



INCLUSIVE SOCIETY INSTITUTE

Op-ed

NO, NOT ALL GOVERNMENT CONTRACTS BELOW R20 MILLION WILL BE RESERVED FOR 100% BLACK-OWNED BUSINESSES

By Daryl Swanepoel

South Africa's proposed new public procurement regulations have generated considerable controversy, but one of the most prominent claims being made about them is simply not correct. Contrary to an impression created in parts of the public debate, the regulations do not provide that all government contracts worth R20 million or less will henceforth be reserved exclusively for 100% black-owned businesses.

This distinction matters. Preferential procurement remains one of the most contested areas of South African public policy, and the proposed regulations contain provisions that warrant serious scrutiny. But legitimate criticism is weakened when it rests on an inaccurate description of what government is proposing. There is enough in the actual regulations to debate without exaggerating their reach.

The Constitutional Court has since declared the Public Procurement Act unconstitutional and invalid, because Parliament failed to facilitate meaningful public participation in its passage. Importantly, the Court's ruling concerned the legislative process, not the substantive merits of the procurement framework. The policy choices embodied in the Act may therefore return in replacement legislation following a constitutionally compliant process. The proposed set-aside system consequently remains a live policy issue, and one that should be scrutinised before, rather than after, it is enacted again.

The policy framework contained in the invalidated Act and its accompanying Draft General Public Procurement Regulations envisages a system of set-asides for designated categories. Black people are among those categories, but the legislation also separately identifies black women, women, black people with disabilities, people with disabilities and military veterans. It provides further categories for various small enterprises, including those owned by black people, women, people with disabilities and youth, as well as small enterprises generally, co-operatives and certain geographically defined categories.

The significance is easily overlooked. A white woman may qualify under a set-aside for women. A white person with a disability may qualify under the category for people with disabilities. A qualifying small enterprise owned by white youth may potentially qualify under a youth-owned small-enterprise set-aside, while a white-owned small enterprise may fall within the general small-enterprise category. Race is unquestionably an important element of the proposed system, but it is not its sole organising principle.

The R20 million threshold must be understood within this broader framework. The draft regulations require procuring institutions to identify up to five designated categories, having regard to their strategic mandates, relevant sectors or supply markets and the availability of potential suppliers. Where the prescribed conditions are met, a contract, or a specifically unbundled portion of one, with

an estimated value not exceeding R20 million may be subjected to a set-aside. There must also be at least three potentially qualifying suppliers in the identified category.

In other words, R20 million is the upper threshold at which the set-aside mechanism may operate. It does not mean that every government contract below that value automatically becomes a tender reserved for 100% black-owned companies.

But that is increasingly how the proposal has been portrayed in parts of the public debate. The interpretation has also entered mainstream media commentary. Business Day has carried the proposition that procurement below R20 million would be set aside for suppliers that are 100% black-owned, while The Citizen repeated the assertion that all tenders under R20 million would be set aside exclusively for such suppliers.

The problem is not that these organisations or commentators are wrong to question the regulations. There are good reasons to do so. The problem is that one particular designated category, black ownership, is being conflated with the entire set-aside regime, materially overstating the extent of racial exclusion contained in the proposals.

There is a related misconception surrounding the 30% target for black people. The regulations prescribe a minimum set-aside target of 30% of an institution's annual procurement budget where black people are one of its identified categories. This does not mean that 30% of all contracts below R20 million are black-only while the other 70% constitute an unrestricted procurement pool.

The target relates to the annual procurement budget, rather than the number of contracts. Institutions may identify several categories, those categories may overlap, and 30% is a minimum, rather than a ceiling. The regulations therefore do not divide procurement into a fixed 30% black-only component and a corresponding 70% unrestricted component. The actual effect will differ between institutions according to their procurement profiles, identified categories and supplier markets.

Correcting these misconceptions should not, however, be mistaken for an endorsement of the proposed regulations. Once the debate is brought back to what the regulations actually provide, there remain substantial questions that government should answer.

Perhaps the most important concerns the requirement that businesses falling within several designated categories must be 100% owned by persons belonging to that category. In a black-ownership set-aside, a company that is 100% black-owned may qualify, while a company that is 99% black-owned with a 1% white shareholder would not. Similar consequences arise under other categories.

The constitutional legitimacy of preferential procurement does not by itself establish the wisdom of such an absolute threshold. The Constitution expressly allows procurement policies designed to advance persons disadvantaged by unfair discrimination. The more pertinent policy question is whether requiring 100% ownership produces better empowerment outcomes than a less rigid approach allowing meaningful majority ownership alongside investment, skills transfer, management participation and enterprise development.

An emerging black entrepreneur may need capital, technical expertise, networks or market access from an established investor or business partner. If bringing a white investor into that company renders it ineligible for particular procurement opportunities, the system risks discouraging precisely the partnerships that could help emerging enterprises become sustainable and independently

competitive. Formal ownership purity should not become more important than substantive empowerment.

Cost and competition must also form part of the assessment. Section 217 of the Constitution requires public procurement to be fair, equitable, transparent, competitive and cost-effective while expressly permitting preference and remedial measures. A reasonable premium may be justified where a set-aside creates sustainable new suppliers, but government should benchmark the unit costs of procurement through set-asides against comparable open-market procurement. The public is entitled to know the developmental premium being paid and the measurable economic benefit obtained in return.

Winning a protected public contract creates access to a market; it does not necessarily create a sustainable enterprise. Successful empowerment should be visible in business growth, employment creation, skills, productive capacity, access to capital and an increasing ability to compete without relying continually on protected procurement.

Set-asides should also broaden opportunity, rather than repeatedly concentrate it. Reasonable limits should be placed on how often the same entity may benefit from set-aside contracts during a fiscal year, taking account of contract value, sector and supplier availability. Material or repeated failure to deliver on protected contracts, without reasonable justification, should likewise carry consequences.

Finally, the administrative implications of the 100% rule should not be underestimated. When identity and ownership classification determine not merely preference points, but whether a company may compete at all, the burden of verification, internal control, transparency and effective auditing becomes substantially greater.

None of these concerns requires the claim that every government contract below R20 million is about to become the exclusive preserve of 100% black-owned businesses.

South Africa's transformation debate would benefit from greater discipline on both sides. Those opposed to the regulations should criticise what they actually contain, rather than exaggerate their effect. Those defending preferential procurement should not use such exaggeration to dismiss legitimate concerns about the proposed system.

The regulations are neither the blanket racial exclusion that some critics portray, nor a policy framework that should escape rigorous scrutiny. Getting that distinction right is the necessary starting point for a more credible debate.

Daryl Swanepoel is the Chief Executive Officer of the Inclusive Society Institute (ISI). This article draws on the Institute's assessment of South Africa's proposed preferential procurement regime.