

Chapter 57

Black Economic Empowerment, ICT, and Preferential Public Procurement in South Africa

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ABSTRACT

Broad-based black economic empowerment has been a central part of the South African government's economic transformation strategy. The main purpose of BEE is to increase the number of black people that manage, own, and control the country's economy, and as a result, to reduce income inequalities and to contribute to economic transformation in South Africa. During apartheid in South Africa, the government procurement system favoured large, established businesses and made it difficult for newly established businesses to participate in the procurement system. This chapter gives an overview of the Black Economic Empowerment policy as a means to achieve socio-economic transformation in South Africa by providing preferences for Historically Disadvantaged Individuals (HDIs) and small businesses, when making procurement decisions. It also examines how procurement is used as a policy tool by government while simultaneously ensuring that it does not contradict the constitutional right to equality. The chapter also explores the implications of the Preferential Public Procurement Framework Act (Act 5 of 2000) and the latest procurement regulations. Finally, it discusses the use of ICT and the vital role it plays in preferential procurement in South Africa.

DOI: 10.4018/978-1-4666-3886-0.ch057

INTRODUCTION

Almost two decades have passed since a democratic government was introduced in South Africa. Whereas the apartheid system was characterized by inequality and segregation in almost every walk of life, including the social, economic and political spheres, the new government is based on integration and equality (Marais & Coetzee, 2006, pp. 111-112). The Constitution of South Africa, (Republic of South Africa, 1996) provides the basis for change in the country's social and political institutions. Hence, the term "transformative character" acknowledges the constitution's role in a period of political transition, to provide a legal framework to redress past injustices and facilitate a more just society (Liebenberg, 2010, pp. 24-25, 27). The principle of equality is one of the fundamental human rights laid down in the Constitution. However, one cannot insist on equal treatment before equality has been achieved (*President of South Africa v Hugo*, 1997(6) BCLR 708 CC pp. 728-729). The Constitution therefore provides for legislative measures designed to provide redress for historically disadvantaged individuals (Section 9[2]). The Broad-Based Black Economic Empowerment Act (BBBEE Act) (Republic of South Africa, 2003) is one such legislative measure designed to correct racial imbalances and to empower disadvantaged communities. Black Economic Empowerment (BEE) is a phenomenon taking precedence in South Africa to create and contribute towards economic transformation and to reduce income inequalities by allowing historically disadvantaged people the opportunity to own and control their own businesses and contribute towards the country's economy (Noon, 2009). One of the three elements of BEE is the use of procurement as a policy tool by government.

During the apartheid era in South Africa, the public procurement system allocated contracts to the lowest bidder unless it was clear that the organization or individual did not have the required experience to complete the contract. As a result,

most government contracts were awarded to white-owned businesses. Such unfair practices made it difficult for small businesses to bid on government contracts since their costs were generally higher than larger firms. The policies during this period also discriminated against economically disadvantaged groups. The black majority in the country (because of the inequalities in income, wealth, and skills that existed between racial groups, between men and women, as well as between urban and rural areas) were not in a position to engage in formal business ventures (Beach, 2012). Since 1994, policy changes have come about that have shifted the emphasis and objectives of public procurement. Through the Constitution and the Preferential Public Procurement Framework Act (PPPF Act) (Republic of South Africa, 2000) and Preferential Procurement Regulations (Procurement Regulations) (Republic of South Africa, 2011), a framework has been created to correct the imbalances of the past through redress. Yet the promulgation of legislation alone cannot bring about the equality that is contemplated. The government also intended to use ICT to correct the imbalances mentioned, particularly through the provision of e-government services (which includes e-procurement).

The first part of this chapter examines how BEE operates. This section deals with measures that are designed to address the economic empowerment of black people in terms of business ownership. The second part analyses the implications of the PPPF Act for organs of government insofar as they may afford preferential treatment to disadvantaged businesses when making public procurement decisions. It concludes with a discussion on how ICT is used to improve and enhance the relationship between the government and the South African public.

SOUTH AFRICA DURING APARTHEID

In order to obtain a proper understanding of South Africa's attempts to provide redress for the harm caused by apartheid, one needs to understand the

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