

THE IMPACT OF THE REVISED BEE CODES

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The amendment to the BEE Codes of Good Practice was unveiled on Friday 11 October 2013. The Codes will only be applicable to businesses measured in terms of the general codes, while the Sector Codes will remain applicable to businesses operating within those sectors.

The most important provisions with respect to EMEs being measured in terms of the Revised Codes are:

1. Threshold for EMEs increased from R5 mil to R10 mil. Businesses with an annual turnover below R10 mil are now regarded as EMEs.
2. An EME receives an automatic Level 4 BEE Status as was the case in the past, but
3. 51% Black-owned EMEs receive an automatic Level 2 BEE Status; and
4. 100% Black-owned EMEs receive an automatic Level 1 BEE Status.
5. Start-up enterprises are measured as EMEs.
6. A sworn affidavit is sufficient proof of a business's turnover and black ownership status for purposes of qualification as an EME.

Impact on Accounting Officers

The increase of the EME threshold and the elevated status for 51% and 100% Black-owned EMEs is good news and, if viewed in isolation, means that the market for Accounting Officers issuing certificates has now dramatically increased. Some of the enthusiasm with which this amendment was anticipated was at first glance somewhat tempered by the provision that sworn affidavits would be sufficient evidence for the EME status of such a business. We say 'at first glance' because upon closer inspection, the following soon became clear.

Statement 005 of the existing Codes has not been repealed. It states that Statement 000, Section 4 of the B-BBEE Codes of Good Practice (the current Codes) still applies for determining eligibility of an Exempted Micro Enterprise.

Statement 000 of the current Codes states that sufficient evidence of qualification as an EME is an auditor's certificate or a similar certificate issued by an Accounting Officer or Verification Agency.

Even though EMEs will therefore be able to merely make a sworn affidavit with regard to their turnover and black ownership status, it will not affect the validity of certificates issued by Auditors, Accounting Officers or Verification Agencies for EMEs. Accounting Officers will still be able to issue certificates as evidence of the EME status of a business, except now they will also be able to do it for businesses with a turnover between R5 mil and R10 mil, which they were previously not allowed to do.

We also expect that very few businesses will make use of the option to use merely an affidavit for the following reasons:

- It lacks the professional appeal of a certificate;
- It is not an independent confirmation like that afforded by a certificate;
- Inadvertent misrepresentation in the affidavit with respect to the BEE Status level could be met with fines of up to 10% of the annual revenue of the business or imprisonment of up to 10 years;
- Tender Boards of Government are not allowed to rely on affidavits in terms of the 2011 Preferential Procurement Policy Framework Act Regulations, but only on certificates;
- An affidavit can only be used to attest to black ownership and turnover,

but aspects which have become relevant in terms of the new Codes, such as the EME's 'designated group status' and 'enterprise and suppliers development beneficiary status', can only be attested to by means of a certificate.

If a business wants to merely use an affidavit, they will still require assistance with the content thereof and in this regard, professional accountants (especially those who are Commissioners of Oaths) are best positioned to assist those clients.

Although the above is good news for Accounting Officers, unfortunately the Revised Codes brought with them a lot of uncertainty as to their application and legal status as a whole.

Legal Status of Revised Codes

The Revised Codes only come into effect on 11 October 2014 and, although they contain a clause that attempts to introduce a transitional period for the next 12 months in terms of which businesses may opt into the Revised Codes, legal commentators are of the opinion that even the transitional clause can only become effective on 11 October 2014. Bad drafting has therefore led to mass confusion and you can expect many requests from clients to be issued with a certificate or affidavit in terms of the Revised Codes. Although this confusion will exist for the next 12 months, we trust that the Dti will provide clarity before the commencement of the Codes on 11 October 2014.

In the interim, we expect that there will be mixed acceptance, both in the private sector and, more specifically, at government tender boards, of certificates or affidavits issued in terms of the Revised Codes. The reason we expect government tender boards and those of

parastatals to be reluctant to accept certificates or affidavits in terms of the Revised Codes is because they are compelled to make use of the scoring mechanism provided for in terms of the Preferential Procurement Policy Framework Act and its 2011 Regulations. The Act and the Regulations have not been aligned to the Revised Codes and won't be for at least the next year. As far as the larger businesses in the private sector are concerned we also believe that very few, if any, will opt into the Revised Codes in the next 12 months because of the onerous requirements it introduces for these entities. As a consequence, some of them will not be accepting certificates in terms of the Revised Codes for purposes of calculating their procurement status under the existing Codes.

To enquire about how the revised BEE Codes impact your business, please contact TFAGlobal at info@tfaglobal.co.za

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