

THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION'S

PRACTICE GUIDE 02 of 2023

THE ROLE OF ORGANS OF STATE AND PUBLIC ENTITIES IN ADVANCING BROAD-BASED BLACK ECONOMIC EMPOWERMENT THROUGH SECTION 10(1) OF THE B-BBEE ACT

A. Introduction

1. The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is an entity established by the Broad-Based Black Economic Empowerment Act 53 of 2003 as amended by Act 46 of 2013 (“the Act”), to oversee the implementation of the Act, which includes provision of practice guides, explanatory notices, non-binding advisory opinions and clarification services to improve the understanding of the Act.
2. This Practice Guide (“the guide”) is issued as a non-binding guide purely to assist organs of state and public entities with the implementation of section 10(1) of the B-BBEE Act.
3. Please note that this Guide does not constitute a legal document or a ruling of the B-BBEE Commission on the issue concerned. Rather, it seeks to guide organs of state and public entities in institutionalising the implementation of the Codes of Good Practice (the Codes) into its legislative and constitutional mandate to give effect to section 10(1) of the Act.

B. Purpose of this practice guide

4. Inequality along racial lines is a priority overarching challenge in South Africa, inherited from the past discrimination against black people in all spheres of life, in particular the economy. For this reason, South Africa’s Constitution advocates the right to equality in section 9(2), which is the enabling provisions for measures aimed at redressing economic injustice.

5. According to the 2020 Inequality Trends in South Africa report released by Statistics South Africa, South Africa is one of the most unequal countries in the world, reporting a per-capita expenditure Gini coefficient of over 0.60 since 2015. Black people, and women to be specific, are the most affected by poverty and inequality. This is also echoed by the 2022 World Bank report on Inequality in Southern Africa: An Assessment of the Southern African Customs Union. Inequality in South Africa results from skewed income distribution, unequal access to opportunities, low economic growth rate, and high unemployment.
6. The practice guide, therefore seeks to enhance the effectiveness and impact with which organs of state and public entities contribute to reducing inequality, and to promote economic transformation and meaningful participation of black people in the economy, using the B-BBEE Codes issued by the Minister of Trade, Industry and Competition (the Minister).

C. What section 10(1) of the B-BBEE Act requires?

7. In terms of section 10(1) of the Act, every organ of state or public entity must apply any the relevant Code issued in terms of the B-BBEE Act in:
 - a) Determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;
 - b) Developing and implementing a preferential procurement policy;
 - c) Determining qualification criteria for the sale of state owned enterprises;
 - d) Developing criteria for entering into partnerships with the private sector; and
 - e) Determining criteria for the awarding of incentives, grants and investment schemes in support of B-BBEE.
8. Therefore, by law every organ of state or public entity ought to include B-BBEE compliance as part of the application or selection criteria in relation to the above listed economic activities. This may require organs of state and public entities to implement measures to facilitate the correct and effective implementation of the B-BBEE Act, including revising licensing and incentive requirements to include B-BBEE as a criteria.

D. Who is regarded as an organ of state or public entity by the B-BBEE Act?

9. The B-BBEE Act in section 1 has defined a public entity as an entity listed in Schedule 2 and 3 of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA), and the term organ of state is defined to include a national or provincial government as defined in the PFMA, a

municipality as contemplated in the Constitution, Parliament, a provincial legislature and a constitutional institution listed in Schedule 1 of the PFMA.

E. What informs B-BBEE compliance for section 10(1) purposes?

10. Compliance with B-BBEE by every entity that undertakes business with an organ of state or public entity will be based on the relevant Codes, and in particular the targets set under each of the B-BBEE scorecard elements, namely ownership, management control, skills development, enterprise and supplier development, socio-economic development, and specific sectoral elements where applicable.
11. Reference to any relevant Codes means the generic Codes and sector Codes. To date, the Minister has gazetted eleven Codes, which are the generic Codes and ten (10) sector Codes for Information and Communication Technology, Tourism, Construction; Integrated Transport (non-aligned 2009 Version), Property, Forestry, Financial Services, AgriBEE, Marketing, Advertising and Communication, and Defence.
12. In applying the relevant Codes to set B-BBEE criteria to comply with the prescripts of section 10(1) of the Act, an organ of state or public entity cannot go beyond the set targets for each of the B-BBEE elements. The only time a higher criterion such as 51% black ownership can be implemented is when the organ of state or public entity through the use of Section 9(6) of the B-BBEE Act, has approached the Minister to obtain approval to set higher transformation targets for the sector based on the desired level in pursuit of economic transformation in the sector. The approval by the Minister must be obtained prior to setting the eligible criteria for any of the above listed economic activities covered by section 10(1) of the B-BBEE Act. The process to seek approval to exceed the set targets is outlined in regulation 19 of the B-BBEE Regulations.
13. To exceed the targets as contemplated in section 9(6) of the Act means exceeding the (i) 40% sub-minimum targets set out in the Codes for each priority element, namely of equity ownership, skills development, and enterprise and supplier development; and (ii) targets set out in each of the five (5) elements of the Codes.

F. When can application of section 10(1) of the B-BBEE Act not be considered?

14. The Minister may, after consultation with the relevant organ of state or public entity, exempt the organ of state or public entity from the requirements contained in section 10(1) of the Act, or allow

a deviation therefrom on the grounds of particular objectively verifiable facts and circumstances applicable to the organ of state or public entity which necessitate an exemption or deviation.

15. An exemption is defined as a relief from implementing the Codes, whilst a deviation means deviation of the organ of state or public entity from the Codes, which it could be by way of lowering the set targets of each B-BBEE element as an example. The process to obtain an exemption or deviation from section 10(1) is clearly stipulated in Part 7 Regulation 20 of the B-BBEE Regulations.
16. The process to seek a deviation and exemption, or permission to exceed the target(s) as per section 9(6) of the Act must be published in the Government Gazette once granted by the Minister. This is intended to ensure transparency and enhance compliance by entities that operate within the sector or industry of the said organ of state or public entity.

G. The role of the B-BBEE Commission

17. The B-BBEE Commission is required to ensure that the Act is implemented properly, and that includes monitoring implementation to section 10(1) by organs of state and public entities. Therefore, in providing support to ensure effective implementation of section 10(1) of the Act, the B-BBEE Commission is available to provide advisory services to all organs of state and public entities, including presentations and workshops on the B-BBEE Act and the Codes in order to enhance the level of compliance with section 10(1) of the Act. These services are provided free of charge.
18. Therefore, any organ of state or public entity should feel free to approach the B-BBEE Commission for such advice at any time. Our turnaround times for simple clarification are 5 working days and 30 working days for a more detailed advisory opinion based on the given facts.

H. Conclusion

19. This Practice Guide is issued as a guide purely to assist organs of state and public entities to better prepare for a verification process.
20. This Practice Guide may be updated by the B-BBEE Commission in the event of any material changes arising from developments in the application of the B-BBEE Act. In such an instance, an amended version will be published to replace this one.

21. For any queries or further clarity on this Practice Guide, kindly feel free to contact us at the following contact details:

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