NATIONAL TREASURY
PPP MANUAL
MODULE 2: CODE OF GOOD PRACTICE FOR BEE IN PPPs

NATIONAL TREASURY PPP PRACTICE NOTE NUMBER 03 OF 2004

In accordance with section 76(4)(g) of the Public Finance Management Act, 1999 (PFMA), National Treasury may issue instructions to institutions to which the PFMA applies in order to facilitate the application of the PFMA and the regulations promulgated under the PFMA.

This National Treasury PPP Practice Note Number 03 of 2004 'Code of Good Practice for Black Economic Empowerment in Public Private Partnerships' applies to departments, constitutional institutions, public entities listed or required to be listed in schedules 3A, 3B, 3C and 3D to the PFMA, and subsidiaries of such public entities.

NATIONAL TREASURY

PPP unit

PPP PROJECT CYCLE

Reflecting Treasury Regulation 16 to the Public Finance Management Act, 1999

PPP Manual reference

PROJECT PREPARATION PERIOD

Phase I — INCEPTION

- Register project with the relevant treasury
- Appoint project officer
- Appoint transaction advisor

PPP Manual reference: Module 1, Module 2, MODULE 3, Module 6

Phase II — FEASIBILITY STUDY

Prepare a feasibility study comprising:
- Needs analysis
- Options analysis
- Project due diligence
- Value assessment
- Economic valuation
- Procurement plan

Treasury Approval: I

PPP Manual reference: Module 1, Module 2, MODULE 4, Module 6, Module 7, Module 8, Module 9

Phase III — PROCUREMENT

- Design a fair, equitable, transparent, competitive, cost-effective procurement process
- Prepare bid documents, including draft PPP agreement

Treasury Approval: IIA

- Pre-qualify parties
- Issue request for proposals with draft PPP agreement
- Receive bids
- Compare bids with feasibility study and each other
- Select preferred bidder
- Prepare value-for-money report

Treasury Approval: IIB

- Negotiate with preferred bidder
- Finalise PPP agreement management plan

Treasury Approval: III

PPP Manual reference: Module 1, Module 2, Module 4, MODULE 5, Module 6, Module 7, Module 8, Module 9

PPP agreement signed

PROJECT TERM

Phase IV — DEVELOPMENT

Phase V — DELIVERY

Phase VI — EXIT

- Measure outputs, monitor and regulate performance, liaise effectively, settle disputes
- Report progress in the Annual Report
- Scrutiny by the Auditor-General

PPP Manual reference: Module 1, Module 2, Module 5, MODULE 6, Module 7, Module 8, Module 9

ABOUT THIS MODULE

Module 2: Code of Good Practice for BEE in Public Private Partnerships is National Treasury's official framework for black economic empowerment in public private partnerships. PPPs are excellent vehicles for developing BEE in South Africa. The *Code* is relevant in all phases of a PPP, and needs to be rigorously applied.

NATIONAL TREASURY

CODE OF GOOD PRACTICE for BLACK ECONOMIC EMPOWERMENT in PUBLIC PRIVATE PARTNERSHIPS

Following public consultation and incorporation of comments, the *Code of Good Practice for Black Economic Empowerment in Public Private Partnerships (Code for BEE in PPPs)*, is submitted by the Minister of Finance to the Minister of Trade and Industry to be issued in terms of the Broad-based Black Economic Empowerment Act, 2003 (BBBEE Act).

The Code for BEE in PPPs constitutes *Module 2* of *National Treasury's PPP Manual,* issued as *National Treasury PPP Practice Note Number 3 of 2004* in terms of section 76(4)(g) of the Public Finance Management Act, 1999 (PFMA). It applies to departments, constitutional institutions, public entities listed or required to be listed in schedules 3A, 3B, 3C and 3D to the PFMA and subsidiaries of such public entities.

This *Code for BEE in PPPs* follows the release of the *Financial Sector Charter*, and complements its commitments. It also acknowledges the development of other sectoral charters whose implementation will further support BEE in PPPs.

CONTENTS

DEFINITIONS

"Active Equity"	means, in relation to any Black Equity or in relation to any issued shares in the share capital of any Subcontractor held by Black People and/or Black Enterprises, in which such Black Equity or shares is/are held by Black People and/or Black Enterprises who will participate directly in the day-to-day management and operations of the project.
"Black Enterprise"	means an enterprise that is at least 50.1% beneficially owned by Black People and in which Black People have substantial Management Control. Such beneficial ownership may be held directly or through other Black Enterprises.
"Black Equity'	means the voting equity in the Private Party held by Black Shareholders from time to time.
"Black People"	means African, Coloured and Indian South African citizens.
"Black Shareholder"	means any shareholder that is a Black Person or a Black Enterprise.
"Black Women"	means female African, Coloured and Indian South African citizens.
"Broad-based Black Economic Empowerment"	has the meaning defined in the Broad-based Black Economic Empowerment Act, No 53 of 2003 (BBBEE Act).
"Feasibility Study"	has the meaning given in Treasury Regulation 16 to the Public Finance Management Act, 1999 (PFMA).
"Institution"	has the meaning defined in Treasury Regulation 16 to the PFMA. It means a department, a constitutional institution, a public entity listed, or required to be listed, in schedules 3A, 3B, 3C and 3D to the PFMA, or any subsidiary of any such public entity.

"Management Control"	means, in relation to any enterprise, the ability to direct or cause the direction of the business and management policies or practices of that enterprise.
"Private Party"	has the meaning defined in Treasury Regulation 16 to the PFMA. Such Private Party is typically a special purpose vehicle (SPV) incorporated in the Republic of South Africa as a private limited liability company for the sole purpose of exercising its rights and performing its obligations under the PPP Agreement.
"PPP Agreement"	has the meaning defined in Treasury Regulation 16 to the PFMA. It means a written contract recording the terms of a PPP concluded between an Institution and a Private Party.
"Public Private Partnership or PPP"	has the meaning defined in Treasury Regulation 16 to the PFMA. It means a commercial transaction between an Institution and a Private Party in terms of which the Private Party – (a) performs an Institutional function on behalf of the Institution; and/or (b) acquires the use of state property for its own commercial purposes; and (c) assumes substantial financial, technical and operational risk in connection with the performance of the institutional function and/or use of state property; and (d) receives a benefit for performing the Institutional function or from utilising the state property, either by way of (i) consideration to be paid by the Institution which derives from a revenue fund or, where the Institution is a national government business enterprise, from the revenues of such Institution; or (ii) charges or fees to be collected by the Private Party from users or customers of a service provided to them; or (iii) a combination of such consideration and such charges or fees.
"Subcontractors"	means the counter-parties of the Private Party to the Subcontracts including the Construction Subcontractor and the Operations Subcontractor.
"SMME or Small, Medium or Micro Enterprise"	means any business, trade, undertaking or other enterprise which is directly owned and managed by one or more natural persons and which has: (a) less

than [x] full-time equivalent employees; (b) an annual turnover less than [Rx] (indexed to CPIX); and (3) gross asset value (fixed property included) of less than [Rx] (indexed to CPIX), to be determined by the Institution, taking account of the sector, on a project by project basis.

"Transaction Advisor" has the meaning defined in Treasury Regulation 16 to the PFMA. It means a person or persons appointed in writing by the Institution, who has or have the appropriate skills and experience to assist and advise the Institution in connection with a PPP, including the preparation and conclusion of a PPP Agreement.

PREAMBLE

In a concerted drive to redress the stifling economic effects of apartheid, the democratic South African government has adopted a policy of BEE which is broad-based, inclusive, and part of the country's overall growth strategy. PPPs are being used increasingly widely to implement national and provincial government's infrastructure and service delivery commitments. Regulated by the relevant treasury (currently, National Treasury) in terms of Treasury Regulation 16 to the PFMA, PPPs offer valuable opportunities for strong and sustainable BEE.

South Africa's BEE policy is articulated in the 2003 *'Strategy for Broad-based Black Economic Empowerment' (BBBEE Strategy)* and is given effect in the BBBEE Act. The *BBBEE Strategy* outlines government's policy instruments for achieving BEE and sets out a balanced scorecard to measure three core elements of BEE progress in all enterprises and sectors:

- direct empowerment through ownership and control of enterprises and assets;
- human resource development and employment equity; and
- indirect empowerment through preferential procurement and enterprise development.

The *BBBEE Strategy* notes that BEE criteria, reflecting the balanced scorecard, will be applied whenever government *'grants a concession to a private enterprise to operate an asset or enterprise on behalf of the state'* or *'enters into a public private partnership'*, amongst others.

Section 9 of the BBBEE Act provides that the Minister of Trade and Industry may issue '*codes of good practice on BEE*'. Section 10 provides further that *'every organ of state and public entity must take into account and, as far as it is reasonably possible, apply any relevant code of good practice'* in, *inter alia 'determining qualification criteria for the issuing of licences, concessions ...; developing and implementing a preferential procurement policy; ... and developing criteria for entering into partnerships with the private sector'*.

Section 12 of the BBBEE Act provides that the Minister of Trade and Industry may publish and promote *'a transformation charter for a particular sector of the economy'* if he or she is satisfied that such a charter *'has been developed by major stakeholders in that sector; and advances the objectives of [the BBBEE Act]'*. This *Code for BEE in PPPs* recognises that the implementation of such transformation charters in the private sector will contribute materially to achieving effective BEE in PPPs.

It is National Treasury's intention that BEE is integral to all phases of the regulated PPP project cycle, and that BEE is made contractually binding in all PPP Agreements. The provisions of the *Code for BEE in PPPs* are therefore reflected in all modules of *National Treasury's PPP Manual*, and in *Standardised PPP Provisions: First Issue: 11 March 2004*.

PART I

1. Policy on BEE in PPPs

In keeping with the principles and policy objectives of the *BBBEE Strategy*, PPP BEE policy is devised to achieve a broad-based and sustainable BEE outcome in every PPP project undertaken in terms of Treasury Regulation 16 to the PFMA. The policy is to be applied by Institutions in the two distinct procurements of the regulated PPP project cycle: firstly, in the selection of its Transaction Advisor; and secondly, in the selection of a Private Party for the PPP itself.

Transaction Advisor procurement[1]

In compliance with the Preferential Procurement Policy Framework Act (PPPFA), the BEE component of a Transaction Advisor bid will constitute **10% of the bid evaluation weighting**[2], with the price and technical elements constituting the remaining 90%. BEE in the Transaction Advisor bid will be evaluated against a balanced scorecard for PPP Transaction Advisor appointments, and bidders must achieve a **minimum threshold of 60%** of the total BEE points. If a Transaction Advisor bid fails to pass this BEE threshold, it should not be evaluated further.

The BEE elements to be evaluated in a Transaction Advisor bid are elaborated in **Part III(1)** of this *Code for BEE in PPPs*.

PPP procurement[3]

BEE is a key component of South African PPP projects, each of which is structured on a combination of financial, technical and BEE components in order to achieve optimal value for money in government's delivery of infrastructure and services. In compliance with the PPPFA, the BEE component of a PPP bid will constitute **10% of the bid evaluation weighting**. The price and technical components will be weighted within the remaining 90%, as appropriate to the project. BEE in the PPP bid will be evaluated against a **balanced scorecard** designed for the project, and bidders must achieve a **minimum threshold of 50%** of the total BEE points. If a PPP bid fails to pass this BEE threshold, it should not be evaluated further.

The BEE elements that should be included in each PPP project, and the indicative targets for each element, are elaborated in **Part II** and summarised in the PPP BEE Balanced Scorecard in **Part IV** of this *Code for BEE in PPPs*.

1. Refer to *National Treasury's PPP Manual: Module 3: PPP Inception*.
2. In terms of the PPPFA, a maximum of 10% of bid evaluation weighting goes to BEE considerations if the price of the contract is above R500 000. If the price is below R500 000, the BEE weighting is 20%. Most PPP transaction advisor costs will be above R500 000.
3. Refer to *National Treasury's PPP Manual: Module 5: PPP Procurement*.

PPP project cycle[4]

No PPP may be issued to the market by an Institution without a BEE balanced scorecard for the project containing a clear and appropriate set of BEE elements, targets, minimum thresholds, and weightings, duly approved as part of the Feasibility Study for Treasury Approval: I and the bid documents for Treasury Approval: IIA in terms of Treasury Regulation 16 to the PFMA. Bids received thereafter are evaluated by the Institution, *inter alia*, for substantiation of the Private Party's BEE commitments. The quality of the BEE component of the preferred bid forms part of the value-for-money report to be submitted by the Institution for Treasury Approval: IIB, prior to the commencement of negotiations. Negotiations that follow must seek to maximise BEE benefits in the final terms of the deal, and to tie up provisions for managing the PPP Agreement post signature. These BEE commitments are part of the motivation for the final Treasury Approval: III, allowing the parties to sign the PPP Agreement. The PPP Agreement binds the parties to their BEE commitments for the duration of the PPP, stipulating the consequences of default.[5]

These phases of the PPP project cycle, as they apply to the BEE component of a PPP, are elaborated in **Part III** of this *Code for BEE in PPPs*.

Policy objectives for BEE in PPPs are:

- to achieve meaningful and beneficial **direct ownership of substantial equity interests** in the Private Party to a PPP Agreement by Black People, Black Women and Black Enterprises;
- to achieve effective **participation in the management control** of the Private Party and its subcontractors by Black People and Black Women;
- to ensure that a substantive proportion of the Private Party's **subcontracting and procurement** is to Black People, Black Women and Black Enterprises;
- to ensure effective **employment equity and skills development** in the Private Party and its Subcontractors throughout the PPP project;
- to promote positive **local socio-economic impact** from the project to the benefit of SMMEs, the disabled, the youth, and non-government organisations within a targeted area of project operations;
- to create **jobs**; and
- for Institutions to be supported in all PPP projects by **financial, legal and technical Transaction Advisors** who generally reflect South Africa's diverse population, and to build the professional skills and number of Black People and Black Enterprises in these fields.

To further support and promote BEE in PPPs, government makes three **proactive commitments** in **Part V** of this *Code for BEE in PPPs*.

4. Refer to *National Treasury's PPP Manual: Module 1: South African Regulations for PPPs*.
5. Refer to *National Treasury's Standardised PPP Provisions*: *First Issue: 11 March 2004*.

2. Legal basis for PPP BEE policy

This PPP BEE policy is developed with reference to the following legislation:

- The **Constitution of the Republic of South Africa, 1996**, enables organs of state to implement *'procurement policy for (a) categories of preference in the allocation of contracts and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination'* (section 217(2)).
- **Treasury Regulation 16**, issued in terms of the **PFMA** for the purposes of regulating national and provincial PPPs, states that the procurement procedure for a PPP '***must** include a preference for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*' (Treasury Regulation 16.5.3 (b)).
- The **PPPFA, 2000**, and its regulations prescribe a framework for calculating BEE points relative to 'functionality' and 'price' in government procurement.
- The **BBBEE Act, 2003**, has as its objective *'to facilitate broad-based black economic empowerment'* and provide for the issuing of codes of good practice to be applied by organs of state and public entities, *inter alia, 'in developing criteria for entering into partnerships with the private sector.'*
- The **Employment Equity Act, 1998** provides for improving employment equity for the benefit of historically disadvantaged individuals (as defined therein).

3. Why PPPs are good for BEE

There are key features of PPPs that make them inherently excellent for achieving BEE objectives:

- The **long-term nature** of PPPs provides an opportune instrument to grow Black Equity and black management over time.
- **Risk is clearly identified** in PPPs, clearly costed and appropriately allocated, so black participants know in advance what they are committing to.
- The formation of **private consortia** in the form of special purpose vehicles (SPVs) for many PPPs facilitates long-term beneficial partnerships between new Black Enterprises and experienced, resourced companies – both as equity partners and in project management, and both at the Private Party SPV and Subcontracting levels.
- Where government is the buyer of a service, and insofar as the service is provided to the agreed standards, there is a **steady revenue stream** to the Private Party, reducing risk to new Black Enterprises.
- Principal equity sponsors in a PPP are often also first-tier Subcontractors, building **incentives for optimal risk management**.
- PPPs provide significant subcontracting opportunities for Black Enterprises, where **early cash-flow benefits** can be derived as delivery commences.
- PPPs have far-reaching **broad-based** BEE potential: through the subcontracting and procurement mechanisms they can involve a full spectrum of large, medium

and small enterprises, and bring tangible, local, economic development benefits to targeted groups of people.
- **Return on equity** to the Private Party is competitive where risk is properly assumed.
- There is an increasingly strong demand for **black professionals** as Transaction Advisors to both Institutions and Private Parties in PPPs.
- PPPs develop **skills**.
- PPPs create **jobs**.

4. Challenges for BEE in PPPs

There nevertheless remain obstacles to achieving sustainable BEE in PPPs:
- There is a **small pool of Black Equity** in South Africa. Historically, Black People have not accumulated capital and it is a challenge for Black Enterprises to raise required levels of equity at reasonable prices.
- Sources of BEE funding are generally **expensive**, reflecting lenders' assessment of risk associated with new enterprises whose balance sheets may be relatively small, or whose experience may be relatively limited.
- Costs of **independent financial and legal advice** to Black Enterprises are an inhibiting factor in the preparation of bids, during contract negotiation, and during start-up, often leaving black partners in a consortium vulnerable to concluding disadvantageous arrangements.
- There is **limited black experience and skill** in PPPs, resulting in an uneven playing field in relation to partners that are established companies.
- Established companies in the consortia often become obliged to provide **sponsor security** for the committed BEE capital and to guarantee performance of the black partners, contributing further to the uneven playing field for consortium members.
- **Dividend distributions** typically do not occur in the earlier years of a PPP, which is hard for new Black Enterprises participating as shareholders in the Private Party.
- There are few experienced black South African **PPP Transaction Advisors**.

It is in recognition of both the value in PPPs for sustainable BEE, and the challenges, that this *Code for BEE in PPPs* has been devised.

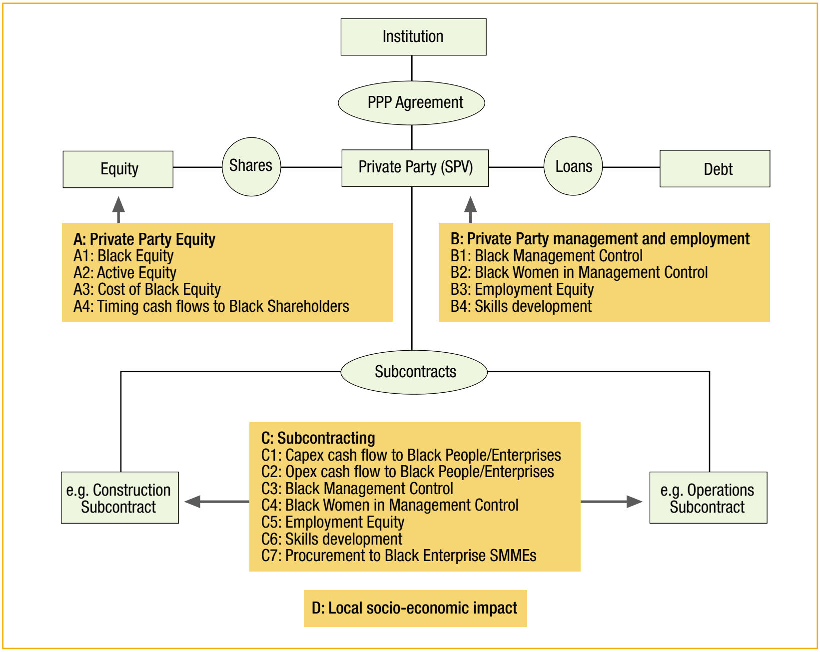
PART II

How to apply BEE PPP policy in the typical structure of a PPP

Many PPP projects are structured in the manner depicted below. The illustration shows where PPP BEE policy should be effected in all PPP Agreements. If alternative or simpler PPP structures are developed, they should seek to achieve an equivalent BEE effect. While PPP projects differ, and the BEE elements identified are not exhaustive, at least **the elements listed as A1- 4, B1- 4, C1- 7 and D should be appropriately incorporated in the structure of PPP projects undertaken in terms of Treasury Regulation 16 to the PFMA**. The remainder of **Part II** elaborates on each **PPP BEE element**.

Indicative targets for each element are given where appropriate. Targets for a project should always be determined during the Feasibility Study phase, in recognition of the capacity of Black Enterprises in the sector, the implementation of sectoral transformation charters, and, where appropriate, may be structured to attain stronger BEE outcomes over the project term.

The identified elements and their indicative targets are summarised in the *PPP BEE Balanced Scorecard* in **Part IV**.



A. Private Party equity

Substantial increases in black ownership of new enterprises is a central policy objective of government's *BBBEE Strategy*. PPPs offer a real opportunity to grow new black ownership in long-term sustainable businesses.

Four specific elements of Private Party equity are identified for ensuring that this part of the *BBBEE Strategy* is captured in a sustainable way in PPPs:

- **A1:** the percentage of Black Equity in the Private Party;
- **A2:** the percentage of Active Equity;
- **A3:** the cost of Black Equity; and
- **A4:** the timing of project cash flows to Black Shareholders.

A1. Black Equity in the Private Party

BEE must be reflected in the percentage of Black Equity in the Private Party SPV. The actual percentage set will vary from project to project. Many PPP projects will be able to attain a 'high' Black Equity threshold from the outset. However, due to the scale of funding required in some large PPP projects, or by virtue of the sector, it may be necessary to start out at an initially 'lower' Black Equity threshold, with milestones to grow the percentage over the project term.

There will be a lock-in provision for a specified period, to contractually bind the agreed percentages and conditions of Black Equity, requiring the Private Party not to effect changes in its capital structure that will dilute Black Equity during this period.

The Black Equity commitment sought by the Institution must be costed in its Feasibility Study models, presented to the private sector in the bid documentation, identifiable in the financial models presented by bidders, demonstrated in the Private Party's shareholders' agreement, and committed in the PPP Agreement. The source/s of the committed Black Equity must be substantiated by bidders and verified by the Institutions during bid evaluation.

A1: *Black Equity in the Private Party*	**PPP indicative target**
	40%

A2. Active Equity

In keeping with government's intention that black ownership should have a broad-based impact, be sustainable and active, and grow over time, Black People and Black Enterprises should not only be passive shareholders ('pure investment' equity) in PPPs, but should take responsibility and operational risk in the project and secure direct benefits in management. This Active Equity may be achieved in a variety of ways, determined on a project by project basis, but must show Black People and/or Black Enterprises participating directly in the day-to-day management and operations of the project, either in the Private Party only, or in the Subcontractors only, or in a combination of Private Party and Subcontractors. Passive equity would normally have no role in day-to-day management and operations, but would involve representation on the Private Party board.

A2: *Active Equity*	**PPP indicative target**
	55% of A1

A3. Cost of Black Equity

Black People and Black Enterprises wishing to participate as shareholders in Private Parties to PPP Agreements often find it difficult and expensive to raise the capital necessary to purchase shares. Funding for Black Equity is thus commonly raised through loans. These either take the form of shareholder loans, based on the strength of the project cash flow, or take the form of loans to the Black Enterprises, based on their company balance sheets. Over time, growing Black Enterprises will have an increasing option to invest their own funds as they build a capital base.

The price of equity in a PPP deal has an impact not only on the potential returns for shareholders, but also on the cost of the project to government. For the purpose of evaluating value for money in the financial component of the PPP, the cost of BEE equity must therefore be clearly shown as a separate component of the Institutions' Feasibility Study models (see **Part III**), and in the financial offers presented by bidders.

Due to the difficulty of placing a value on Black Equity that is not funded through borrowing, points will not be awarded under the BEE component of the PPP bid evaluation for the assumed value of the Black Equity in the SPV. However, the overall cost of equity in the deal will have a direct bearing on the Institution's value-for-money assessment of the bidders' financial offers, and will be evaluated accordingly.

Government is committed to facilitating the establishment of a PPP BEE equity facility with dedicated advisory services to black bidders, to help address this constraint, amongst others (see **Part V**).

A4. Timing of project cash flows to Black Shareholders

In typical PPP funding structures, operating expenditure and debt service take first call on project cash flows, and shareholders are the last in line to receive returns on their investment. This has an obviously debilitating effect for new Black Enterprises, which in such arrangements have capital tied up for the long haul and cannot expect dividends until late in the project term.

The challenge to advisors, sponsors, banks and the Black Enterprises in PPPs is to find innovative ways of unlocking value in project cash flow, particularly in structuring early cash flows for Black Shareholders. How this is to be achieved will not be prescribed, but bids should show how their funding structures effectively unlock value for Black Shareholders early and throughout the project term. Bidders' proposals on this element must be clearly demonstrated in their financial models and reflected in their shareholders' agreements. The commitment agreed between the parties will become a contractual obligation in the PPP Agreement.

B. Private Party management and employment

The *BBBEE Strategy* identifies further BEE objectives to increase the number of Black People in executive and senior management of enterprises and the number of black-engendered enterprises, and to increase income levels of Black People, and reduce income inequalities. Human resource development and employment equity are also targeted elements. All PPP Agreements will bind the Private Party to minimum commitments in these matters.

Four specific elements of the Private Party's management and employment regimes are therefore identified to enable PPPs to meet these objectives in a meaningful and sustained way:

- **B1:** the percentage of Black People in Management Control in the Private Party;
- **B2:** the percentage of Black Women in Management Control in the Private Party;
- **B3:** compliance with the provisions of the Employment Equity Act, 1998 by the Private Party; and
- **B4:** skills development expenditure as a proportion of Private Party payroll.

B1. Black Management Control in the Private Party

The percentage of Management Control by Black People in the Private Party SPV should be at least commensurate with the Black Equity (passive and active) in the SPV. An initial percentage may be designed to grow by milestones over the project term.

B1: *Black Management Control in the Private Party*	**PPP indicative target**
	Commensurate with A1 and A2

B2. Black Women in Management Control in the Private Party

The percentage of Black Women in Management Control in the Private Party must be targeted and committed appropriately. An initial percentage may be designed to grow by milestones over the project term.

B2: *Black Women in Management Control in the Private Party*	**PPP indicative target**
	15% of B1

B3. Employment Equity in the Private Party

The Private Party must be in compliance with the Employment Equity Act, 1998, and produce a comprehensive employment equity plan as part of its bid.

B3: *Employment Equity plan*	**PPP indicative target**
	Compliance with law

B4. Skills development in the Private Party

Bidders must present a clear skills development plan and targets for the Private Party's managers and employees, and must commit a minimum percentage of their payroll for expenditure on meeting these targets each year of the project. This sum is additional to the skills development levy prescribed by the Skills Development Levies Act, 1999, and must be applied to the skills development of staff employed in the PPP itself.[6]

B4: *Percentage of payroll on skills development*	**PPP indicative target**
	1%

C. Subcontracting

Significant opportunities for BEE reside in the Subcontracting arrangements of a typical PPP structure, where cash-flow benefits, ownership, management, women, employment equity, skills development, and procurement commitments can all be targeted for strong BEE results. If appropriate, initial target percentages may grow by milestones over the project term. While Institutions may adjust these elements on a project-by-project basis, their broad-based effect should be achieved in all PPP projects.

Although elements C1 and C2 are not prescriptive about how the participation is to be structured, the extent of such participation must be measurable as a percentage participation in the total capital expenditure cash flows and operating expenditure cash flows to the Subcontractors.

Six specific elements of the PPP subcontracting arrangements are identified in this *Code for BEE in PPPs* for ensuring broad-based and sustainable BEE in PPPs. All commitments will be binding obligations in the PPP Agreement.

6. Depending on the Institution's objectives for element **D** (local socio-economic impact), it may agree that if the Private Party is able to achieve its annual skills development targets without spending the minimum sum, the costs savings will be applied by the Private Party to the agreed local socio-economic targets or on new skills development targets.

C: Subcontracting	PPP indicative target
C1: Percentage participation by Black People and/or Black Enterprises in the capital expenditure forecast to be incurred by the Private Party under the Subcontracts[7]	30%
C2: Percentage participation by Black People and/or Black Enterprises in the operating expenditure forecast to be incurred by the Private Party under the Subcontracts.[8]	30%
C3: Percentage of Black Management Control in the Subcontractors	25%
C4: Percentage of Black Women in Management Control in the Subcontractors	15% of C3
C5: Employment equity plans of the Subcontractor	Compliance with law
C6: Percentage of Subcontractors' payrolls to be spent on skills development per annum[9]	1%
C7: Percentage of procurement budget committed by the Subcontractors to Black Enterprise SMMEs	30%

D. Local socio-economic impact

PPP projects must be seen, and tangibly experienced, as directly beneficial to the people in whose neighbourhoods they operate. Every PPP must therefore be designed, and proactively seek, to produce a positive local socio-economic impact in any way that is appropriate to the project and its location. This must be done taking cognisance of relevant Integrated Development Plans. The targets that may be set in this element need not be limited only to Black People or Black Enterprises, but in targeting local communities must directly benefit the poor and the marginalised, and must effect local socio-economic upliftment.

This final set of PPP BEE elements must be: determined by the Institution on a project-by-project basis during the Feasibility Study phase; communicated with bidders during procurement; proposed by bidders in their plans, with costs reflected in their financial models; negotiated with the preferred bidder; and committed in the PPP Agreement.

7. This participation may involve, amongst other things, a direct equity participation by Black People and/or Black Enterprises in the Construction Subcontractor, or the assignment of a percentage of the entire capital expenditure subcontract value to Black People and/or Black Enterprises and/or a combination of these.
8. This participation may involve, amongst other things, a direct equity participation by Black People and/or Black Enterprises in the Operations Subcontractor, or the assignment of a percentage of the entire operating expenditure subcontract value to Black People and/or Black Enterprises and/or a combination of these.
9. This minimum sum is additional to the skills development levy prescribed by the Skills Development Levies Act, 1999 and is to be applied to the skills development of staff employed in the PPP project itself.

Listed below is an indication of beneficial local socio-economic impacts that may be targeted under PPP element D, any of which may be qualifications to BEE elements A, B or C:

- involvement of, and direct benefits to, non-governmental organisations, religious institutions, civics, clinics, child-care centres, and the like;
- employment preference for youth in a targeted geographic area;
- employment targets for disabled people;
- employment preferences for women;
- preference for contracting with SMMEs as suppliers of materials and/or services in a targeted geographic area;
- initiatives that will support HIV and Aids education; and
- other local socio-economic impacts appropriate to the project and its location.

Such elements may be itemised individually or, on larger projects, incorporated under a requirement that the Private Party devise and implement an innovative and effective social responsibility programme as part of its operations.

PART III

How to apply BEE PPP policy at each phase of the PPP project cycle[10]

PPP BEE policy objectives will be pursued at every phase of the PPP project cycle, namely:

- appointment of a Transaction Advisor by the Institution;
- Feasibility Study for Treasury Approval: I;
- PPP procurement, including:
  - bid documentation preparation for Treasury Approval: IIA,
  - PPP procurement and value-for-money report on the preferred bid, for Treasury Approval: IIB,
  - negotiations with the preferred bidder, and
  - Treasury Approval: III for the final terms of the PPP Agreement and the Institution's contract management plan;
- managing the PPP Agreement.

Set out below is the approach to be adopted in each phase to ensure that PPP BEE policy objectives are appropriately achieved in every PPP project undertaken in terms of Treasury Regulation 16 to the PFMA.

1. Appointment of the Institution's Transaction Advisor[11]

The Institution's Transaction Advisor is a consortium of professionals with appropriate skills and experience to assist the Institution with the preparation and conclusion of a PPP Agreement. The Transaction Advisor is a key player in the success of a PPP.

While at present there are few black PPP Transaction Advisors, it is government's intention:

- to be represented in its PPP transactions by teams of skilled and experienced professional financial, legal and technical advisors who generally reflect South Africa's diverse population;
- to be confident that its Transaction Advisor thoroughly knows, supports and will seek to optimise the *Code for BEE in PPPs* in the PPP project; and
- to proactively grow the number of Black People and Black Enterprises participating as professional advisors in PPP transactions.

The Transaction Advisor is hired by the Institution through an open and competitive bidding process, after the registration of the PPP project with the relevant treasury. The selection is made on a combination of technical, BEE and price considerations. A two-envelope system is used, and threshold scores are set for

10. Detailed modules on each of these phases are provided in *National Treasury's PPP Manual*.
11. Refer to *National Treasury's PPP Manual*: *Module 3: PPP Inception*.

both the technical and BEE elements. Only those bids that meet or better the technical and BEE thresholds are considered in respect of their price. The Transaction Advisor contracts with the Institution through a lead Transaction Advisor company, and all other members of the consortium participate either through subcontracts with the lead company or via a joint venture arrangement.

In compliance with the PPPFA, the BEE component of a Transaction Advisor bid will constitute **10% of the bid evaluation weighting**[12], with the price and technical elements constituting the remaining 90%. A minimum threshold of 60% of the total BEE points will be set. If a Transaction Advisor bid fails to pass this BEE threshold, it should not be evaluated further.

Set out below is the balanced scorecard, containing four sub-elements to the BEE element of the Transaction Advisor bid evaluation, making up 100 points, 60 of which constitute the minimum threshold. The technical and price elements are each also scored out of 100 points. The BEE score achieved (if it meets or betters the minimum threshold) by each bidder will be calculated into the bidder's overall score, using the following formula:

a* (technical score/100) + b* (BEE score/100) + c* (price score/100) = d
where:
a is the weighting for technical (either 50% or 70%)[13]
b is the weighting for BEE (10%)[14]
c is the weighting for price (either 20% or 40%)[15], and
d is the total score achieved by the bidder.

12. In terms of the PPFA, a maximum of 10% of bid evaluation weighting goes to BEE considerations if the price of the contract is above R500 000. If price is below R500 000, the BEE weighting is 20%. Most PPP transaction advisor costs will be above R500 000.
13. The alternative technical and price weightings (together making up 90%) vary depending on whether the fees budget is declared or nor declared by the Institution. For further detailed guidance, refer to *National Treasury's PPP Manual: Module 3: PPP Inception*.
14. 10% is the maximum weighting allowed in terms of the PPPFA for BEE elements in a contract valued above R500 000.
15. The calculation of price points will be done using the prescribed price formula set in the regulations to the PPPFA. For further detailed guidance, refer to *National Treasury's PPP Manual: Module 3: PPP Inception*.

	Transaction Advisor bid evaluation BEE elements	Maximum score	Scoring criteria	Weighting	Points total
1	The percentage of Black People playing leading professional roles in the Transaction Advisor consortium	5	25% – 35% = 3 >35% = 5	6	30
2	The percentage of black equity in the Transaction Advisor consortium	5	25% – 35% = 3 >35% = 5	6	30
3	A credible plan for structuring effective BEE for the PPP, with necessary skill and experience in the team	5	Poor plan, poor skill & experience = 1 or 2 Incomplete plan, limited skill & experience = 2 or 3 Credible plan, skill & experience = 4 or 5	4	20
4	A credible plan for skills transfer within the consortium to directly benefit black professionals inexperienced in PPPs (may specify targeting of Black People within a geographic area)	5	Poor plan = 1 or 2 Incomplete plan = 2 or 3 Credible plan = 4 or 5	4	20
	Total points				**100**
	Minimum threshold				**60**

The Transaction Advisor bids must therefore show:

- how Black People are included in all professional aspects of the work (legal, financial and technical and at all phases of the PPP project cycle), and must specifically indicate those aspects where Black People are designated to play leading roles. Fronting of Black People for the purpose of winning contracts will not be tolerated and will lead to contract termination. Black People are therefore expected to perform the work they were assigned to, and the fee-sharing structure must reflect the actual work, risk and responsibility assumed by each of the team members. The cash flow earmarked for each member of the consortium must therefore also be shown in the price envelope, indicating how Black People will benefit;
- the percentage of Black Equity in the companies making up the Transaction Advisor consortium, with a weighted average calculated on the percentage of the work to be performed by each company;[16]
- that the member(s) of the consortium responsible for structuring BEE in the PPP can demonstrate insights into how to apply the *Code for BEE in PPPs*. References should be provided to substantiate claims of skills and experience in structuring BEE in PPPs; and
- that the skills transfer plan allows the Institution to see success in this respect throughout the Transaction Advisor assignment. While the leading black professionals on the team are likely to be both skilled and experienced, the intention is

16. For further guidance, refer to *National Treasury's PPP Manual: Module 3: PPP Inception*.

to encourage the Transaction Advisor consortia to include black professionals who are inexperienced in PPPs, and who can learn on the job.

Government's commitment to achieving a growing number of skilled and experienced black PPP Transaction Advisors is reflected further in **Part V**.

2. The PPP Feasibility Study[17]

Each of the PPP BEE elements set out in Part II above and reflected in the *PPP BEE Balanced Scorecard* in **Part IV** must be taken into consideration by the Institution in the preparation of the Feasibility Study, in order to establish the BEE targets that can realistically be achieved in the project, and specifically to determine their impact on project affordability, value for money and risk.

Key stages of the Feasibility Study for BEE are summarised in the table below.[18] Importantly, the overall BEE analysis in the Feasibility Study must be sufficiently robust to enable the Institution to determine sound benchmarks for the BEE impact it can realistically expect to achieve, both by conventional means (as reflected in a public sector comparator (PSC) model using the PPPFA 90:10 formula and price premium on all procured goods and services) and in a possible PPP project (as reflected in a PPP reference model where the *PPP BEE Balanced Scorecard* targets are costed).

17. Refer to *National Treasury's PPP Manual: Module 4: PPP Feasibility Study*.
18. Not all stages of the Feasibility Study are shown in the table.

Relevant stage of the Feasibility Study	Brief description	BEE feasibility phase task
Output specifications	To clearly identify what the Institution wants to deliver	Draw up a list of BEE outputs that the Institution wishes to achieve in the project, using the *PPP BEE Balanced Scorecard* as reference.
Solution options analysis	To identify the pros and cons of each option that can meet the Institution's needs and output specifications; to examine the risks, benefits and impacts for government of each; and to select a preferred option	Set out a preliminary view of the impact of each option on the intended BEE outputs, and identify the possible BEE outcomes of the preferred option.
Due diligence	To undertake a due diligence assessing all budgetary, institutional, legal, regulatory, site, BEE and other socio-economic factors that constrain and/or enable the project	Identify project-specific BEE sectoral conditions: Black Enterprise strength, implementation of sectoral BEE charters, local socio-economic factors that could be addressed in the project location, and any constraining factors to the achievement of the intended BEE outputs.
If the preferred option can be procured through a PPP, the Institution must then establish affordability, value for money and risk transfer. This entails constructing a PSC model, and a PPP reference model, both risk-adjusted.		
Risk identification	To identify all possible risks in the construction and operation of the project, the probability of each arising, the value of each risk, and strategies and costs of mitigation	Identify all possible BEE risks in the project, probabilities of each such risk arising, values for each, and the strategies for, and costs of mitigation.
Public sector comparator (PSC)	Life-cycle cost model of the output specifications where the public sector takes financing, construction and operating risks	Cost the achievement of the project's identified BEE outputs if it were procured conventionally, namely calculate preferential procurement as stipulated by the PPPFA's 90:10 formula price premium for procured goods and services, and include in the model.
PPP reference model	Life-cycle cost model of the same output specifications where the private sector takes substantial financing, construction and operating risk	Cost the achievement of the project's identified BEE outputs by calculating how the private sector would cost each of the BEE elements of a proposed *PPP BEE Balanced Scorecard for the project* in the PPP reference model.
Sensitivity analysis	To test the resilience of the models to changes in assumptions and risk over the project term	Test varying BEE targets for the project, their costs and their assumptions, to assess the impact on affordability and value for money.
Value-for-money test and making the procurement choice	To reach a justified conclusion analysing the outcomes of the modelling as to which procurement route is both affordable and will achieve optimal value for the Institution	Analyse which procurement route will best achieve the identified BEE outputs for the project.
If a PPP is the procurement choice, finalise the optimal **proposed *BEE Balanced Scorecard for the project***, with appropriate elements and targets.		
Economic analysis	To establish the economic rationale for the project, where required	Identify the economic benefits and opportunity cost to BEE of a 'no-project' scenario.

In providing the BEE inputs for the Feasibility Study, the Institution should investigate and cost the following for each of the *PPP BEE Balanced Scorecard* elements:

PPP BEE element	Feasibility Study considerations
A: Private Party equity A1: Black Equity A2: Active Equity A3: Cost of Black Equity A4: Timing of project cash flows to Black Shareholders	**A:** Assess realistic targets by establishing: • Possible Black Equity participants • Extent, possible sources, and projected costs of Black Equity, impact of assumptions on affordability and value for money • Effect of phased increase in Black Equity on affordability and value for money • Effect on affordability and value for money of early cash flow to Black Shareholders • Impact of sectoral BEE charters.
B: Private Party management and employment B1: Black Management Control B2: Black Women in Management Control B3: Employment Equity B4: Skills development	**B:** Assess targets in a sectoral analysis of: • Black management capacity • Black Women in management • Employment equity track record • Skills shortfalls, existing initiatives to address these, training opportunities • Sources and costs of possible support.
C: Subcontracting C1: Capital expenditure cash flow to Black People and/or Black Enterprises C2: Operating expenditure cash flow to Black People and/or Black Enterprises C3: Black Management Control C4: Black Women in Management Control C5: Employment Equity C6: Skills development C7: Procurement to Black Enterprise SMMEs	**C:** Assess realistic targets by establishing cost and risk implications of: • Number and capacity of existing Black Enterprises in the relevant sectors • Employment equity track record of enterprises in the relevant sectors • Range of Black Enterprise SMMEs in the market for procurement opportunities, and nature, sources and cost of support they may need.
D: Local socio-economic impact	**D:** Cost all the local socio-economic targets and assess impact on project affordability, value for money and risk assumption.

The extent to which the Institution is able to produce a thorough and comprehensive Feasibility Study – resulting, *inter alia*, in the production of a proposed *PPP BEE Balanced Scorecard* appropriate for the project – will directly impact on its ability to produce sound bid documentation for a PPP, in which BEE targets are appropriately set for the maturity of the market in which the project takes place. Getting these targets right or wrong may significantly impact on the project's affordability and value for money, and on the Private Party's willingness to assume risk – and will certainly impact directly on the sustainability of BEE in the deal. The Feasibility Study phase is therefore crucial to ensuring a sound BEE outcome in a PPP.

Government is willing to pay a certain premium for its BEE targets to be met. This is a cost of essential economic transformation, which is well understood. But a BEE premium is not prescribed for all PPPs. All cost items of a PPP, including any costs associated with meeting BEE targets, have affordability constraints to the Institution concerned, and have value-for-money and risk considerations. The BEE targets established in the Feasibility Study must therefore be justified by the Institution, in value-for-money terms, and risk must be properly allocated in the achievement of all PPP BEE outcomes. In addition, PPP competition will drive innovation by private sector bidders, from which the Institution can expect to receive the best possible costing for achieving its intended BEE targets.

3. PPP procurement[19]

The PPP procurement phase entails Treasury approvals: IIA, IIB, and III in terms of Treasury Regulation 16 to the PFMA. These three Treasury approvals will, respectively, entail careful scrutiny of the BEE components of the bid documentation, the BEE component of the preferred bid, and the BEE obligations contained in the final proposed terms of the PPP Agreement and in the Institution's plan for managing the PPP Agreement.

No bid documentation (RFQ, RFP, draft PPP Agreement, Best and Final Offer RFPs) may be issued to the market without Treasury Approval: IIA. Negotiations with the preferred bidder may not commence without Treasury Approval: IIB for a value-for-money report. Signature of the PPP Agreement may only take place after Treasury Approval: III.

Scrutiny of BEE terms during a PPP project's procurement phase will be benchmarked against:

- this *Code for BEE in PPPs*;
- *Standardised PPP Provisions*; and
- the *PPP BEE Balanced Scorecard for the project*.

The PPP project's BEE profile during the PPP procurement phase must be based on the *PPP BEE Balanced Scorecard for the project* developed during the Institution's Feasibility Study (as approved at Treasury Approval: I) and will be adapted and refined as the procurement process unfolds.

The Institution should, at the outset of the procurement phase, ensure that specified members of its project team (from the Institution and its Transaction Advisor) are dedicated to managing the BEE component of the procurement process throughout. This is essential to ensure that BEE elements are not lost and that the BEE policy objectives of government are not unduly compromised through poor attention to detail.

RFQ stage

The Request for Qualification (RFQ) stage is usually the first point at which there is formal project interaction with the market. It is imperative that all BEE elements and targets which the Institution intends for the project are communicated clearly

19. Refer to *National Treasury's PPP Manual: Module 5: PPP Procurement*.

with potential bidders at this early stage so that appropriate consortia can be formed and the necessary financing sourced. It is recommended that the proposed *PPP BEE Balanced Scorecard for the project*, developed during the Feasibility Study, be provided in the RFQ, allowing the bidding consortia to comment on the proposed BEE targets in their RFQ submissions. In some projects it may be appropriate to grow the BEE targets between the RFQ and RFP phases, but such an intention must be clearly communicated to bidders in the RFQ.

The RFQ stage requires that bidders submit a range of information about their consortia, enabling the Institution to select those that are indeed suitably qualified to prepare bids. A key element of this qualification will be whether or not a private consortium has the requisite BEE characteristics and commitment for the project. Realistic, minimum BEE qualification standards must therefore be given to bidders at the RFQ stage for the purposes of evaluating RFQ submissions.

In order to pre-qualify in the BEE component of the RFQ stage, bidding consortia should be required to demonstrate:

- that they have written commitments in place for the required targets of BEE participation in the Private Party and the Subcontracts, providing verifiable company information to substantiate BEE credentials;
- that they have the ability to secure the targets of Black Management Control required for the Private Party and the Subcontracts, attaching curriculum vitae of key personnel;
- that relevant members of the consortia have demonstrable track records in devising and implementing local socio-economic programmes as part of their operations;
- that the sponsor companies are compliant with the provisions of the Employment Equity Act, 1998, and can demonstrate their own track record in BEE.

Once consortia have been pre-qualified, they will need agreement from the Institution to change their consortia membership, and the qualifying BEE targets may not be compromised in any such change. Fronting of Black People and Black Enterprises will not be tolerated.

RFP stage

Pre-qualified bidders will, in many projects, be issued with a draft Request for Proposals (RFP), containing the further refined *PPP BEE Balanced Scorecard for the project*. This draft RFP facilitates detailed engagement with the pre-qualified parties to establish their feedback on the bid specifications and criteria. The BEE elements must be clearly presented, based on the outcome of the Feasibility Study and adapted from feedback obtained in the RFQ process. The BEE elements must also be reflected in the draft PPP Agreement, with contractual non-compliance linked to the project's penalty regime.

Comments received from pre-qualified parties on draft RFP documents must be assessed by the Institution and its Transaction Advisors, and a final RFP and draft PPP Agreement drafted and issued. The Institution must ensure in this process that the broad-based impact of its *PPP BEE Balanced Scorecard for the project* is not compromised, and that it upholds its BEE policy intent throughout, based on the thorough assessment undertaken in the Feasibility Study phase. Where appropriate, certain targets can be phased in over the project term to accommodate start-up capabilities within certain sectors.

Each PPP project's BEE elements, minimum targets per element, bid evaluation points for each element, criteria for awarding points, the weightings to be given to each element, and an overall minimum threshold score of 50%, must all be set out unambiguously in the final RFP.

Bids received from the pre-qualified parties must contain dedicated sections setting out the bidder's detailed response as to how it will address each of the BEE elements of the project, and what targets it undertakes to meet over the project term.

In addition, the following components of the bid submissions must be clearly referenced by bidders in their BEE proposals, and closely examined and verified by the Institution for substantiation of all BEE commitments:

The **funding structure** and **financing arrangements** reflected in the **financial models** must show:

- sources or type of Black Equity (e.g. Black Enterprises' balance sheet funds, loans to Black Enterprises or Black Shareholders, equity funds including exit strategy, etc.);
- costs of Black Equity;
- timing on project cash flows to Black Shareholders; and
- operating costs for all skills development, employment equity and socio-economic programmes.

Shareholders' agreements and any third party agreements thereto must show:

- terms for Black Shareholders;
- sponsor support arrangements to Black Shareholders, if any; and
- commitments in respect of Black People in Management Control.

Subcontracts (first tier) must show:

- terms for Black Shareholders;
- Black People in Management Control;
- Black Women in Management Control;
- skills development and employment equity commitments for first-tier Subcontractors; and
- Procurement commitments to Black Enterprise SMMEs.

The **marked-up PPP Agreement** must be checked for:

- any proposed changes to standardised PPP BEE provisions[20]; and
- draft schedules capturing all BEE commitments.

The BEE offer made by the bidder will be evaluated out of 100 points, according to the targets, criteria and weightings specified in the RFP. The technical and price elements are each also scored out of 100 points as specified in the RFP. The BEE

20. Refer to *National Treasury's Standardised PPP Provisions: First Issue: 11 March 2004: Part M: Black Economic Empowerment*.

score achieved (if it meets or betters the total 50% threshold) will be calculated into the bidder's overall score, using the following formula:

a* (technical score/100) + b* (BEE score/100) + c* (price score/100) = d *where*: **a** is the weighting for technical elements (between 50% and 70%)[21] **b** is the weighting for BEE elements (10%)[22] **c** is the weighting for price (between 20% and 40%)[23], and **d** is the total score achieved by the bidder.

Negotiations stage

The Institution's intention to commit the bidders contractually to the targets submitted by them in response to the RFP should be made clear throughout the procurement process. The negotiation and finalisation of the PPP Agreement must therefore ensure that this transpires. The Institution should specifically guard against claw-back during negotiations.

The PPP Agreement[24]

Standardised PPP Provisions: Part M reflects this *Code for BEE in PPPs*, making provision for BEE in the PPP Agreement by, amongst others:

- itemising all **elements** of the *PPP BEE Balanced Scorecard* to be made contractually binding;
- providing schedules that commit the Private Party to its BEE **targets** for each element;
- establishing **performance monitoring** arrangements;
- specifying Private Party **reporting** requirements;
- setting up the **dispute resolution** system;
- establishing the **penalty regime** and providing for **empowerment penalties**; and
- setting up **termination** arrangements.

The Private Party is obliged in terms of the PPP Agreement to produce an annual BEE report containing details of its achievements in meeting all BEE targets agreed. Reviews – both regular and 'spot checks' – by the Institution are provided for. In addition, the PPP Agreement may provide for reviews by independent monitors.

21. The alternative technical and price weightings (together making up 90%) will vary from project to project, determined during the feasibility study and preparation of procurement documents. For further detailed guidance, refer to *National Treasury's PPP Manual: Module 5: PPP Procurement.*
22. 10% is the maximum weighting allowed in terms of the PPPFA for BEE elements in a contract valued above R500 000.
23. The calculation of price points will be done using the prescribed price formula set in the regulations to the PPPFA. For further detailed guidance, refer to *National Treasury's PPP Manual: Module 5: PPP Procurement*.
24. Refer to *Standardised PPP Provisions: First Issue: 11 March 2004*.

Any proposed deviation from *Standardised PPP Provisions* requires specific justification by the Institution as part of its relevant Treasury Approval application. The Institution must obtain Treasury Approval: III for the final terms of the PPP Agreement for a project before signature.

4. Managing the PPP Agreement[25]

Managing the PPP Agreement involves three main functions:

- Partnership management;
- Service delivery management; and
- Contract administration.

In each of these, the Institution and the Private Party need to establish systems for managing the BEE obligations in the project throughout the development and delivery phases of PPP implementation.

Reporting obligations are substantively on the Private Party for all its contractual commitments, including BEE. The Institution must, however, establish, in its service delivery management arrangements and contract administration system, the ability to check and verify such reporting, manage remedy periods that may be provided for, effect contractual penalties in relevant events of poor performance, and manage termination should this arise. In large projects, it may be necessary for the parties to establish a joint independent monitor specifically for BEE.

Above all, the quality of the PPP partnership management, and the parties' ability to identify impediments to BEE and to resolve disputes effectively, are paramount to the PPP's success, not least in respect of BEE. As a general guide, the penalty regime should be deployed only after genuine efforts have been made by the parties to address the impediments to compliance.

25. Refer to *National Treasury's PPP Manual: Module 6: Managing the PPP Agreement*.

PART IV

The PPP BEE Balanced Scorecard

The *PPP BEE Balanced Scorecard* provides a quick-reference benchmark to measure the extent to which a PPP project – in any of its phases – is successfully achieving BEE in terms of this *Code for BEE in PPPs.*

The PPP BEE **elements** (A, B, C, D) and their sub-elements shown in column 1 in the table below should be reflected in all PPP Agreements as appropriate to the project. In making any adjustments to these, the broad-based BEE effect should not be compromised.

The indicative **targets** shown in column 2 are guidelines, and will need to be adjusted according to the outcomes of the PPP Feasibility Study and procurement process, as appropriate to each project. In making these decisions, the parties may also usefully agree that such BEE targets will grow over the project term.

The recommended PPP bid evaluation **weightings** shown in column 3 guide the Institution on a balanced allocation of points out of 100 for the BEE component of the whole bid evaluation.

A **minimum threshold of 50%** of the total possible 100 BEE points must be achieved for the bid to be evaluated further.

PPP BEE element	Indicative PPP project target	Recommended bid evaluation weighting
A: Private Party equity		**20%**
A1: Black Equity	40%	
A2: Active Equity	55% of A1	
A3: Cost of Black Equity	Value for money	
A4: Timing of project cash flows to Black Shareholders	Early and ongoing	
B: Private Party management and employment		**15%**
B1: Black Management Control	Commensurate with A1 and A2	
B2: Black Women in Management Control	15% of B1	
B3: Employment Equity	Compliant with law	
B4: Skills Development	1% of payroll	
C: Subcontracting		**50%**
C1: Capital expenditure cash flow to Black People and/or Black Enterprises	30%	
C2: Operating expenditure cash flow to Black People and/or Black Enterprises	30%	
C3: Black Management Control	25%	
C4: Black Women in Management Control	15% of C3	
C5: Employment Equity	Compliant with law	
C6: Skills development	1% of payroll	
C7: Procurement to Black Enterprise SMMEs	30%	
D: Local socio-economic impact	Sustainable, effective plan	**15%**

PART V

Government's further commitments to taking BEE in PPPs forward

In recognition of the current challenges to BEE in PPPs, and the positive BEE impact that PPPs can achieve, and complementary to the commitments of the *Financial Sector Charter*, government undertakes proactively to pursue the following initiatives:

- to establish a PPP BEE equity facility that lowers the cost of capital to Black Shareholders in PPPs;
- for such a facility to support independent financial and legal advice to Black Enterprises bidding for, negotiating and implementing PPP projects; and
- to establish an internship programme to grow the number of experienced Black Transaction Advisors in South Africa's PPP market.

Together with the strong BEE measures articulated in this *Code for BEE in PPPs*, the implementation of these three steps will establish PPPs as leading contributors to South Africa's BEE over the coming years.