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B-BBEE is here to stay!



Don't be so quick to tear up your BEE certificate. You will need it!

Recently published articles in the media leave a false impression that you will no longer need a valid B-BBEE (Broad-Based Black Economic Empowerment) certificate by 16 January 2023. This perception that is created is incorrect.

The organisation **Sakeliga** won a case in the Constitutional Court earlier this year where the court found the “local content requirements” gazetted on 20 January 2017 (*Government Gazette* No. 40553) by the then Finance Minister Pravin Gordon to be unconstitutional.

The Constitutional Court held that the Minister acted outside his legislative mandate (ultra vires in promulgating the Preferential Procurement Regulations). The current Minister of Finance, Enoch Godongwana, was ordered by the court to replace this *Preferential Procurement Regulations* with legislation in line with the Preferential Procurement Framework and the Constitution of South Africa. This gazette has since been repealed and replaced with new regulations in *Government Gazette* No. 47452 which was published on 4 November 2022.

The previous regulations required State-Owned Entities (SOEs) to procure from designated groups – companies with previously disadvantaged ownership of at least 51% or 100% black ownership. The new Regulations do not disqualify white owned entities as in the past, but still give preference to black owned and B-BBEE compliant entities based on a preferential point system.

No change to the B-BBEE codes

The B-BBEE codes have not been changed at all. The revised procurement policy still takes your B-BBEE level into consideration on all SOE tenders.

To summarise – contracts below R50 million will be awarded based 80% on price and 20% on “specific goals”, while contracts above R50 million will be awarded based 90% on price and 10% on “specific goals”.

The definition of “specific goals” in the latest Preferential Procurement Regulations:

“Specific goals” means specific goals 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, including the implementation of programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994.

The above gazette of 1994 forms the foundation of the B-BBEE codes as we know it. Bear in mind that *previously disadvantaged ownership* is only one of the five elements of the B-BBEE scorecard. The Constitutional Court effectively ruled that you cannot exclude companies from applying for SOE tenders simply on the basis that they are white owned, but the company’s B-BBEE certificate (and the associated recognition level) will still heavily impact your chances of getting that tender.

How does BEE impact my business?

You can refer to *Government Gazette* No. 47452 for the precise formula for the calculation. Effectively, a level 1 certificate B-BBEE company (135% recognition under the B-BBEE codes) applying for the same tender of below R50 million as a level 4 certificate B-BBEE company (100% recognition level), will be able to quote a 5% higher price and still receive the contract.

This might sound like a small change in the tender price but when you consider that this is effectively gross profit margin it makes an enormous difference to the business. A level 8 certificate B-BBEE company (with only a 10% recognition level) will have a huge disadvantage as his price would need to be more than 15% less than the level 1 company to be awarded the same tender. With all of the above it is assumed that they meet the same basic qualifying criteria.

The Political view of Broad Based Economic Empowerment

I tend to stay clear of politics as it becomes a heated subject. I always advise my clients that *participating in the B-BBEE programme is a purely financial decision*. What does your business stand to lose or what do you stand to gain compared to the associated cost? I do think it is relevant to mention that you will probably never hear our current state president, Cyril Ramaphosa, say: "B-BBEE has been scrapped". The ANC can ill afford to alienate millions of their voters and spark huge unrest in South Africa. Our country (white and black citizens alike) can also not afford any additional pressure on our economy.

BEE in conclusion:

B-BBEE is here to stay for the foreseeable future. The recent changes to the Employment Equity Act also give us a clear indication that *the government will not stop putting pressure on businesses as far as transformation is concerned*. We all agree that the state in which our SOEs find themselves due to mismanagement is shocking and very concerning. That said - consider the pros and the cons as well as the impact B-BBEE will have on your business. We have a beautiful country with endless opportunities. Let's make the best of it.

*SERR Synergy assists businesses to implement viable B-BBEE initiatives and ensures alignment of initiatives with the legal requirements of the B-BBEE Codes. Our **comprehensive BEE service** includes tailor-made solutions that meet existing B-BBEE challenges by implementing effective and value-adding strategies. We encourage our clients and other impacted businesses to **contact us** for specific guidance in this regard.*

About the author: Duncan Cloete currently holds the title of National Marketing Manager. His previous work experience and involvement with B-BBEE verification added to his broad spectrum of B-BBEE knowledge. With more than 8 years' service at SERR Synergy in the B-BBEE environment, he has consulted with thousands of business owners ranging from small start-up companies to large international entities seeking solutions to their B-BBEE challenges.

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