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CORPORATE AND COMMERCIAL ALERT

IN THIS ISSUE

REVISED CONSTRUCTION SECTOR CODE DECONSTRUCTED

The DTI issued the draft Amended Construction Sector Code for public comment (Revised Construction Sector Code) on 28 October 2016. The purpose of the Revised Construction Sector Code is to, *inter alia*, align to the principles contained in the Amended Generic Codes of Good Practice of 2013 (Amended Generic Codes).

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This alert is a snapshot of the notable changes between the Revised Construction Sector Code and the Construction Sector Code published on 5 June 2009 (Current Sector Code).

The thresholds of entities set out in the Revised Construction Sector Code have been increased compared to the Current Sector Code, which follows the trend of the Amended Generic Codes.



The DTI issued the draft Amended Construction Sector Code for public comment (Revised Construction Sector Code) on 28 October 2016. The purpose of the Revised Construction Sector Code is to, *inter alia*, align to the principles contained in the Amended Generic Codes of Good Practice of 2013 (Amended Generic Codes). Whilst on a whole this has been achieved, there are some deviations from the methodology, thresholds, targets and weighting contemplated in the Amended Generic Codes. Interested parties are entitled to submit comments on the Revised Construction Sector Code to the DTI within 60 days from the date of publication.

This alert is a snapshot of the notable changes between the Revised Construction Sector Code and the Construction Sector Code published on 5 June 2009 (Current Sector Code).

The terms "Built Environment Professional" (BEP) and "Contractor" have been expanded in the Revised Construction Sector Code. The term BEP now contemplates a list of activities that are conducted by BEPs and broadens the industries within which BEPs provide services. The term Contractor now classifies Contractors in accordance with the CIDB grading tables and confirms that construction material suppliers, being entities that, *inter alia*, manufacture or supply building material and equipment or enterprises that provide plant hire for construction related activities, are measurable against the thresholds, targets and weighting applicable to Contractors in the scorecards.

The thresholds of entities set out in the Revised Construction Sector Code have been increased compared to the Current Sector Code, which follows the trend of the Amended Generic Codes.

The Revised Construction Sector Code also seeks to deviate from the Amended Generic Codes as it is proposed that affidavits should

not be accepted in the sector unless these have been issued by:

- (i) the CIPC, in the case of start-up enterprises; or
- (ii) commercial attorneys, accountants and officers with a competent understanding of the BEE policy framework, in the case of entities seeking to declare that they are either 51% or 100% black-owned.

The rationale for this deviation is unclear. In terms of the Amended Generic Codes, the requirement for such entities to submit an affidavit by an individual from within the organisation is aimed at alleviating the costs associated with having to conduct a verification exercise. The proposal is however for a nominal fee to be charged for an EME certificate by BEE verification professionals or rating agencies. No mention has been made of the fees that should be charged by commercial attorneys and auditors (presumably because such fees cannot be regulated in the Revised Construction Sector Code), nor is it clear whether such fees will also be charged for a QSE certificate.

The Revised Construction Sector Code classifies the elements of ownership, preferential procurement and supplier

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The target for Exercisable Voting Rights in the Large Enterprise Scorecard in the Revised Construction Sector Code is 32.5%, which is 2.5% higher than the Generic Scorecard set out in the Current Sector Code.



development as priority elements, each of which has a minimum threshold that must be achieved; failing which the measured entity will be penalised by a reduction in its BEE compliance status by one level. The minimum thresholds are the same as set out in the Amended Generic Codes.

Ownership

The target for Exercisable Voting Rights in the Large Enterprise Scorecard in the Revised Construction Sector Code is 32.5%, which is 2.5% higher than the Generic Scorecard set out in the Current Sector Code. Both Contractors and BEPs will be able to obtain one bonus point if over 50% of the Exercisable Voting Rights in a measured entity is held by:

- (i) black people; and/or
- (ii) black women.

In addition, two bonus points can be attained if more than 75% of the Exercisable Voting Rights in a measured entity are held by black people. The bonus points will only be attained if the targets are met on a flow through basis.

The QSE Scorecard in the Revised Construction Sector Code contemplates a current target of 25% for Exercisable Voting Rights and Economic Interest to which black people are entitled, which is lower than the target set out in the QSE Scorecard in the Current Sector Code. Bonus points will also be attained if the Exercisable Voting Rights and Economic Interest to which black people are entitled equals to or exceeds 40% and if the Exercisable Voting Rights and Economic Interest to which black women are entitled equals to or exceeds 12.5%.

Management Control

The Large Enterprise Scorecard in the Revised Construction Sector Code seeks to increase the targets for Exercisable Voting Rights of black board members and black employees in junior management. Additional points will be attained if a target of 50% is met for black professionally registered employees as a percentage of all professionally registered employees and if 30% of all black employees are youth.

The QSE Scorecard in the Revised Construction Sector Code splits the targets and weightings according to the number of black people and black females at the executive management level and then in the senior, middle and junior management categories. No bonus points are applicable in this scorecard.

There is also a commitment that measured entities must strive for parity in remuneration between race groups and gender and to this end must provide full payroll access to a verification agency during the verification "to ensure that a person's responsibility and remuneration are in line with their job grade". It is not clear what consequences from a BEE perspective, if any, would arise if a measured entity has not met its requirements in respect of parity of remuneration.

Skills Development

The skills development element in the Large Enterprise Scorecard of the Revised Construction Sector Code contains a current target of 2% for skills development expenditure on black people as a percentage of the Leverage Amount which target is increased incrementally. This is

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The Revised Construction Sector Code is aligned to the Amended Generic Codes in that for this element, procurement spend must be on empowering suppliers but contains a deviation in that the Revised Construction Sector Code does not contain an enterprise development element.



much lower than the target of 6% in the Amended Generic Codes. The second category relating to skills development expenditure of black people is then subdivided between African people, black management (executive, senior, middle and junior management) and bursaries or scholarships for black people. The targets are not based on the overall demographic representation of black people as contained in the Amended Generic Codes. Bonus points can be attained by Contractors for the number of black employees that complete a mentorship programme during the previous three years.

The skills development element in the QSE Scorecard follows a similar format to the Amended Generic Codes save that seven points can be obtained if a target of 25% is attained for skills development expenditure on learning programmes for black management (executive, senior and middle management) as a percentage of total skills development expenditure of the measured entity on black people.

Preferential Procurement and Supplier Development

The Revised Construction Sector Code is aligned to the Amended Generic Codes in that for this element, procurement spend must be on empowering suppliers but contains a deviation in that the Revised Construction Sector Code does not contain an enterprise development element.

The targets in the Large Enterprise Scorecard for the preferential procurement element

for both BEPs and Contractors for BEE procurement spend from all empowering suppliers has been increased to 80% and the points allocated thereto has been reduced to six compared to 12 in the Current Sector Code. In order to obtain an increased scoring for this element, clients would need to ensure that a target of 20% is met for BEE procurement spend from empowering suppliers that are either 51% black-owned or 51% owned by black designated groups and that a target of 12% is met for BEE procurement spend from empowering suppliers that are 35% black women-owned.

The QSE Scorecard also does not contain an enterprise development element. No points are attained if any spend is on black designated groups that are 51% black-owned nor are any bonus points allocated for this scorecard.

Socio-Economic Development

The target for the average annual value of all socio-economic development contributions by the measured entity as a percentage of NPAT/Leviable Amount in the Current Sector Code is 1% NPAT for Contractors and 0.25% Leviable Amount for BEPs. The Large Enterprise Scorecard in the Revised Construction Sector Code contemplates a two pronged approach for socio-economic development. The first part relates to the annual value of all qualifying socio-economic contributions by the measured entity as a percentage of the target (which will be 1.25% of NPAT). The second part relates to that portion of qualifying socio-economic

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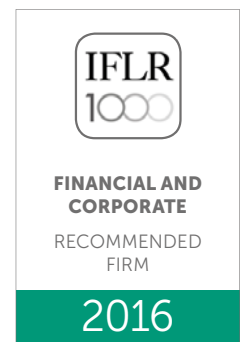
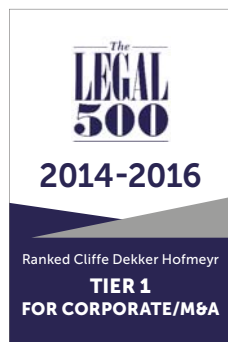
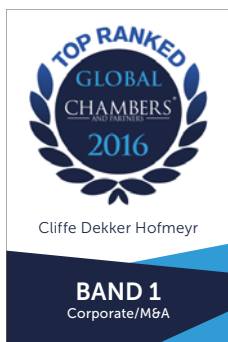
The target set out in the QSE Scorecard for the annual value of all socio-economic development contributions by the measured entity as a percentage of NPAT/Leviable Amount is 1% NPAT for Contractors and 0.2% of Leviable Amount for BEPs.

contributions (ie 1.25% of NPAT) that is spent on disadvantaged communities and the target is 30% of the 1.25% of NPAT target. An additional bonus point can also be attained if the annual value of contributions towards Structured SED Projects by the measured entity meets 1.25% of NPAT.

The target set out in the QSE Scorecard for the annual value of all socio-economic development contributions by the measured entity as a percentage of NPAT/Leviable

Amount is 1% NPAT for Contractors and 0.2% of Leviable Amount for BEPs. A bonus point will be attained if the portion of qualifying socio-economic contributions (i.e. the 1% of NPAT or 0.2% of Leviable Amount) that is spent on disadvantaged communities is 50% of the aforementioned targets.

Lauren Wilson and Verushca Pillay



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