality as part of the pricing preference system is dealt with in detail. Functionality evaluation can easily be used as a loophole against preferential procurement. In order to limit this risk, the RAU criteria is definitive on this matter.

Fourthly, specific points have been set for SMME status of tenderers based on the definitions in the National small business act that will be dealt with in detail in chapter 9 of this thesis.

The Tender Evaluation Criteria that was developed for the RAU are set out below together with the necessary explanations.

1. Tenders for the procurement of goods and services as well as for the sale and letting of assets that are presented to the tender committee will be evaluated on a preference point
system. In line with the governance needed over asset transactions as explained in chapter 7 of this thesis.

2. In the case of tenders with a value equal to or below R500 000, an 80/20 point system will apply. The focus of preferencing will be placed on the tender committee as it is an independent body from the finance section and includes a range of expertise.

3. In the case of tenders with a value above R500 000, a 90/10 point system will apply. The focus of preferencing will be placed on the tender committee as it is an independent body from the finance section and includes a range of expertise.

4. In the case of tenders for which samples must be submitted, tender price evaluation will still be based on the point formula system, but points will also be awarded for functionality in respect of the samples. However, functionality does not affect the awarding of the 20 or 10 points for other goals. In each case where samples are to be handed in, the relative ratio between the evaluation of price and the evaluation of functionality will be proposed to the tender committee for consideration by the project leader and/or consultant who sponsor the project. Functionality evaluation will not be entertained on other grounds. In this respect, the counter balance is already firmly in place in that tender specifications are written in great detail, comprehensive information about the past experience of tenderers is available, the list of tenderers are approved in advance by the tender committee as well as the fact that a contract may always (in the extreme) be awarded to a tenderer that did not score the highest number of points on reasonable and justifiable grounds.

5. In the case of the application of the 80/20 point system for procurement, the tender with the lowest price will score 80 points. In the case of the application of the 80/20 point system for asset transactions, the tender with the highest price will score 80 points. Other tenders score in relation to the lowest (or highest tender price in respect of asset transactions) tender price by using the following formula (that is consistent with the Regulations):
**Part A**

**Chapter 8 – Preferential procurement**

\[ Ps = 80 \left( 1 - \frac{Pt - P_{\text{min}}}{P_{\text{min}}} \right) \]

Where:
- \( Ps \) = Points scored for price of tender under consideration
- \( Pt \) = Rand value of tender under consideration
- \( P_{\text{min}} \) = Rand value of lowest acceptable tender.

6. In the case of the application of the 90/10 point system for procurement, the tender with the lowest price will score 90 points. In the case of the application of the 90/10 point system for asset transactions, the tender with the highest price will score 90 points. Other tenders score in relation to the lowest (or highest tender price in respect of asset transactions) tender price by using the following formula (that is consistent with the Regulations):

\[ Ps = 90 \left( 1 - \frac{Pt - P_{\text{min}}}{P_{\text{min}}} \right) \]

Where:
- \( Ps \) = Points scored for price of tender under consideration
- \( Pt \) = Rand value of tender under consideration
- \( P_{\text{min}} \) = Rand value of lowest acceptable tender.

7. The preference point system that will be used to adjudicate tenders will be stipulated together with each tender document issued. In accordance with the principles of communication, openness and transparency of processes that was dealt with in chapter 7 of this thesis.

8. The basis for determining whether the 80/20 or 90/10 point system is in use, is the estimated value of a contract in Rand denomination which is calculated at the time of tender invitations and includes all applicable taxes and excise duties. In the event that, in the application of a tender scored on the 80/20 basis, all tenders exceed R500 000, the tender must be cancelled. The same applies if all tenders received are below R500 000 and the 90/10 point system was used. In both cases tenders must be re-invited. Consistent with the Regulations.

9. The RAU may, prior to the award of a tender, cancel the tender if due to changed circumstances, there is no longer need for the goods or services tendered for or funds are
no longer available to cover the total envisaged expenditure or no acceptable tenders are received. Consistent with regulations. The RAU tender documents do include additional safeguards.

10. Prior to making an invitation to tender, the deliverables or performance indicators in terms of which a person awarded a contract will be assessed need to be determined. The deliverables must form part of the tender specifications.

11. Points scored must be rounded off to the nearest 2 decimals.

12. In the case of the application of the 80/20 point system, a maximum of 20 points will be awarded as follows:
   - Points for equity ownership by HDI’s (non-white males, all females, disabled people irrespective of race) calculated by using the formula:

   \[ \text{NEP} = \text{NOP} \times \frac{\text{EP}}{100} \]

   Where:
   - \( \text{NEP} \) = Points awarded for equity ownership by an HDI
   - \( \text{NOP} \) = The maximum number of points awarded for equity ownership by an HDI; set at 20
   - \( \text{EP} \) = Percentage of equity ownership by HDI’s.

   Ownership refers to economic interest as stated in the BEECOM Report.

   - Points for management of an organization by HDI’s (non-white males, all females, disabled people irrespective of race) calculated by using the formula:

   \[ \text{NMP} = \text{NBP} \times \frac{\text{MP}}{100} \]

   Where:
   - \( \text{NMP} \) = Points awarded for executive management by an HDI
   - \( \text{NBP} \) = The maximum number of points awarded for executive management by an HDI; set at 20
   - \( \text{MP} \) = Percentage of executive management by HDI’s.
The issue of executive management by HDI’s as a criteria for procurement preference was raised in the BEECOM report. As the emphasis is on executive management, being the extent to which **executive directors** are HDI’s, it is this author’s belief that there is huge merit in this criteria, as it empowers HDI’s rather than HDI’s being appointed as non-executive directors so as to merely “colour” boards of directors.

- Points for SMME status based on definitions in the National Small Business Act. The definition of an enterprise as SMME will be discussed in detail below. Points awarded for a business classified as a small, medium, micro or very small enterprise, is 10.

13. In the case of the application of the 90/10 point system, a maximum of 10 points will awarded as follows:

- Points for equity ownership by HDI’s (non-white males, all females, disabled people irrespective of race) calculated by using the formula:

\[
NEP = NOP \times \frac{EP}{100}
\]

Where:
- \(NEP\) = Points awarded for equity ownership by an HDI
- \(NOP\) = The maximum number of points awarded for equity ownership by an HDI; set at 10
- \(EP\) = Percentage of equity ownership by HDI’s.

Ownership refers to economic interest as stated in the BEECOM Report.

- Points for management of an organization by HDI’s (non-white males, all females, disabled people irrespective of race) calculated by using the formula:

\[
NMP = NBP \times \frac{MP}{100}
\]

Where:
- \(NMP\) = Points awarded for executive management by an HDI
- \(NBP\) = The maximum number of points awarded for executive management by an HDI; set at 10
Part A
Chapter 8 – Preferential procurement

\[ MP = \text{Percentage of executive management by HDI’s.} \]

The issue of executive management by HDI’s as a criteria for procurement preference was raised in the BEECOM report. As the emphasis is on executive management, being the extent to which executive directors are HDI’s, it is this author’s belief that there is huge merit in this criteria, as it empowers HDI’s rather than HDI’s being appointed as non-executive directors so as to merely “colour” boards of directors.

- Points for SMME status based on definitions in the National Small Business Act. The definition of an enterprise as SMME will be discussed in detail below. Points awarded for a business classified as a small, medium, micro or very small enterprise, is 5.

14. In respect of tenders that are presented to the tender committee, the tender procedures state that at least 5 prospective tenderers should be targeted. At least 1 of these prospective tenderers must include an organization in which equity ownership and/or executive directors include HDI’s.

In cases where more than 5 prospective tenderers are forwarded to the Tender committee, the number of tenderers involving HDI’s in equity ownership and/or executive management must be as follows:

- Up to five prospective tenderers - 1 HDI organization
- 6 to 10 prospective tenderers - 2 HDI organizations
- 11 and more prospective tenderers - 3 HDI organizations.

This measure will ensure inclusivity in respect of tenders.

15. The point system for the evaluation of tenders will come into operation on 1 January 2002.
King 2 makes it clear that every company should disclose the nature and extent of its commitment to, among others, procurement practices and BEE (Institute of Directors of Southern Africa, 2001:38). The process documented above will certainly ensure that the RAU is in a position to report positively on its efforts in respect of BEE.

### 8.8 OTHER PREFERENTIAL PROCUREMENT ISSUES

Preferential procurement is extremely complex and cuts across a number of issues. In large conglomerates, separate business units or support units are created to implement preferential procurement. The RAU does not have the resources to appoint additional personnel to deal exclusively with procurement empowerment. In this regard, the criteria developed for the institution is easy to follow and to implement.

Secondly, although preferential procurement in the case of tenders is one of the ways through which BEE may be advanced, there is a wider issue to address, being the normalization of business relationships with all organizations. In this respect it is imperative to develop legitimate business relationships with a wide range of organizations based ultimately on a close business relationship between suppliers and the RAU, underpinned by value for money and quality of goods and services. The RAU can certainly work effectively towards this goal through the deliberate accessing of BEE and SMME through an approved supplier list that will be explained in detail in chapter 9 of this thesis.

Although preferential procurement in respect of tenders will go a long way to ensuring change, the largest portion of procurement at the RAU is sourced via quotations. In order to sustain meaningful change, a concerted effort must be made to target BEE organizations in respect of all procurement transactions, albeit not on preferential treatment basis.

Another important issue is the fact that a skills transfer must take place in South Africa. Given the core educational business of the RAU, the institution can certainly make a huge contribution in this regard.

In large conglomerates a lot of emphasis is placed on BEE and SMME support should a
tender or procurement action for which has been contracted, not be completed or completed in time. As the RAU has limited resources available, no special treatment or support service is envisaged for BEE or SMME procurement. Also, in respect of the financing of procurement, no special arrangements will apply vis a vis early payment or help in respect of obtaining finance.

8.9 SUMMARY

Preferential procurement is one of the economic strategies that may be used to drive social change in South Africa. Preferential procurement is underpinned by the Constitution of South Africa.

Procurement change involves different strategies or measures such as the setting of preference criteria, BEE and SMME advancement.

Government has been the main driver of preferential procurement through its own procurement as well as through the issue of the Preferential Procurement Policy Framework Act and Preferential Procurement Regulations.

The purpose of the Act and Regulations was to give preference to certain individuals or groups of individuals.

Based on the Act, Regulations and the BEECOM report, this chapter established preferential procurement regulations for the RAU which is to be applied to tenders presented to the tender committee.

However, preference treatment in respect of tendering will not ensure systemic procurement change. In this respect it is important that wider measures are put in place to promote among others, SMME’s. The issue of systemic change will be discussed in chapter 9 of this thesis.
BIBLIOGRAPHY


LEVIEV-SAWYER, C 2001: Cabinet poised for big push on job creation. Cape Argus.


industry.