

April 2021

Presentation to the Portfolio Committee on Employment and Labour

Input into the proposed Employment Equity Amendment Bill
SAFCEC



13 April 2021

To:

The Honourable Chairperson of the Portfolio Committee on Employment and Labour and;

The Honourable Members of the Portfolio Committee

Parliament of the Republic of South Africa

1. It is indeed a privilege and honour for the South African Forum of Civil Engineering Contractors (SAFCEC) to herewith present our written submission relating to the Employment Equity Amendment Bill, 2020, to the Portfolio Committee on Employment and Labour.
2. We look forward to the opportunity to present and share our views within our allocated time slot.
3. The presentation will be led by SAFCEC Representative at the Construction Sector Charter Council, Ingrid Campbell who will be supported by a technical team. Her email address is info@safcec.org.za.
4. Kindly be assured of SAFCEC's ongoing commitment to transformation and diligently working towards building our beautiful country and inclusive economy.

Yours faithfully



Webster Mfebe

Chief Executive Officer

Presentation to the Portfolio Committee on Employment and Labour

SAFCEC written input into the proposed Employment Equity Amendment Bill

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Table of Contents

1	Introduction.....	1
1.1	Who is SAFCEC	1
1.2	The Objective in Presenting to the Portfolio Committee on Employment and Labour.....	1
1.3	Pro Active Transformation Participation in the Construction Industry	2
2	Background, Submissions and Relevance	3
3	The Economic Position of the Construction Industry.....	5
3.1	Economic Constraints.....	6
3.2	Job Creation Constraints	6
4	Legal Commentary	7
4.1	Introductory Comments.....	7
4.2	Thresholds and Quotas	8
4.3	Encroachment	8
4.4	Threshold for Participation	9
4.5	Targets vs Quotas.....	9
4.6	Section 217 of the Constitution	9
4.7	Procurement Legislation	10
4.8	The EEA is a labour act	10
4.9	Threshold for participation conflicting with the scoring system under the Framework Act.....	12
4.10	Pre-eminence given to the Framework Act	12
4.11	Thresholds set by regulation unconstitutional – <i>ultra vires</i> the Framework Act.....	13
4.12	The Framework Act will co-exist with the EEA.....	14
4.13	Criteria for setting the thresholds and issuing compliance certificates.....	17
4.14	Quotas.....	18
4.15	Section 53(6) and section 15A	20
4.16	Conclusion	21
5	Setting Sector Specific EE Targets	23
5.1	Historical Performance and Context.....	23
5.2	EE Targets in Construction Sector Codes	23
5.3	Target Setting Process Concerns.....	23
5.4	National vs Regional Targets for the Industry.....	24
5.5	Consequences	25
6	Certificates of Compliance	26
7	Impact and Consequences	28
8	Proposals to improve Employment Equity.....	29
8.1	General.....	29
8.2	Legal proposals.....	29
8.3	Target setting and compliance certification	29

9	Conclusion	31
10	Bibliography.....	32

Annexures:

- Annexure 1 Submission SAFCEC to Minister of Labour and Commission for Employment Equity 18 June 2020 based on 2018 EEAB and copied to Portfolio Committee on 16 February 2021
- Annexure 2 Submission to BUSA on September 2020 EEAB
- Annexure 3 SAFCEC Transformation Declaration
- Annexure 4 Supplementary information to support Legal Commentary.
Extracts from relevant legislation to which reference is made in these submissions

1 Introduction

1.1 Who is SAFCEC

The South African Forum of Civil Engineering Contractors (SAFCEC) is – the leading voluntary employers' organisation for the Civil Engineering Contracting Industry in South Africa registered under the Labour Relations Act (Act No. 66 of 1995), as amended.

The organisation was founded in 1939 as the South African Federation of Civil Engineering Contractors. Today we are known as the South African Forum of Civil Engineering Contractors. SAFCEC supports established and emerging contractors, whether they are small, medium or large contracting companies, in the Civil Engineering Construction Sector. SAFCEC has in excess of 300 member companies and collectively represent in excess of 50% of the workforce employed in the Civil Engineering Construction Industry.

In addition to serving our members we are also a united voice on issues affecting the civil engineering contracting industry. Although we are united by our professionalism and desire to collaborate, we offer our members different areas of expertise, analysis and perspective.

SAFCEC acknowledges that the membership base is diverse, a fact we take pride in and enables the organization to serve a varied community of contractors and share diverse views and opinions. Members are supported by meeting their individual needs for Human Resources & Labour Relations, Training, Transformation & Development, Health & Safety, Contractual and Economic advice, irrespective of their company size, so that they can stay informed and operative in an ever changing demanding environment.

The **SAFCEC Values** are:

Humanity, Harmony and Democracy.

Our **Mission** is:

To promote the image of the civil engineering constructing industry by enabling members to deliver a professional construction service and encourage them to take care of their employees' safety and welfare, the environment and the community, thus providing a foundation for our country's development.

On the 26th June 2018 the SAFCEC Council adopted a Transformation Declaration and signed such on behalf of members. The **SAFCEC Transformation Declaration** is attached to this submission as Annexure 3.

1.2 The Objective in Presenting to the Portfolio Committee on Employment and Labour

Transformation of the Construction Industry is an important objective for SAFCEC as detailed below via the pivotal role it played in the Construction Charter process. The organization has an active and dedicated transformation committee and, when compared to other South African economic sectors, takes pride in achievements made as reported by the Commission for Employment Equity 20th report¹.

SAFCEC acknowledges the need to transform the South African Economy and, in particular our construction industry. As a major industry body SAFCEC endeavors to play a constructive role in achieving meaningful transformation by setting achievable targets and the implementing support programmes to achieve transformation whilst simultaneously serving the nation of South Africa by delivering our services in a safe, economical and responsible manner.

Our participation in this process aims to:

- a) Brief and provide the Portfolio Committee with the required situational context and information on the Construction Industry thereby enabling members to reach informed decisions or make recommendations
- b) Consider the proposed Bill and the potential impact thereof on our industry and report these observations to the lawmakers
- c) Identify any potential unintended consequences which, in our view, may prove to be counterproductive in achieving the objectives of Employment Equity
- d) Interact responsibly as part of the South African business community to ensure the proposed Bill supports the growth in the economy and, most critically, creates and does not reduce sustainable employment opportunities.
- e) Within the ambit of our knowledge and experience, support the establishment of a legal, regulated working environment which passes constitutional muster
- f) Positively influence the proposed regulatory target setting mechanisms that will yield a rationally motivated and achievable targets thereby enabling the legislation to become effective.

1.3 Pro Active Transformation Participation in the Construction Industry

SAFCEC is a signatory to the Construction Sector Charter of Broad Based Black Economic Empowerment. SAFCEC initiated the initial engagements with Emerging Business in 2003 to collectively gazette the Construction Charter and the first set of Industry specific BEE Codes. SAFCEC were instrumental in the alignment process from 2013 to develop the Amended Construction Sector Codes of 2017. These Codes are now in its second 7 year period and actively addresses EE, Skills training and Enterprise development aspects in the industry, exceeding the objectives set in the generic codes.

Most of the economic and skills shortage challenges facing the construction sector still exist and, moreover, have been exacerbated by the current economic realities.

As recognised in clause 2.7 of the 2007 Construction Charter, under the heading “Challenges”, there are a limited number of black people, including black women, in controlling positions, managerial positions and in the specialised professions in the larger enterprises of the construction sector.

This was attributed to a number of factors including the “disconnection of academia from the needs of the sector, the sector’s lack of appeal as a career choice, the low numbers of school leavers with adequate grades in mathematics and science, low salaries and poor prospects for career advancement.”

2 Background, Submissions and Relevance

SAFCEC Commented on the 2018 first draft of the Employment Equity Amendment Bill (EEAB), when the call was made for public comment. To date, no feedback has been received on our submission.

In February 2020 the Department of Employment and Labour (DOEL) held a meeting to engage with Construction organizations. Although SAFCEC was not initially invited, members heard about the said meeting and attended. The purpose of the meeting was to discuss the setting of Employment Equity (EE) targets for the Construction Industry. SAFCEC representatives at the meeting registered significant concern in relation to the approach the DOEL were taking in setting targets, and the fact that most industry organisations were not present. This process raised questions regarding the progression of the Bill and quality of the claimed public participation recorded in the same.

SAFCEC through its Transformation Committee and Human Resources Committee decided to create an *ad hoc* EEAB subcommittee to advise the respective SAFCEC Committees, SAFCEC leadership and Council regarding the potential effect(s) of the proposed Bill. Furthermore, the subcommittee commissioned internal and external data gathering processes, established member opinion and mandates and finally committed to engage with the DOEL regarding the target setting process that the DOEL had appeared to have embarked upon.

SAFCEC considered it prudent to timeously provide input by compiling a detailed letter on the matter which was directed to the Portfolio Committee. To this end, commentary was compiled which addressed some aspects of the proposed Bill, as known at the time, as well as emergent factors that were considered important in determining sector targets. The documents were submitted on 18 June 2020.

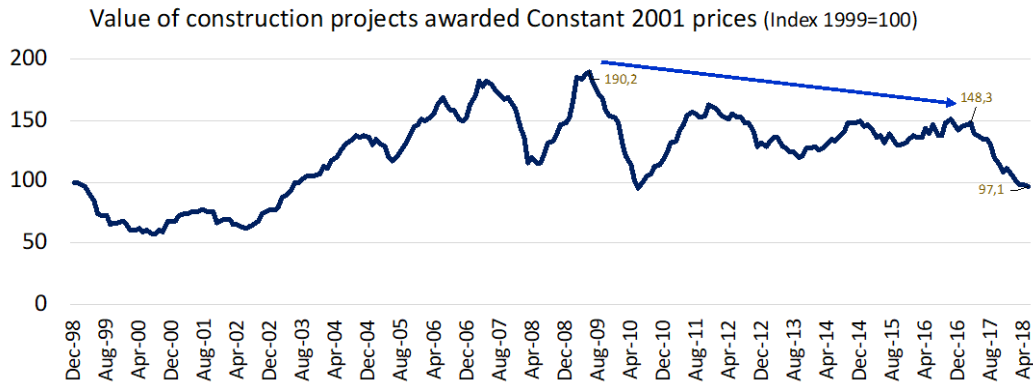
On 20 July 2020 regulation Gazette No 11148 published the Employment Equity Amendment Bill, 2020 (the Bill). This provided the clarity on the Bill after 2018 input and set out the envisaged legislative process going forward. SAFCEC decided to submit the documents referred to above, as appended in Annexure 1, to this Portfolio Committee on 16 February 2021, and, at the time, requested the opportunity to present which we are grateful for.

The Bill could have a significant impact on businesses engaged in providing all forms of construction products and services to the State. Furthermore, in the event of non-compliance and a clearance certificate being withheld, the service provider would be precluded from transacting with the State. The South African Construction industry is unique in relation to most other economic sectors in that up to 64% of it's services are provided to the State in the form of construction. This could grow to over 80% if the National Development Plan (NDP) target for expenditure of GDP on Fixed Capital Formation is achieved. The potential impact of the proposed act is disproportionately high to our Economic Sector and can easily result in the failure of businesses and the resulting significant job losses. If for this reason only, it is imperative that the voice of SAFCEC is heard regarding these proposed EE amendments.

Construction capacity must be at the ready when the South African Gross Fixed Capital formation investment escalates to levels where it can underpin the National Development Plan and the various current Infrastructure plans designated for roll out.

3 The Economic Position of the Construction Industry

The precarious position of the construction industry economy is well known and has been widely reported. The graph below indicates the decrease in value of projects awarded. The graph details data to late 2018. Since that date the position has significantly worsened due to a decrease in GDP growth and impact of COVID.



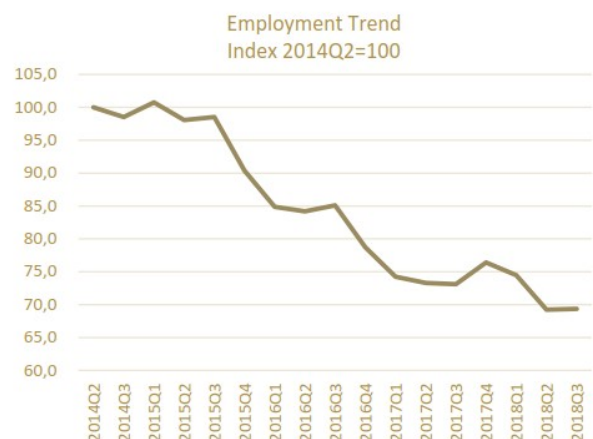
A number of listed construction companies employing large numbers of employees have divested, ceased some or all operations or gone into business rescue.

Well publicised cases impacting our industry include:

- I. M&R disposing of its construction operations and the de-listing of Concor Construction
- II. Aveng significantly curtailing operations and selling significant assets to raise cash
- III. Basil Read and ESOR going into business rescue
- IV. Group Five going into business rescue and effectively cease operating
- V. Other listed entities shedding significant value on the JSE with the associated complexities in raising cash and investing in their operations, people and equipment.
- VI. A large number of medium and smaller contractors going out of business.

It has been reported that large numbers of skilled employees (black and white) from these businesses have left the shores of South Africa and have emigrated to Australia, New Zealand, the UK and Canada where current stimulus packages are creating significant construction opportunities.

The most significant value of the industry to South Africa is its inert ability to rapidly translate State expenditure into jobs. As a result of the significant reduction in activity, the industry has been in a decline in terms of job creation and just in the period 2014 to 2018 has lost 30% of its jobs. The graph may be referred to. According to Mfebe (2020)⁶ 60% of all job losses in the country occurred in the construction



sector in 2018 when just our sector lost 142 000 jobs. Since 2018 a further , large % has, no doubt, been lost due to economic decline and the Covid pandemic.

3.1 Economic Constraints

Business Leadership SA commissioned Intellidex to compile a report on Infrastructure for South Africa. In the report Theobald, *et al*,⁵ report a sharp decrease in infrastructure investment over the past six years, far from the National Development Plan (NDP) of 30% of GDP. They report that the fall has been particularly clear in Public Sector spending. Adding to this is the fact that there is frequent underspending of allocated and available infrastructure budgets in the public sector. In some cases, budget spend can be as low as 55% of the budget with the best performance entities spending only 80% of the available budget on infrastructure. The link between infrastructure spend and activity in the Construction industry is well known with its resultant impact on job losses.

Government fiscal constraints and the resulting consequences for infrastructure investment are reported on by Theobald *et al* ⁵. Growth in employment in our sector in the immediate future seems unlikely as far as dependence on public sector spending is concerned.

3.2 Job Creation Constraints

The impact of the severe reduction of the Construction industry had a devastating impact on the construction industry. As far as Human Capital was concerned the following trends were marked:

- Outright job losses in failed businesses
- Staff reductions through retrenchment processes as regulated by the Labour Relations Act. This generally created havoc with EE Plans and the ability of companies to implement the plans. Many companies finding themselves at a deficit to their objectives.
- Significant immigration of staff that were identified for promotion as international companies identified the ailing South African construction industry as a target for recruiting our arising talent.
- Complex and often violent and dangerous conditions on South African construction sites seeing employees leave the industry. (Mfebe 2020)⁶.

The ability of an industry to achieve employment growth and significant EE improvement is directly linked to economic activity improving. Initially the retained underutilization of existing capacity will be taken up in a renewed growth cycle whereafter employment will grow. Economic conditions will thus dictate that EE implementation plans will be dependent on natural attrition which is much lower than the desired rate of EE.

The structural constraints represented by the education system is publicised by Lawless (2005 & 2007)^{3,4} as well as the progression of graduates and upskilled employees within the Construction enterprise is demonstrated in the SAFCEC submission to the DOEL per **Annexure 1**, pg 11 to 15.

4 Legal Commentary

The following legal commentary is based on a legal opinion on the proposed Bill and its legal implications & challenges, prepared for SAFCEC, by Adv R Stelzner SC.

The commentary below should also be read in conjunction with the extracts from relevant legislation annexed hereto in **Annexure 4**.

4.1 Introductory Comments

4.1.1. This part of the submission draws attention to certain provisions of the Bill, which if passed, it is herewith submitted, will render the Employment Equity Act (as amended) unconstitutional for being in conflict with sections 217(3), 217(2) and section 9(2) of the Constitution.

4.1.2. At the very least, by seeking to legislate matters of State procurement by way of amendments to the Employment Equity Act (EEA) the Bill gives rise to conflict between different pieces of legislation (intended to regulate different matters). The Bill also creates internal conflict within the EEA itself.

4.1.3. The result is that the EEA, if amended, will conflict directly, to the extent referred to below, with existing procurement legislation.

4.1.4. This is caused by the insertion in the EEA, which is fundamentally aimed at advancing employment equity at the workplace, of a provision dealing with State procurement (section 53 of the EEA and section 53(6) of the Bill).

4.1.5. It creates the added risk that pre-eminence will be given to the EEA, as amended, above procurement prescripts, which in turn will give rise to potentially conflicting judgments in different courts looking at the same issue through different lenses, the one being the promotion of employment equity at the workplace, the other being fair, transparent, cost effective and competitive competition in terms of a framework which at the same time promotes Broad Based Black Economic Empowerment consistent with section 217(3) of the Constitution.¹

4.1.6. This conflict in legislation is being created against the backdrop of a Draft Public Procurement Bill, a bill which has as its stated purpose *“the creation of a single regulatory framework for public procurement to eliminate fragmented procurement prescripts”*.²

¹ In this regard section 63 of the EEA states that preference is to be given to the EEA where it conflicts with any other law, other than the Constitution and amendments to the EEA itself.

²http://www.treasury.gov.za/legislation/draft_bills/Public%20Procurement%20Bill%20for%20public%20comment%2019%20Feb%202020.pdf

4.2 Thresholds and Quotas

- 4.2.1. The proposed determination of thresholds and the withholding of compliance certificates is furthermore in conflict with inter alia section 15(3) of the Employment Equity Act itself (a sub section which is not affected by the proposed amendments and which specifically excludes rigid quotas).
- 4.2.2. Section 53(1) of the EEA (as it currently stands) provides that every employer that makes an offer to conclude an agreement with any organ of state for the furnishing of supplies or services to that organ of state or for the hiring or letting of anything must comply with certain provisions of the Act.
- 4.2.3. Section 53 (4) provides that a failure to comply with the relevant provisions of this Act is sufficient ground for rejection of any offer to conclude an agreement referred to in subsection (1) or for cancellation of the agreement.
- 4.2.4. Paragraph 12.1 of the Explanatory Memorandum which accompanied the Bill explains that section 53 of the Act (the EEA), which has not yet been “operationalised”, provides that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the Act.
- 4.2.5. The Bill seeks to amend section 53 of the Act by adding a new subsection (6) “*in order to clarify*” that the Minister may only issue a compliance certificate to an employer if-(a) the employer has complied with any applicable sectoral targets or has raised a reasonable ground for non-compliance; (b) the employer has submitted its most recent employment equity report; (c) within the previous three years, the employer has not been found to have breached the prohibition on unfair discrimination or paid wages below the level of the minimum wage.”
- 4.2.6. It is not clear whether these requirements are conjunctive or disjunctive.
- 4.2.7. What is clear however from the proposed amendment to section 53 of the Act that a compliance certificate is a threshold requirement for even submitting a bid for a government contract.
- 4.2.8. Paragraph 3.3 of the Explanatory Memorandum makes this clear - *The promulgation of section 53 of the Act dealing with State contracts and the issuing of the Certificate of Compliance as a prerequisite for access to State contracts*

4.3 Encroachment

- 4.3.1. The same paragraph (and 3.4) also make it clear that the amendments encroach on that which until now has been the domain and responsibility of other state departments in terms of other pieces of procurement legislation – *(this necessitated inter-departmental consultations with the National Treasury (Chief Procurement Office), the Department of Trade and Industry (BBBEE Policy Unit), the Department of Mineral Resources and Energy and the Commission for Conciliation, Mediation and Arbitration (CCMA). 3.4 These consultation processes are continuous to ensure alignment in relation to procurement and BBBEE policies, including other legislation and regulatory mechanisms such as sector charters.*

4.3.2. Before even considering what the sectoral targets, set in terms of section 15A of the Act, may be and which targets will need to be met in order to obtain such a compliance certificate under section 42, the first point to be made is that the proposed amendments to the EEA encroach on matters of public procurement.

4.4 Threshold for Participation

4.4.1. The second point to be made is that section 53 seeks to introduce a threshold requirement for participation by an employer in such procurement, i.e a certificate of compliance with sectoral targets.

4.5 Targets vs Quotas

4.5.1. The third point to be made at the outset is that the criteria for the setting of such targets are not clearly stated and appear will be akin to quotas – i.e fixed and rigid, non – compliance with which will result in a certificate not being issued and a bidder being excluded from bidding for government work (in fact any contract, it appears, even for the hiring or letting of “anything”).

4.6 Section 217 of the Constitution

4.6.1. In order to pass constitutional muster, the section needs to satisfy the requirements set by the Constitution for state procurement.

4.6.2. Once these are considered, in particular section 217(2), and the legislation which specifically seeks to give effect to that constitutional imperative, it should be clear, it is submitted, why section 53 of the EEA (in its unamended form) has not been put into operation before. This, notwithstanding the promulgation of other sections of the EEA more than 20 years ago, in August 1999.

4.6.3. Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

4.6.4. In terms of subsection (2) subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-categories of preference in the allocation of contracts; and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

4.6.5. But, in terms of subsection (3), in order to do so national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

4.6.6. Section 53 (and the concomitant provisions, the setting of sectoral targets and the issuing of compliance certificates under the EEA and its proposed amendments provide no framework, let alone a framework as envisioned by the Constitution.

4.7 Procurement Legislation

4.7.1. The legislative framework as envisioned by s 217 of the Constitution comprises the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) and the Preferential Procurement Policy Framework Act 5 of 2000 (the Framework Act).³ To this can be added legislation such as the Public Finance Management Act, the Municipal Finance Management Act and numerous other pieces of legislation dealing with procurement directly.

4.7.2. The stated purpose of the EEA (in section 3 of that Act) is to achieve equity in the workplace by (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.

4.7.3. It is not to give effect to the constitutional imperatives set by section 217.

4.7.4. That is the expressly stated purpose of the Framework Act - *To give effect to section 217 (3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217 (2) of the Constitution; and to provide for matters connected therewith.*

4.7.5. There is another problem in using employment legislation such as the EEA in order to regulate public procurement matters, and that is the question of jurisdiction and the legal principles to be applied in determining any dispute under the EEA.

4.8 The EEA is a labour act

4.8.1. In *Allpay Consolidated Investment Holdings*⁴ Froneman J dealt with the relationship between s 6 of the PAJA and the five procurement principles that have their origin in s 217 of the Constitution.

He held

'[43] The legislative framework for procurement policy under s 217 of the Constitution does not seek to give exclusive content to that section, nor does it grant jurisdictional competence to decide matters under it to a specialist institution. The framework thus provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any

³ *ACSA SOC Ltd v Imperial Group Ltd* 2020 (4) SA 17 (SCA) ([2020] ZASCA 2) applied in *Afribus NPC v Minister of Finance* 2021 (1) SA 325 (SCA), an important decision for purposes of the present submission, which will be returned to.

⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) ([2013] ZACC 42) paras 43 – 45

shortfall in the requirements of the procurement system — unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency — may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.

[44] Doing this kind of exercise is no different from any other assessment to determine whether administrative action is valid under PAJA. In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.”

4.8.2. The EEA on the other hand not only regulates the direct application of the right to equality, it provides under section 49 that the Labour Court, as specialist institution, has exclusive jurisdiction to determine any dispute about the interpretation or application of that Act, except where this Act provides otherwise, which would include any dispute about the interpretation or application of section 53 for example, and its constitutional validity.

4.8.3. And where this is so, the whole question of the applicability of the PAJA review grounds referred to in *Allpay* is brought into play.⁵

4.8.4. Whilst section 217 of the Constitution, the Framework Act, the Public Finance Management Act and B-BBEE Acts for example may provide the constitutional and legislative framework within which administrative action may be taken in the procurement process, and the lens for judicial review of these actions, as with other administrative action, is to be found in PAJA, the question which arises with procurement matters being dealt with under the EEA, over which the Labour Court as specialist court has exclusive jurisdiction, is on what grounds is the Labour Court to decide such procurement matters, on different grounds to those which the Constitutional Court in *Allpay* has determined find application in state procurement disputes?

4.8.5. This is but one conflict which is created by seeking to deal with procurement matters under the EEA.

4.8.6. Another is created by setting a threshold requirement for participation in the bidding process under the EEA, when there is no such threshold requirement set by the Framework Act.

⁵ Cf in this regard the decisions of the Constitutional Court in *Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC) and *Sidumo v Rustenburg Platinum Mines* [2007] 12 BLLR 1097 (CC)

4.9 Threshold for participation conflicting with the scoring system under the Framework Act

- 4.9.1. The amendments to the EEA if the EEAB is passed will allow the Minister to not only set sector specific targets by way of regulation, but bidders can be excluded from bidding for government projects unless the set targets have been met by them through the withholding of certificates for want of compliance with these targets.
- 4.9.2. The Bill in fact proposes that the Minister and his officials be given the power to withhold a certificate of compliance. This would prevent parties without such certificates from participating in public tenders.
- 4.9.3. Similar threshold requirements for participation in a public tender were set through the Preferential Procurement Regulations, 2017, promulgated under the Preferential Procurement Policy Framework Act 5 of 2000.
- 4.9.4. In terms thereof the Minister of Finance sought to directly incorporate affirmative action into the procurement system by setting minimum B-BBEE compliance levels (of which employment equity is a part) as a bid condition.
- 4.9.5. The Supreme Court of Appeal in *Afribus NPC v The Minister of Finance 2021 (1) SA 325 (SCA)* declared that the Preferential Procurement Regulations, 2017 promulgated by the Minister of Finance on 20 January 2017 under s 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (the Framework Act) are inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and are invalid.
- 4.9.6. The SCA held that black ownership of a business could not be set as a threshold requirement for procurement by ministerial decree given that such a requirement was in conflict with the scoring system provided for in the Framework Act.
- 4.9.7. By setting a certificate of compliance as a prerequisite for access to State contracts / a threshold requirement a similar conflict with the Framework Act arises, this time not between a regulation promulgated under that Act and the Act itself, but between the EEA (as amended) and the Framework Act.
- 4.9.8. How is this conflict to be resolved, by giving preference to the EEA by virtue of section 63 of the EEA or by giving preference to the Framework Act by virtue of its having been promulgated pursuant to and with the express purpose of giving effect to the Constitution's procurement requirements?

4.10 Pre-eminence given to the Framework Act

- 4.10.1. According to its Preamble, the Framework Act was enacted to give effect to s 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in s 217(2) of the Constitution; and to provide for matters connected therewith. 'Preferential procurement policy' is defined in the Framework Act to mean 'a procurement policy contemplated in s 217(2) of the Constitution'.

Section 217(2) of the Constitution reads:

- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing 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(3) of the Constitution reads:

- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.’

4.10.2. The Framework Act is such legislation, the EEA not.

4.10.3. *Afribusines* held that the national legislation contemplated in s 217(3) is the Framework Act.

4.11 Thresholds set by regulation unconstitutional – *ultra vires* the Framework Act

4.11.1. Regulation 4(1) promulgated thereunder dealt with pre-qualification criteria for preferential procurement. It provided ‘(1) If an organ of state decides to apply pre-qualifying criteria to advance certain designated groups, that organ of state must advertise the tender with a specific tendering condition that only one or more of the following tenderers may respond - (a) a tenderer having a stipulated minimum B-BBEE status level of contributor ...’

4.11.2. In terms of Regulation 4(2), ‘[a] tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender.

4.11.3. These were pre-qualification criteria, which must be applied before determining the award of a tender on the preference point system. The Minister contended that the purpose of pre-qualifying and sub-contracting criteria was to prefer ‘designated groups’ above other tenderers.

4.11.4. According to the appellant in *Afribusines*, the 2017 Regulations put the cart before the horse by providing that the tenderers who qualify to tender, may first be determined according to, inter alia, race, gender and disability, and only thereafter in terms of the preference points system. It argued that s 2 of the Framework Act does not allow for qualifying criteria, which may disqualify a potential tenderer from tendering for State contracts.

4.11.5. The same applies to section 53 of the Act. Except that that legislative provision conflicts with section 217 of the Constitution.

4.12 The Framework Act will co-exist with the EEA

- 4.12.1. The SCA held that s 5 of the Framework Act itself makes it plain, the Minister's powers are not unconstrained. He may only make regulations '*regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act*'.
- 4.12.2. Section 2 of the Framework Act is headed '*Framework for the implementation of preferential procurement policy*'.
- 4.12.3. On a proper reading of the regulations, the SCA held, the Minister had failed to create a framework as contemplated in s 2 of that Act. It further held that the application of the pre-qualification requirements was largely discretionary. The regulations did not provide organs of state with a framework which would guide them in the exercise of their discretion should they decide to apply the pre-qualification requirements.
- 4.12.4. The similarities between these regulations and that which is proposed in the Bill and its amendments should be apparent.
- 4.12.5. The fact that this is being dealt with in proposed legislation (the EEA as amended) (as opposed to regulations which were found to be *ultra vires* the Framework Act) does not remove nor address the conflict which is now being created between two pieces of legislation, one seeking to give effect to the Constitution's requirement that there be a framework within which section 217(2) demands are pursued through a scoring system, and the other providing for undetermined subjective threshold requirements before even being permitted to participate in the tender exercise.
- 4.12.6. The SCA held in para [38] of the judgment that the discretionary pre-qualification criteria in regulation 4 of the 2017 Regulations constituted a deviation from the provision of s 217(1) of the Constitution which enjoins organs of state when contracting for goods or services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 4.12.7. Any pre-qualification requirement which is sought to be imposed must have as its objective the advancement of the requirements of s 217(1) of the Constitution.
- 4.12.8. The pre-qualification criteria stipulated in regulation 4 and other related regulations did not meet this requirement.
- 4.12.9. Points are to be allocated to bidders based on the goals set out in s 2 of the Framework Act. The discretion which is conferred on organs of state under regulation 4 to apply pre-qualification criteria in certain tenders, without creating a framework for the application of the criteria, may lend itself to abuse and is contrary to s 2 of the Framework Act.
- 4.12.10. All of these considerations apply equally to the proposed implementation of section 53 and its amendment.

- 4.12.11. The freedom conferred on organs of state to implement preferential procurement policies is circumscribed by s 217(3) of the Constitution, which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented.⁶ The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation.
- 4.12.12. It followed therefore that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful. He acted outside his powers under s 5 of the Framework Act. In exercising the powers to make the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act, which is the national legislation that was enacted to give effect to s 217 of the Constitution. The framework providing for the evaluation of tenders provides firstly for the determination of the highest points scorer and thereafter for consideration of objective criteria which may justify the award of a tender to a lower scorer. The framework does not allow for the preliminary disqualification of tenderers, without any consideration of a tender as such. The Minister cannot through the medium of the impugned regulations create a framework which contradicts the mandated framework of the Framework Act.
- 4.12.13. The Minister's decision was held to be *ultra vires* the powers conferred upon him in terms of s 5 of the Framework Act.
- 4.12.14. The SCA in *Afribusines* held that by virtue of section 217(3) of the Constitution a statutory framework within which the goals set in section 217(2) of the Constitution are to be achieved, would need to be promulgated.
- 4.12.15. If such a threshold is to be set it would need to be in terms of legislation, and not by ministerial decree or regulation or the adoption of a policy to that effect.
- 4.12.16. Section 53 of the EEA, if "operationalised", may be legislation, but without replacing the Framework Act and without providing a framework within which the procurement exercise is to be done, it cannot simply provide that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the Act (even if the purpose thereof is to encourage employers to meet yet to be determined EE targets and punish those who don't).
- 4.12.17. The proposed implementation of section 53 of the EEA (a section which has been dormant for more than two decades) and the insertion of an amendment in the form of section 53(6) appear to be designed to achieve a similar end to that which was previously sought by way of the impugned regulations in *Afribusines*.
- 4.12.18. A certificate of compliance under section 53 is the proposed threshold requirement for procurement.

⁶ See also *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; 2020 (4) SA 17 (SCA) at para 64

- 4.12.19. The requirement itself may be set by legislation (section 53 of the EEA), but the issuing of the certificate of compliance itself will be done by an official, acting in terms of legislation which does not provide the framework or criteria within which the exercise is to be done.
- 4.12.20. The difficulty which will then arise when the section 53 of the EEA is implemented, is that it will have the same effect as that which the SCA in *Afribusines SA* determined to be in conflict with section 2 of the Framework Act, an Act which is not being repealed under the proposed amendments.
- 4.12.21. Unless section 2 of the Framework Act is revoked, both section 53 of the EEA and section 2 of the Framework Act, will be on the statute books, the one setting a B-BBEE threshold requirement for participation in a public tender, the other providing B-BBEE qualifications to be part of the scoring exercise.
- 4.12.22. This conflict cannot be resolved simply with reference to section 63 of the EEA.
- 4.12.23. Section 2 of the Framework Act was specifically promulgated in order to give effect to section 217 (3) and (2) of the Constitution, and section 63 provides that the EEA itself is subject to the Constitution, and by necessary implication, subject to any legislation promulgated specifically in order to give effect to the Constitution.
- 4.12.24. It needs to be noted in this regard that the Framework Act is legislation designed specifically to deal with procurement, whereas the EEA has as its stated object and purpose the promotion of employment equity amongst employees.
- 4.12.25. As legislation implementing the preference element of s 217, the Framework Act has parallels with other constitutionally-mandated legislation such as PAJA, PAIA, and PEPUDA.
- 4.12.26. The central issue is whether and to what extent can pieces of legislation other than and additional to the primary one enacted by Parliament and intended to implement a mandating provision of the Constitution “enforce” the constitutional rights or provisions at issue.
- 4.12.27. The general answer may be that they can, but these laws are thus distinguished from those laws implementing constitutional rights in a field where the legislation is to be implemented by specialist institutions, such as labour.
- 4.12.28. The EEA and its amendments is such legislation.
- 4.12.29. Whilst other legislation implementing s 217 may be non-exclusive and capable of being implemented by generalist rather than specialist institutions, the EEA is not such legislation.
- 4.12.30. The conflict between the legislation is incapable of being resolved.

4.12.31. The further difficulty is that the SCA has suspended the operation of its decision in Afribusines in order for the legislature to address the issues raised in that judgment. Putting section 53 and its amendment into effect is simply going to cause further confusion in that process and provide additional grounds for litigation.

4.13 Criteria for setting the thresholds and issuing compliance certificates

4.13.1. Section 15A is being contemplated in order to empower the Minister of Labour to identify national economic sectors for the purposes of the administration of the Act, in order to determine “*numerical targets for these sectors*”, based on factors / criteria which the Minister may determine.

4.13.2. The sectoral targets which can be set may differentiate between occupational levels, sub-sectors, regions or “*other relevant factors*”.

4.13.3. These are not spelt out.

4.13.4. Section 42 of the Act is to be amended in order to “*clarify*” that a designated employer's compliance with its obligations to implement employment equity may, in addition to being measured against the demographic profile of either the national or the regional economically active population, be measured against an employer's compliance with the sectoral numerical targets set by the Minister in terms of the proposed section 15A. If these targets are furthermore to be determined by using national demographics only, and ignoring for example the regional demographics of the area in which the construction services are to be rendered and from where much of the workforce for the work in question is to be obtained, this would be impermissible and a breach of other sections of the EEA. See *Solidarity and others v Department of Correctional Services and others 2016 (5) SA 594 (CC)*

4.13.5. The amendments to the EEA, if the EEAB is passed in its present form, will allow the Minister to not only set sector specific targets by way of proclamation (which needs to be published for comment, but which comment need not be complied with), but bidders can be excluded from bidding for government projects unless the set targets have been met by them through the withholding of certificates for want of compliance with these targets.

4.13.6. The effect hereof is that meeting the targets as set by the Minister (and obtaining the requisite certificate) will become a threshold / mandatory / minimum requirement for participating in the bid at all, whereas currently BBBEE status is part of the overall evaluation, as to either 10% or 20% of the total score, the balance being for price (functionality / the ability to do the work in question often being the threshold requirement)..

4.13.7. This does not meet the Constitutional requirement set by section 217(3). National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

- 4.13.8. The setting of targets by ministerial decree, based on unspecified factors, for a variety of sectors, sub-sectors, regions, etc does not in my view satisfy the underlined portions of section 217(3), even if this were to be done pursuant to the Bill.
- 4.13.9. Section 15A, if passed, may be part of national legislation, but it sets no framework within which the policy is to be implemented.
- 4.13.10. It simply empowers the Minister to determine targets without reference to any prescribed framework.
- 4.13.11. As such it will be unconstitutional for being in conflict with section 217(3) of the Constitution if passed in its present form.
- 4.13.12. For procurement under the EEAB to pass constitutional muster and serve a rational purpose, the other considerations in section 217(1) are also important, such as being able to obtain the best possible service at the best possible price – something which should lie at the heart of an efficient, fair, equitable, transparent and cost effective public procurement exercise.
- 4.13.13. If the setting of BBBEE targets under the Bill (coupled with the threshold requirement of certification by the Minister) ends up being radically opposed to the advancement of these interests or results in an outcome which bears no rational connection with the above general procurement objectives, the setting of the targets under the EEAB would be unconstitutional for want of compliance with section 217(1) and could be arbitrary, irrational and fail on grounds of legality.
- 4.13.14. Giving a Minister or one of his / her officials the power to set targets by decree outside of the legislation promulgated specifically to give effect to section 217(3) without setting a similar legislative framework within which this is to be done, will, in those circumstances, conflict with both sections 217(1) and 217(3) of the Constitution, and not be rescued by the proviso in section 217(2), which of itself needs to comply with section 217(3).

4.14 Quotas

- 4.14.1. If the target which is set constitutes an absolute barrier or quota, which the withholding of a certificate and with that the opportunity to bid for government work will do, that would fall foul of section 15(3) of the EEA.
- 4.14.2. Section 15(3) of the EEA in its current unamended form provides that affirmative action measures include preferential treatment and numerical goals, but exclude quotas.
- 4.14.3. According to the Bill an employer's BEE score in respect of the various pillars (as per the codes) must be taken into account in the awarding of tenders, of state contracts and/or as a licensing or concession criterion.
- 4.14.4. This is a requirement of section 10 of the Broad-based Black Economic Empowerment Act 53 of 2003.

- 4.14.5. What is now proposed however is that the certificate be a threshold requirement and could, if withheld, serve to exclude potential bidders from the very process of bidding.
- 4.14.6. The imposition of a strict quota is a rigid measure requiring a certain fixed proportion or percentage to be met (for the granting of a certificate) whereas preferential treatment and goals / targets is more flexible allowing the achievement of objectives over a period of time.
- 4.14.7. Section 20(2A) of the EEA, if passed, will have the effect of the Minister in effect determining for the employer what the employer's target must be, and together with certification and a certificate being set as a threshold requirement for bidding, in effect constitutes the setting of a strict barrier for entry into the bidding process.
- 4.14.8. It is difficult to otherwise reconcile the idea of issuing of certificates with the setting of targets – how can someone get a certificate for having committed themselves to achieving a target (particularly when that target is set by the Minister)?
- 4.14.9. The notion of certification suggests that something more definite and fixed, set by an outside agency, such as the Minister, must be met. This clearly akin to a quota, a yet to be fixed, but absolute barrier to entry and bid participation.
- 4.14.10. Any attempt to impose such fixed targets or similar measures of this nature amounting to quotas under any amendment to the EEA by any Minister exercising what he or she may think their powers are under section 53A, will not pass muster, not under the EEA itself, nor under section 9(2) of the Constitution.
- 4.14.11. Rigid quotas, just like any affirmative action measures giving automatic and unqualified preference to designated groups who meet minimum job requirements, are not compatible with the variety of factors that need to be taken into account for an employment decision to bring about the required balance.
- 4.14.12. Section 15(3) of the Employment Equity Act itself however provides that affirmative action measures include preferential treatment and numerical goals, but exclude quotas.
- 4.14.13. “Quotas” refer to all preferential techniques that have the effect of reserving all or a fixed percentage of job opportunities for designated groups.
- 4.14.14. In *Barnard*,⁷ Moseneke ACJ stated *obiter* that “Section 15(3) [EEA] contains a vital proviso that the measures directed at affirmative action may include preferential treatment and numerical goals but must exclude ‘quotas’. Curiously, the statute does not furnish a definition of ‘quotas’. This not being an appropriate case, it would be unwise to give meaning to the term. Let it suffice to observe that s 15(4) sets the tone for the flexibility and inclusiveness required to advance employment equity. It makes it quite clear that a designated employer may not adopt an employment equity policy or practice

⁷ *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* [2014] 11 BLLR 1025 (CC) at par 42

that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups.”

4.14.15. As the above-mentioned passages point out, albeit in employment context, it is significant that quotas are explicitly excluded from a specific category of affirmative action measures designated by the Act as obligatory, namely measures that “ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce”.

4.14.16. This puts quotas outside the protection that the EEAB and any attempts to impose such fixed targets or similar measures of this nature amounting to quotas under any amendment to the EEA by any Minister exercising what he or she may think their powers are under section 53A, will not pass muster.

4.14.17. See also *Mgolozeli*⁸: “The applicant was a victim of blind application of a quota. A target is something to be aspired to because it is based on scientific data whereas a quota system has no science or law. It is arbitrary.”

4.14.18. The bottom line is that there cannot be an absolute barrier for non-designated groups, and a repetition of the kind of complications experienced in instances like the *Barnard* case *supra*, is to be expected if the EEAB is passed in its current form, and the Minister is effectively given *carte blanche* to determine the targets and bidders for government work are precluded from tendering for the work on the basis of these targets or on the basis of refusals to give them certificates under the EEA as amended.

4.15 Section 53(6) and section 15A

4.15.1. Section 53(6) needs to be read with section 15 and the amendment proposed for that section, in terms of section 15A.

4.15.2. The first point to be made in this regard is that under the new subsection 53(6) the Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that the employer (a) has met any sectoral targets in terms of section 15A that applies to it or has provided reasonable grounds, as contemplated by section 42(4), justifying its failure to comply...

4.15.3. In terms of the amendment it appears the issue of a certificate is no longer dependent on that which was (and still is) provided for in the remainder of that section (i.e under subsections 2 and 5 of the old section 53, read with the Code of Good Practice section, 54).

4.15.4. This depends on whether section 53(6) overrides these subsections, and whether the only requirement for a certificate is compliance with 15A or whether it is that an additional requirement, to that provided for in 15(2), 15(5) and the Code of Good Practice requirement.

⁸ *Mgolozeli v Gauteng Department of Finance and Another* [2015] 3 BLLR 308 (LC) at par 24

4.15.5. Given that the latter subsections are retained in the proposed amendment, it appears, that compliance with section 15A is an additional requirement for a certificate.

4.15.6. That is supported by the Minister's public announcement that employers can still set the targets for themselves, provided these are not less than the targets set by the Minister within the specified time period.

4.15.7. But if section 15A conflicts with 15(2), 15(5) etc, and one needs to resort to section 63 to resolve this conflict, preference would need to be given to the amendment ⁹ and section 15A may, at least in the eyes of the Minister, become determinative (and potentially solely determinative) for the granting of a certificate.

4.16 Conclusion

4.16.1. It is clear from the foregoing that public procurement, whether indirectly through the mechanism of the EEA or directly through BBBEE legislation, must accordingly be implemented in accordance with a system which accords with *inter alia* section 217 of the Constitution and must furthermore be in terms of a framework prescribed by national legislation, currently legislation such as the Framework Act and the BBBEE Act, and in due course, should this and other legislation be replaced by the Public Procurement Act, by that Act.

4.16.2. That legislation itself would need to comply with section 217 of the Constitution and the other sections referred to above.

4.16.3. This applies too to any amendment to the EEA, and to any attempts in the EEA to also deal with procurement.

4.16.4. Section 53 does not comply with the Constitution – it does not provide a framework within which public procurement is to be conducted, and if it is ever suggested that it does or that a section in that Act overrides the provisions in existing public procurement legislation, that would be unconstitutional.

4.16.5. In the absence of legislation which empowers the Minister and officials to depart from the existing prescripts under for example the Framework Act they cannot introduce new threshold requirements which conflict with the existing legislation or seek to amend same, since they would be encroaching on the territory of public procurement which is the domain of other legislation as required by section 217 of the Constitution.

4.16.6. Section 9(2) of the Constitution permits legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination to be taken, but the Minister

⁹ **63. Application of Act when in conflict with other laws.**—If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act prevail. This is particularly pertinent given that there is a relatively large array of legislation dealing specifically with BBBEE,

of Labour and his officials can similarly not rely on that section to circumvent the requirement under section 217 of the Constitution which requires national legislation to provide a framework within which government procurement is to be done.

4.16.7. The Bill does not do so.

4.16.8. For *inter alia* these reasons, it is submitted, the Bill is unconstitutional.

Following this legal review, we turn now to providing the Portfolio Committee with more practice related and cause & effect orientated commentary. This is provided to support considerations of the Portfolio Committee and legislators in understanding the implications to our sector of the industry and so the national economy and job market.

Practical implications will be discussed under the following themes:

1. Setting of targets where these would be considered critically important.
2. Dealing with Certificates of Compliance where such are deemed unavoidable considering the legal issues alluded to above.
3. Considering the impact and potential consequences on the construction industry and, lastly
4. Contributing some proposals.

5 Setting Sector Specific EE Targets

In accordance with the Bill the Minister of Employment and Labour will set Sector Specific EE targets for a particular sector. In the case of the Construction Industry, the DOEL appear to have already opted to commence this undefined and unregulated process. From this process SAFCEC have been able to experience the approach of the DOEL. This process is ongoing and raises a number of questions regarding how the process should be conducted to yield achievable targets rather than quotas.

5.1 Historical Performance and Context

A review of the past 10 years will show that the Construction Sector has out-performed private industry in terms of black representation at Top and Senior management, notwithstanding the pressing need to improve the current situation.

The equitable representation at Middle and Junior management are proof that acceleration efforts post 1994 are bearing fruit, however the industry experience and professional registration required at Senior and Top levels cannot be accelerated. The particular challenges of educational and legislative requirements, and poor educational output are discussed in detail in the attached submissions of *18 June 2020 and 16 February 2021* per **Annexure 1** pages 9 to 17.

5.2 EE Targets in Construction Sector Codes

The perception that targets were a subject of negotiation and agreement by the Construction Sector Council prior to the 2017 Amended Construction Sector Codes Gazette is inaccurate. This exercise was an alignment exercise to the 2013 DTI generic codes. The same targets and weightings exist in the Generic Codes, and in every Sector Specific Code, and an extraction of this element for the purposes of targets under this Bill, to be used in isolation for Compliance to participate in government tenders, is considered irrational or arbitrary.

The point to be made is the employment equity targets in the construction sector are multi sector targets prescribed by the DTI. They do not result in a disqualification of getting a BEE scorecard nor are they even seen in the generic scorecard as essential elements where the non-attainment of the 40% subminimum reduces a measured entity by a level in its scorecard. The measured entity gets pro-rata points based on its achievements towards those targets.

5.3 Target Setting Process Concerns

The Bill is not prescriptive and, in our view the Bill should be prescriptive regarding the methodology that shall be followed to ensure the targets set do not amount to quotas. Please refer to part 4 of this submission for detailed legal context and concerns.

No provision exists for industry or the public to comment on sector specific targets the Minister proposes to publish, there is also no process to allow for objection, appeal or mitigation. It is, in our view, extremely important that the Minister is able to consult widely and obtain the best information on which a rational and informed and sustainable set of targets may be promulgated. This consultation process should be provided for in the Bill.

The factors to be considered by the Minister should be identified and regulated via regulation or practice notes for each industry. These should be agreed upon by each industry. Specifically, factors for the Construction industry factors to be included *inter alia* are:

- Current and projected state of the industry and expected employment trends
- Recent EE performance
- Reliable industry employment trends in all EE categories
- Structural deficiencies in the employment market for skills in the industry. Here one may consider the Critical Skills lists published by the Minister of Home Affairs from time to time. Coincidentally, those skills we, as the Construction Industry are challenged to obtain to promote persons into Technical & Professional, Senior and Top Management levels are defined as Critical Skills in previous and the current Critical Skills list ⁷ recently published for input.
- Education to Employment opportunities for EE candidates including, but not limited to:
 - Enrollment for tertiary studies in the construction sector
 - Tertiary output of skills for the construction industry
 - Professional registration performance
 - Immigration statistics
- Etc.

It is imperative that **realistic** and **achievable** targets are set. This requires unemotional, rational interaction between knowledgeable and mandated parties who represent identifiable and significant numbers of employees.

5.4 National vs Regional Targets for the Industry

The Bill is not clear as to how the Minister will recognize the Regional Economically Active Populations (EAP) when determining the Sector Targets as discussed under par 4.13. South Africa is a large country with a diversity of languages and citizens. The development and legislated support for the advancement of small business has led, and will lead, to the emergence of successful local and regional construction businesses. These businesses recruit and appoint staff from their local communities which is closely linked to the regional EAP.

A recent SAFCEC survey was undertaken to measure EE achievement targets currently in place amongst our diverse membership grouping. The results revealed the following:

- a) Due to the technical nature of our industry, statutory registration prescripts dictated by Acts such as that on the Built Environment and the Occupational Health and Safety Act as well as risk management requirements set by company owners, construction company senior management and top management have a very high number of skilled and experienced engineers in the leadership levels. Such persons have, in general spent more than 15 years dedicated to the construction industry. Please refer to

- Annexure 1** page 11 in this regard. It is not uncommon for the advancement of an economy to be measured as the number of engineers per 100 000 of a particular population.
- b) Our membership companies show high correlation in targets and performance within regions
 - c) Larger, black-owned and other CIDB Level 9 companies, do not comply with the targets proposed at Senior and Top Management, currently proposed by the DOEL. This is partly due to regional demographics ie. Indian or Colored Top management in KZN and the Cape, and *inter alia* the requirement for registered professionals to comply with legislative and insurance requirements. The latter being from predominantly the white ethnic group. Refer to **Annexure 1**, page 7
 - d) Companies would be unable to reverse their planning and implementation of EE from their regional to national EAP's. As a result, they would be found wanting and could be barred from undertaking State work.
 - e) The sample results show that the 20th CEE survey averages are not currently being achieved in our post Covid depressed economy and major shrinkage has occurred.

5.5 Consequences

Excluding the larger enterprises in the construction sector from even bidding for government work on the grounds that at senior levels they are unable to appoint sufficient numbers of black people with the requisite qualifications (in many cases a degree from a tertiary institution) for the level of the engineering and construction work in question, is not going to advance employment equity (at that level). In our view, it will have the converse effect, reducing the ability of these enterprises, in those cases where the critical and scarce skills can be found, to employ and advance people from designated groups at this level. Setting threshold requirements which cannot be met excludes potential bidders and leads to a reduction in work opportunities. Granting potential bidders the opportunity to bid for the government work in question, creates employment opportunities and the ability to appoint or advance black people to the senior positions, where such skills are available. This is the nexus of a spiral leading to potentially large-scale job losses.

State Infrastructure investment not only takes place on a national level, but a significant percentage thereof is spent at Provincial and Local Govt level. It is at this level where a significant number of employees who are employed by construction companies are to be found. It is also at this level where construction companies organically grow to achieve up to cidb level 7/8 status. In our view, it is only beyond cidb level 7/8 that is it sustainable to operate nationally and recruit from a national EAP. Enforcing National EE targets on this fragile part of the industry will only have the impact of denying employees work opportunities, and more importantly, the citizens access to infrastructure such companies should be constructing for the State.

Publication of unrealistic and/or unachievable targets will lead to noncompliance and be counterproductive to transforming this fragile industry trying to recover from the ravages of a number of external economic factors.

6 Certificates of Compliance

The putting into operation and amendment of Section 53 of the principal Act as proposed in the Bill that proposes the issuing of certificates of compliance and then setting such a certificate as a prerequisite to transact with the State is problematic for the construction industry at a number of levels.

- a) Such a requirement is legally incorrect as alluded to in par 4.2, 4.4 and 4.5.
- b) It should be noted that the requirement for a **Certificate of Compliance** for State Tenders will nullify the PPPFA and in turn the BEE Act. The importance of BEE compliance in State tenders is incorporated into the 80:20 and 90:10 scoring under the PPPFA, but the if the EEAB is implemented it will be afforded greater impact than the Procurement Bill. (s63 of EEAB states it enjoys preference to any other legislation other than the Constitution).
- c) Such a requirement has a much larger impact on the Construction Industry than any other sector in our economy. This disparate and inconsistent treatment of businesses singles out the Construction Industry in its impact and intent. The impact on any construction business of not being able to obtain a certificate of compliance is grave as 64% of the construction turnover has State expenditure at it's core (per BER).
- d) The existence of a domestic construction industry is a national asset. Not only does the sector contribute to our economy and fiscus, it also is a major job creation tool and serves the country in constructing infrastructure it desperately needs. It is counter productive and irrational to deny the State and its citizens the service of any local business wishing to operate, and simultaneously create jobs, through withholding certificates of compliance, amounting to a "blacklisting" process.
- e) How will this be implemented where foreign competitors compete with local companies for State work?

A number of concerns arise in relation to the inspectorate tasked with enforcement through the issuing and/or withholding of compliance certificates (Refer to par 4.12 in this regard). The proposed Bill is vague in relation to how the inspectorate will conduct themselves. Furthermore, it is also vague regarding how the Minister will regulate this enforcement without it being seen as "*legislating*" through regulation.

As an Industry, questions such as the following arise and have cause for concern:

- a) Are there sufficient and capable resources in the DOEL to ensure this is realistically, fairly, consistently and pro-actively implemented?
- b) How will businesses be protected from irrationality in the actions of inspectors refusing to issue certificates or repealing certificates that will effectively shut down businesses with the most severe impact being the loss of jobs, particularly for those who are most vulnerable and without the skills or education to source alternative employment.

- c) Inspectors gain the power to shut down operations of construction businesses who are dependent on their livelihoods in providing services the State. How do the lawmakers propose to ensure the inspectorate do not abuse these powers and do not succumb to the very real risk of bribery and corruption given their power position over the life and death of the organization?
- d) How do the lawmakers ensure that these certificates of compliance cannot be abused in the powerplay of competing for State tenders? It is not inconceivable for competitors to harm each other by abusing the provisions engrained in this part of the Bill to put each other out of business, thereby “thinning the herd”.
- e) The process of proposed certification has not been consistently explained by DOEL officials. These varied signals point toward a lack of clarity in the proposed Bill. This should be clarified. Specifically, regarding failure to meet targets and the withdrawal or non-issue of a Certificate of Compliance Every verbal engagement with DOEL includes comments of “reasonable” provisions for failing to meet targets. These regulations are unpublished, unseen and require the engagement agreement and support of industry.
- f) Additional objective factors should be identified that represent justifiable grounds and reasons for not meeting sectoral targets to be listed in the EEAB and in addition, the process for designated employers to apply for exemption therefrom is to be codified into the EEAB.

Debate around the punitive nature or not of certificates of compliance will no doubt be lively. As far as our industry is concern this is not a trifling matter but rather one of life or death of the company. The Portfolio Committee is reminded of the powers afforded to the Employment Equity Commissioner, through the current EE Act, to levy fines. These existing, severe, sanctions under the Act already provide measures to ensure compliance under the Act. Adding a compliance certificate requirement for State contracts represents a crippling, punitive and, in our view unfair measure, particularly given the impact on our industry so dependent on State contracts and critical for job creation.

7 Impact and Consequences

The following unintended consequences of incorrect drafting and implementation of this Bill / Act have been identified:

- a) A decrease in choice of service providers doing business with the State. Entities should be encouraged to do business with the State rather than discouraged to do so. In this manner sect 217 of the constitution assures that the state procures in the interest of all citizens of SA with particular emphasis on fairness, equitability, competitiveness and cost-effectiveness. This cannot be the case where doing business with the state is discouraged.
- b) The cost of doing business increases due to appointments of scarce employees within a particular demographic group leading to unsustainable salary levels. This becomes a vicious circle where existing employees must have their salaries increased as well in line with the principle of equal pay for equal work. This will directly impact South Africa's global competitiveness. In the construction market it will severely hamper our ability to export our services to the rest of Africa further advantaging competitors from elsewhere.
- c) The ease of doing business in South Africa will further decrease denying the State access to a wider supplier network.
- d) Emigration of scarce skills will further increase.
- e) The temptation for black-owned businesses with a turnover under R50 million, who do not require the measurement of Employment Equity in the issuance of a SANAS scorecard, to suppress their employment numbers. Those working as Specialist Trade Subcontractors, bricklayers, plastering , steel-fixing , glazing and partitioning have a fairly large labour compliment and will now need a Certificate of Compliance or will suppress their workforce numbers to avoid this proposed legislation.
- f) Continuous and costly legal action constantly challenging, firstly, the setting of targets and, secondly, the actions of inspectors withholding compliance certificates denying companies the ability to earn a living. In our industry. This will be brought to a head during bidding processes and has the potential to further delay bid awards and, importantly the execution of infrastructure work with the associated job creation. In practice State entities are generally unable to award projects in under 6 months with a bid award period of 18 months not uncommon. During this time the EE compliance of a once compliant bidder can change leading to award challenges.
- g) Bribery and corruption may arise in a drastic effort to obtain EE compliance certification or to prevent the suspension of a certificate which could well lead to the demise of a company.

8 Proposals to improve Employment Equity

The Construction Industry shares the deep concerns regarding the constraints to Top and Senior management positions, and the equitable representation by all South Africans in business.

8.1 General

Review the Bill to incorporate more prescriptive measures to guide the Minister in establishing regulations to deal with processes of consultation and consensus setting with public participation thereafter in the process of setting sector targets. This also applies in determining regulations and practice notes on the issuing of compliance certificates or the grounds for, and basis of, exemption.

8.2 Legal proposals

A thorough legal review must be undertaken including that of the myriad regulations impacting business. The matter of using labour legislation which interferes with procurement legislation is of concern, particularly as a review of procurement is currently underway. It is our view that EE legislation should be devoid of legislation impacting procurement.

8.3 Target setting and compliance certification

Achievable and realistic targets are important to get buy in. Legislation should take note of the real concerns around the process of setting targets.

The concerns expressed by the DOEL and CEE regarding the perceived slow rate of progress in EE highlights the real need for Industry to engage and workshop the good intentions of the DOEL and the CEE, with accurate information and research to provide a factual basis for assertions made.

It is believed that the ever-growing list of Scarce Skills can be directly attributed to both the contracting economy and educational restraints. However, the solutions will only be found with accurate research and sound statistics. Private industry and Government should join hands in funding research at an independent research institute such as an academic institution or a business school which could be commissioned to collect, collate, interpret and report on the data sets required to firstly set and review targets and subsequently measure performance against. This could form part of a larger commission to collect data on our industry needed to impact infrastructure delivery strategy.

This data can then be obtained and presented to the CEE and to assist in rational planning and may include:

- a) Sound economic projections based on present data and post Covid.
- b) Statistics of the attrition rate per Industry must be considered, together with the recent decimation of the industry.
- c) Professional bodies in all Industry must be required to submit stats of registered Professionals, together with race and gender for accurate knowledge of the candidate pool available at each Level of Management.

- d) It must be accepted that any target setting with Sectors cannot be the same, and sub-sectors must be taken into account.
- e) Tertiary institutions should be required to make submissions to the CEE regarding their enrolment and graduation stats in terms of qualifications / race / gender and nationality. This will form the basis of future modelling for all economic sectors.
- f) Similarly, the Department of Education should be required to make submissions to the CEE regarding their enrolment, throughput and Grade 12 pass rate in terms of race, gender, nationality and subjects that enable registration for each industry or profession.
- g) For construction, an analysis of the current CIDB Company registrations per Grade can be used to model the future industry requirements in terms of engineers and related professions upon which realistic targets can be set.
- h) Local vs National demographic targets must be taken into consideration.
- i) Contractual requirements that enforce the employment of local labour, typically on a fixed-term contract basis equivalent to the duration of the Contract does not lend itself to long-term permanent work opportunities and related career development. These must be considered in Procurement Legislation.
- j) The combined effects of legislation must be viewed in totality to measure the effect on Companies who rely on State Contracts, ie The Procurement Bill, B-BBEE Act and the Employment Equity Act. This should include a total legal review of the potential constitutional challenges highlighted.
- k) Prior to acceptance of changes to the EE Bill; and the proposed Regulations, a revised Bill including all areas of concern, regulations, prescripts and protocol; must be published for Public comment.
- l) The reporting mechanism, that identifies “acceptable reasons” for failure of a Company not to achieve their plan, must be discussed, agreed, and prescribed in the Act. Like- wise the power of the DOEL officers to investigate Companies and withdraw certificates of Compliance must be clearly identified, agreed and published.

9 Conclusion

This submission has attempted to inform the members of the Portfolio Committee on the nature of the Construction Industry, the role SAFCEC plays therein and the current economic and future construction economic realities to provide broad context.

The report has provided a thorough legal review and expressed concerns and highlighted pinch points in relation to current legislation and applicable court rulings.

At a practical level the authors have attempted to illustrate their concerns as these apply to the implications of the Bill on the South African Construction industry. In this regard, attention was drawn to the process of setting EE sector targets as well as the proposed process of issuing compliance certificates to impact EE behavior of employers.

It is our view that this Bill has not yet considered all of the legal ramifications required to pass Constitutional muster and yield legislation that is practically enforceable and, importantly, has the desired effect intended by the majority of voters in South Africa.

We are of the view that the Bill does not sufficiently address the content and process through which the Minister sets sector specific EE targets and we raised a number of concerns in that regard. As an enforcement tool coupled to the setting of targets we are of the opinion that the punitive nature of withholding compliance certificates for companies engaged in our industry will be counterproductive and has the real risk to lead to job losses rather than stimulating the economy, creating jobs and delivering infrastructure to the people of South Africa efficiently and affordably.

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2. The Employment Equity Amendment Bill, 2020 as published in the Govt Gazette nr 43535 on 20 July 2020.
3. Numbers and Needs in Local Government – Addressing civil engineering – the critical profession for service delivery. Allyson Lawless, The South African Institution of Civil Engineering, 2007.
4. Numbers and Needs– Addressing imbalances in the civil engineering profession. Allyson Lawless, The South African Institution of Civil Engineering, 2005.
5. Infrastructure for South Africa. A report commissioned by Business Leadership South Africa and prepared by Intellidex, S Theobald et al, Intellidex 2021. Available online at : <https://hub.blsa.org.za/wp-content/uploads/2021/03/BLSA-Intellidex-Infrastructure-Report.pdf>
6. Special Report – Construction Mafia, Conquered, Captured and incapacitated by the Construction Mafia, Mfebe W, Shape Shifter Magazine, January 2020, a SACPCMP Publication.
7. Invitation to comment on the Critical Skills List (2020), as published in the Govt Gazette nr 44164 on 18 February 2021.



ANNEXURES

- Annexure 1 Submission SAFCEC to Minister of Labour and Commission for Employment Equity
18 June 2020 based on 2018 EEAB and copied to Portfolio Committee on 16
February 2021
- Annexure 2 Submission to BUSA on September 2020 EEAB
- Annexure 3 SAFCEC Transformation Declaration
- Annexure 4 Supplementary information to support Legal Commentary.
Extracts from relevant legislation to which reference is made in these submissions

Annexure 1

Submission SAFCEC to Minister of Labour and Commission for Employment Equity 18 June 2020 (based on
2018 EEAB)

Copied to Portfolio Committee on 16 February 2021

18 June 2020

Director of Employment Equity
Department of Employment and Labour
Attention : The Honourable Chairperson Ms Ntsoaki Mamashela - ntsoaki.mamashela@labour.gov.za
The Commission of Employment Equity
Via : The Chairperson Ms Tabea Kabinde - tabea@wefindtalent.co.za

Dear Sirs / Madam

EMPLOYMENT EQUITY BILL OF 2018, AND PROPOSED TARGETS FOR THE CONSTRUCTION SECTOR, AS TABLED BY DOEL.

The South African Forum of Civil Engineering Contractors (SAFCEC); as a significant Construction Sector stakeholder, submitted comments relating to the Act above, when it was published in draft during the commentary period. SAFCEC have had no feedback to our constructive engagement, and none of our commentary appears to have been considered. In addition, we are aware of the submission by BUSA, representing South African Business at NEDLAC of 21 November 2018; where it was noted that the consultation process that had taken place at NEDLAC has also not been taken into consideration.

We attended a meeting on 28 February 2020 at the DOEL, where a presentation of the proposed targets for the Construction Sector were presented.

This submission is in response to both the EE Bill and its potential consequences, and to the targets suggested by the DOEL on 28 February. Attached to this submission discussion document, is a data analysis which is referenced, and provides more in-sight and explanation to the Items discussed. Reference **ANNEXURE A** attached

1. Firstly, it must be acknowledged that SAFCEC shares the concern by the Commission for Employment Equity on the lack of equitable representation at Top and Senior levels in the Business Sector. It is our sincere hope that once the specifics of our industry are understood in this submission; that SAFCEC has the opportunity to workshop solutions to the challenges experienced. Our commitment to Transformation is evidenced by the highest Black

ownership, Procurement and Employment Equity targets in the Amended Construction Sector Codes.

2. This commitment is further evidenced by the Construction Sectors percentage of the largest EAP grouping, being African Male at Top Management, being almost double that of the private sector average **REF ITEM 1**.
3. The proposal to use the EE targets contained in the Amended Construction Sector Codes in the Construction Sector for their company EE Targets is considered disingenuous, for the following reasons:

- There are 5 elements in a Scorecard so Companies can invest in other elements of the scorecard to make up scoring in the event of unforeseen EE events, (like key staff attrition)- i.e. additional spend on Training and the Company can still have a scorecard and win state tenders.
- The Construction Sector Codes (CSC) encompass Built Environment Professionals (BEP) whose business operational parameters and conditions are very different to Contractors.
- The CSC also include Suppliers to the Construction Industry, eg cement suppliers, steel companies, brick manufacturers; who report under different Sectors to the DOEL.
- The DOEL EE report can never be used for a scorecard audit – “to reduce red tape” as suggested during the DOEL presentation. Scorecards expire at all times and audits are done on previous years financials, ensuring that 2 elements are measured in the month of audit, ie ownership and employment equity. DOEL EEA2 reports are submitted at the end of each year, with possibly different employment statistics during the next years scorecard audit.
- Black owned business with turnover less than R50m do not have employment equity measured for their scorecard, but are most likely employing more than 50 employees. They will now be required to conform to the industry targets in order to do state business.
- Regional Contracting Companies can elect to be measured on Regional EAP targets in their scorecard, while DOEL requires National EAP targets (*refer* **ITEM 9**).

4. The decimation of the Construction Industry during this recession, prior to the Covid pandemic, has been catastrophic. It is untenable therefore that further prohibitive measures are now being contemplated to prevent Contractors engaging in State Contracts via the requirement to have a Compliance Certificate. In this regard, the following must be considered:

- Legislation is being tabled giving the Minister power to issue regulations prior to these regulations being agreed?
- The consideration and acceptance of "acceptable circumstances", for not achieving targets and determining the issuance of a Compliance Certificate when companies submit their EEA2 reports.
- The implementation measures allowed by DOEL inspectors, and the circumstances of revoking a Compliance Certificate which effectively puts a Contractor out of business, and the real possibility of abuse and corruption attached to this situation
- What measures are being contemplated to penalise other businesses in the private sector, who do not meet their Plan, but do not require a Compliance Certificate as they do not engage in State Contracts? The table below will illustrate the performance of Construction vs Private Sector Average vs Proposed DOEL Targets – (extract from **ITEM 1.**)

INDUSTRY	LEVEL	AFRICAN		COLOURED		INDIAN		WHITE		F NATIONALS	
		M	F	M	F	M	F	M	F	M	F
CONSTRUCTION	Top	13.8	5.3	5.5	2	5.9	2.5	55.9	6.7	2.2	0.3
	Senior	17	6.5	6.3	2.1	5.8	1.8	46.2	11.3	2.5	0.5
Private Sector Average	Top	7.0	3.9	3.2	1.9	7.1	2.9	56.4	13.2	3	0.5
	Senior	10.8	5.9	4.7	3.2	7.7	4.1	41	19.1	2.7	0.8
DOEL Proposed Sector Targets	Top	25,9	25,9	3,2	3,2	0,9	0,9	20,0	20,0	0,0	0,0

5. The perception and interpretation of member companies that these targets in numerical form assume the prescription of quotas, in contravention of the Constitution and the ILO 111 Convention, which poses the very real prospect of legal challenge.
6. **ITEMS 2 and 3** in the attachment outlines the legislative requirements for the selection of Operational staff in Senior and Top Management in Construction Companies and the education and qualifications required. **ITEM 4** is current data showing the small pool of candidates available for selection in these positions, irrespective of race and gender. The lack of equitable representation at Top and Senior levels is accepted as being a direct result of past injustices in Education, but cognisance has to be made of these facts when ascribing targets.

7. **ITEM 5** compares the comparison of actual race percentages of qualified candidates vs the DOEL proposed targets at Top Management, showing that these will take at least 20 years to achieve,
8. **ITEM 6** shows the gender gap in Construction and Engineering, with no available statistics in which Sector of Engineering these Registered Female Professionals are employed. These statistics are for all women, yet DOEL require EE stats that reflect demographics.
9. **ITEM 7** shows detail of the talent pool at lower management levels, which is a positive sign for the future.
10. **ITEM 8** details the restriction on all youth pursuing academic qualifications and the current situation in our Education system, where excellence in Maths and Science is mostly achieved in private schooling. This situation is a great source of concern because it indicates that unless there is immediate redress, then under privileged children may forever be trapped in a cycle of poverty, despite the best intentions of the CEE, and the efforts of industry.
11. **ITEMS 10 and 11** described the complexities in Legislation and Tender rules that are unique to Construction and also the cyclical nature of Construction that require permanent adjustment to employment figures. These include prescriptive tender requirements for "local" employment, and the requirement to sub-contract contracts to Emerging Contractors. These factors further illustrate the need for Contractor- specific "acceptable **reasons**" to deviate from a Contractors EE Plan; which will form part of the EEA2 annual submission to DOEL.

The final Item is the attached document is repeated here to further emphasise the need of our Industry to engage and workshop the good intentions of the DOEL and the CEE, with accurate information and research.

SAFCEC would like to actively engage with both DOEL and CEE to explore interventions that overcome the issues presented in this document; and it is believed that this can take place with further study and information sourcing.

It is considered that meaningful engagement can take place when the following information is obtained by the Council of Employment Equity (CEE)

1. Economic projections based on present data and post Covid.
2. Statistics of the attrition rate in Construction must be considered, together with the recent decimation of the industry.
3. Professional bodies like ECSA and CESA must be required to submit stats of registered Professionals per Engineering and Construction Sector, together with race and gender for

accurate knowledge of the candidate pool available at each Level of Management, and whether these professionals are located in Construction Companies or Consulting Engineers.

4. It must be accepted that any target setting for Contractors and Consultants cannot be the same, nor can this be applicable to Construction Material Suppliers who fall under the Construction Sector Codes, but report under "Manufacturing" on their EE reports to DOEL.
5. Tertiary institutions should be required to make submissions to the CEE regarding their enrolment and graduation stats in terms of qualifications / race / gender and nationality. This will form the basis of future modelling for all economic sectors.
6. Similarly, the Department of Education should be required to make submissions to the CEE regarding their enrolment, throughput and Grade 12 pass rate in terms of race, gender, nationality and subjects that enable registration for engineering.
7. For construction, an analysis of the current CIDB Company registrations per Grade can be used to model the future industry requirements in terms of engineers and related professions upon which realistic targets can be set.
8. Local vs National demographic targets must be taken into consideration.
9. Contractual requirements that enforce the employment of local labour, typically on a fixed-term contract basis equivalent to the duration of the Contract does not lend itself to long-term permanent work opportunities and related career development. These must be considered in Procurement Legislation.
10. The combined affects of legislation must be viewed in totality to measure the affect on Construction Companies who rely on State Contracts, ie The Procurement Bill, B-BBEE Act and the Employment Equity Act.
11. Prior to the acceptance of changes to the EE Bill; the proposed Regulations, that the Bill will empower the Minister to enforce; must be published for Public comment.
12. The reporting mechanism, that identifies "acceptable reasons" for failure of a Company not to achieve their plan, must be discussed and agreed. Like wise the power of the DOEL officers to investigate Companies and withdraw certificates of Compliance must be clearly identified, agreed and published.
13. To enable rational and considered decision making, it is proposed that an independent institution such as a academic institution offering construction management or a business

school be commissioned to collect, collate, interpret and report on the data sets required to firstly set and review targets and subsequently plot performance.

Finally, we trust that this extensive response is accepted in the spirit of constructive engagement and the willingness to engage and find solutions; now that the reality of our industry has been outlined in detail

We hold ourselves available to clarify any issues contained in this communication if required.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Webster Mfebe', with a large, stylized flourish at the end.

Webster Mfebe
Chief Executive Officer

South African Forum of Civil Engineering Contractors

Schedule of Annexure Items

**Submission to the Department of Labour and the Commission of Employment Equity
Regarding The Employment Equity Amendment Bill as well as the Associated Setting of
Sector Specific Guidelines to the Construction Industry**



ITEM 1

STATISTICS EXTRACT FROM LAST AVAILABLE EE REPORT 2018-2019 ¹

(PERIOD 2019 -2020 NOT YET PUBLISHED)

The table below indicates comparative statistics of top and senior management from different industries (excluding state owned enterprises) percentages, highlighting the comparison between construction and other sectors.

INDUSTRY	LEVEL	AFRICAN		COLOURED		INDIAN		WHITE		F NATIONALS	
		M	F	M	F	M	F	M	F	M	F
Agriculture	Top	5.8	2.0	2.7	1.9	1.1	0.3	72	13.3	0.8	0.1
	Senior	9.1	3.5	4.3	2.1	1.5	0.8	58.1	19.4	1.1	0.2
Mining	Top	20.5	7.1	2.6	0.7	2.5	1.2	54.3	7.8	3	0.4
	Senior	21.9	5.8	2.5	0.8	4	1.9	51.6	8.8	2.3	0.4
Manufacture	Top	5.8	3	3.3	1.6	9.3	2.8	58.7	10.4	4.5	0.5
	Senior	9.7	4.5	5.8	2.9	9.7	4	44.7	15.4	2.9	0.5
CONSTRUCTION	Top	13.8	5.3	5.5	2	5.9	2.5	55.9	6.7	2.2	0.3
	Senior	17	6.5	6.3	2.1	5.8	1.8	46.2	11.3	2.5	0.5
Retail Motor	Top	4.7	2	3.3	2	8.9	2.8	59.8	14.8	1.4	0.2
	Senior	11	6.3	6.4	4.8	8.4	4	38.2	19.3	1.2	0.4
Commercial	Top	4.7	2.8	2.7	1.4	10.7	3.7	55.9	14.7	2.8	0.6
	Senior	9.5	5.6	4.4	3.7	11.1	4.9	37.7	20.2	2.3	0.6
Catering	Top	8.9	5.6	2.4	2.3	4.5	2.4	49.3	20.4	3.6	0.8
	Senior	14.2	11.2	4.5	5.2	4	2.8	29.5	25.1	2.5	1
Transport	Top	11.5	6.4	3.4	2.4	9.4	4.2	46.7	11	4.6	0.4
	Senior	15.4	8.2	4.9	2.9	9.6	4.5	33.9	15.6	4.1	0.9
Finance	Top	9.4	5.7	2.7	2.3	5.8	3.4	50.3	16.2	3.3	0.9
	Senior	10	7.8	3.7	3.4	7.7	5.8	35	22	3.2	1.4
Private Sector Average	Top	7.0	3.9	3.2	1.9	7.1	2.9	56.4	13.2	3	0.5
	Senior	10.8	5.9	4.7	3.2	7.7	4.1	41	19.1	2.7	0.8

ITEM 2

LEGISLATIVE REQUIREMENTS FOR PROFESSIONAL ENGINEERS AND CONTRACT MANAGERS, IN SENIOR AND TOP MANAGEMENT POSITIONS

The **Occupational Health and Safety Act and Construction Regulations** ⁴ place onerous obligations on line managers in construction companies. This is done for good reason as **construction projects are high risk environments with the potential to harm employees and members of the public**. Recent high profile safety incidents within our industry attest to this. It is evident that investigations into these incidents also focus on the competency of site managers as well as temporary works inspectors and designers.

The onerous obligations and consequences faced by construction company line managers and leaders require competent persons and at the core of the requirement lies the definition of competence as defined in the Construction Regulations which read as follows:

“**competent person**” means a person who-

- (a) has in respect of the work or task to be performed the required knowledge, training and experience and, where applicable, qualifications, specific to that work or task: Provided that where appropriate qualifications and training are registered in terms of the provisions of the National **Qualification Framework Act, 2000 (Act No.67 of 2000)**, ⁵ those qualifications and that training must be regarded as the required qualifications and training; and
- (b) is familiar with the Act and with the applicable regulations made under the Act;

The above definition prohibits people without recognised qualifications to be appointed under the act. Of particular importance in the career path and appointment scope of construction company leaders at the professional, senior and top management levels is the clause 8.1 appointment of construction manager which is defined as:

“**construction manager**” means a competent person responsible for the management of the physical construction processes and the coordination, administration and management of resources on a construction site;

The appointment obligation is described as :

- 8. (1) A principal contractor must in writing appoint one full-time **competent** person as the construction manager with the duty of managing all the construction work on a single site, including the duty of ensuring occupational health and safety compliance, and in the absence of the construction manager an alternate must be appointed by the principal contractor.
- (2) A principal contractor must upon having considered the size of the project, in writing appoint one or more assistant construction managers for different sections thereof: Provided that the designation of any such person does not relieve the construction manager of any personal accountability for failing in his or her management duties in terms of this regulation.

Also of importance in the professional and senior management levels will be appointments as construction supervisor defined as:

“**construction supervisor**” means a **competent** person responsible for supervision construction activities on a construction site;

Contractors have design responsibilities often undertaken on site by construction employees at professional and senior manager levels. This either where they manage design and construct projects, do temporary works design or supervise and inspect temporary works design. For these functions the appointment as designer is of importance where:

“**designer**” means-

- (a) a competent person who-
- (i) prepares a design;

- (ii) checks and approves a design;
- (iii) arranges for a person at work under his or her control to prepare a design, including an employee of that person where he or she is the employer; or
- (iv) designs temporary work, including its components;
- (b) an architect or engineer contributing to, or having overall responsibility for a design;
- (c) a building services engineer designing details for fixed plant;
- (d) a surveyor specifying articles or drawing up specifications;
- (e) a contractor carrying out design work as part of a design and building project; or
- (f) an interior designer, shop-fitter or landscape architect;

These persons must be professionally registered with ECSA and are specifically referred to in the regulations as:

“Professional Engineer or Professional Certificated Engineer” means a person holding registration as either a Professional Engineer or Professional Certificated Engineer in terms of the **Engineering Profession Act, 2000 (Act No. 46 of 2000)**; ⁶

“Professional Technologist” means a person holding registration as a Professional Engineering Technologist in terms of the Engineering Profession Act, 2000; ⁶

ITEM 3

REGISTRATION REQUIREMENTS

The Engineering Professions Act of 2000 ⁶ places further obligation on registered persons in professional, senior and top management positions in construction companies. In addition, requirements by **clients and insurers of construction companies** and projects require that leaders be registered with professional bodies.

The Engineering Council of South Africa (ECSA) identifies work that may only be done by professional persons in accordance with the Engineering Professions Act. This should include certain roles and responsibilities of construction engineers.

The ILLUSTRATIVE career path table, below, serves to illustrate the time and background in meeting candidacy requirements prior to registration that must be gone through. Only once registered can such persons be appointed under the regulations and start gaining experience at the particular level on site. This is then followed by further appointments overseeing many sites usually at a senior management position and thereafter at a top management position.

ILLUSTRATIVE TYPICAL CAREER PATH TABLE

Professional Qualification	4- 5years of study	Minimum entrance- requirement: Advance 70% Math and science at 60% plus	5 years
Candidacy program for Professional Registration	Minimum 5 years	Minimum entrance requirement: <ul style="list-style-type: none">• Professional Qualification• Structured Mentorship programme	10 years
Middle Management	5 to 10 years	<ul style="list-style-type: none">• Professional work experience and further academic development• On the job Coaching programme	10 - 15 years
Senior Management	Minimum 5 years at Middle Management level	<ul style="list-style-type: none">• Broader business experience and academic development• Leadership development	15 – 20 years
Top Management	Minimum 5 years at Senior Management level	In depth strategic and business development experience and professional development	20-25 years

The table above illustrates that it could take from 15 to 20 years for a construction leader to reach senior and top management levels coming through the ranks. It thus follows that senior and top managers that wrote their Senior Certificate, Gr 12, exam in 2000 to 2005 are only now at the levels of senior management. The pool of incumbents from designated groups is small given the numbers leaving school with adequate maths and science marks, (refer to **ITEM 8**) showing maths pass rates in 2002). This pool was by no means fully available to the construction market and is contested by other industries offering much better salaries, working conditions with lower responsibility levels.

Construction companies rarely appoint persons to line management positions and ultimately senior and top management without the incumbent having undergone the above process. This is driven by the requirement that construction leaders need to meet statutory prescripts and be able to lead teams who require valuable industry experience, and can make contractual, bidding and commercial decisions based on their broad experience.

This philosophical argument is often counteracted by corporates who believe leading construction companies is simply a management function not requiring specific construction experience. The track record of organisations holding this belief is evident in failures of large construction businesses here and abroad where leadership lose touch with the business of construction and the soul of the

construction people employed at all levels in the organisation. Senior and top management in particular must make critical bidding, technical, safety, contractual and commercial decisions which are not similar to normal management tasks. These require the prerequisite experience. Ultimately the failure of the company negatively impacts firstly all the employees and then of course the shareholders and the national economy.

ITEM 4

CURRENT STATISTICS OF REGISTERED PROFESSIONALS – (REQUIRED BY LEGISLATION TO HOLD TOP MANAGEMENT OPERATIONAL POSITIONS IN CONSTRUCTION COMPANIES)

CESA ² published the number of registered professionals in the industry. **By far the most do not work in construction companies!** From statistics it is difficult to sometimes isolate Civil Engineers which should be considered in isolation when considering our industry

Table 1: Professional Category Registration Statistics

Professional Engineer		
		Total Registrations to date
TOTALS		21446
Gender	Male	20315
	Female	1131
Race	Black	2338
	White	17932
	Indian	926
	Coloured	250

STATS EXTRACT REF 2

SACPCMP		
3. Professional Construction Manager (910)	910	
Black - 158	158	17.36%
White- 676	676	74.29%
Indian - 38	38	4.18%
Coloured -38	38	4.18%
Female - 18	18	1.98%
Male- 892	892	98.02%

STATS EXTRACT REF 3

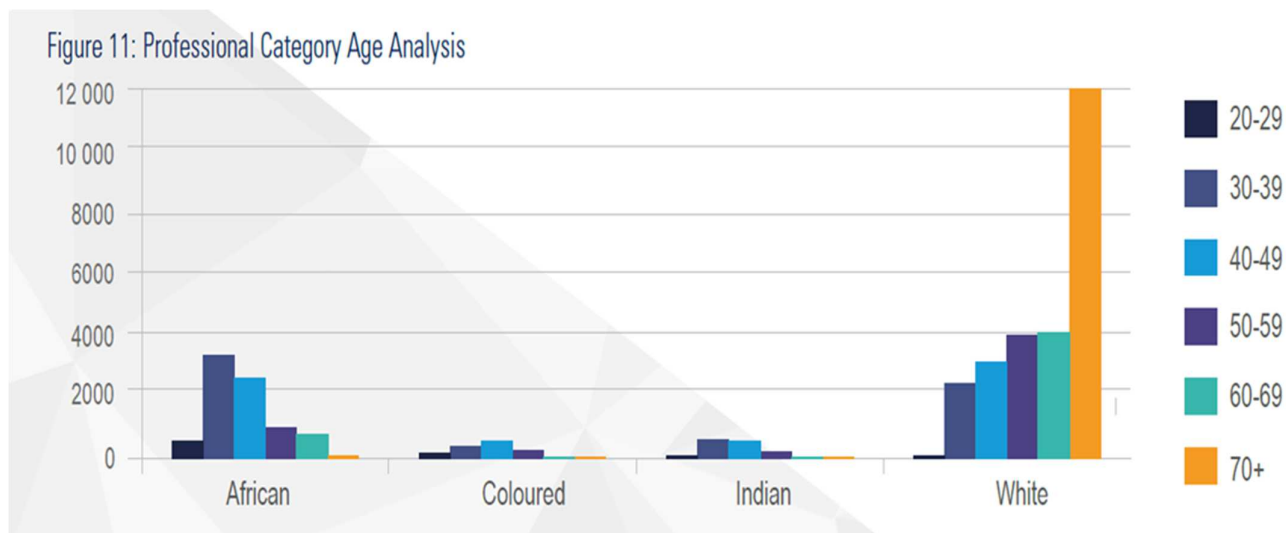
In terms of legal requirements the above figures show that there are a total of **3 514** black Registered Professional Engineers in **all fields of engineering, not just civil engineering, much less construction**, a total of **16.4 %**. The number of black registered Professional Construction Managers totals **234** .

The total number of CIDB Construction companies Grade 7 to 9 requiring certified Professionals total **3040**.

If you compare the number of professionally registered SACPCMP Construction Managers with the number of Construction Companies in the (CIDB 7 -9) category, there is less than one (1) registered professional for every two (2) companies. These stats take into account all persons registered as a

Professional Construction Managers across race and gender. If you remove the white people from this equation, the figure drops to a staggering low figure of less than one (1) for every 10 companies.

This is further illustrated when the age and race of registered professionals is reviewed:²



ITEM 5

COMPARISON OF ACTUAL RACE PERCENTAGES VS PROPOSED DOEL TARGETS *Comment on Race Target (African) TOP MANAGEMENT*

It was suggested by the Department of Education and Labour at a Construction Industry presentation on 28 February 2020, that agreed new EE targets in Construction should be aligned to those contained in the Revised Construction Sector Codes ⁷.

This document has illustrated in great depth; the requirement for Registered Professionals in Top Management positions in construction companies. It is therefore appropriate again to look at these Top Management Targets vs Industry available candidates.

In **ITEM 4**, industry statistics show the total number of registered professionals in race and gender categories. The statistics are of all registered Professional Engineers in all categories ie mining, electrical, mechanical etc and therefore only a small percentage will be in the construction industry. It is from this category that Top Management must align with proposed Construction Sector Code Targets.

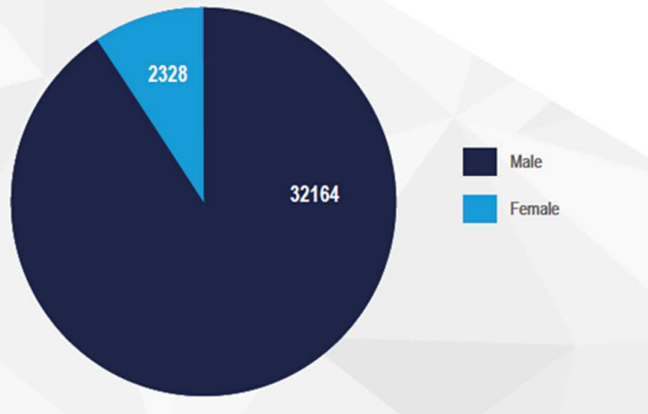
The stats show all industry **African = 10.9%** DOEL suggested target is **51,8%** (African male and female).

ITEM 6

GENDER ISSUE IN CONSTRUCTION

Few women, of all races qualify as Engineers, and those that do usually join Consulting Engineers not Construction Companies. The registration statistics of women from CESA #②, are shown below:

Figure 2: Professional Category Registration Statistics By Gender and Category



Actual Females percentage of **all races** = **7.2%**
 Proposed DOEL target at Top Management = **30%, excluding white females**

The chart above reflects the status of Females, in all race groups and all categories of Engineering that will be eligible for Top Management positions.

ITEM 7

DEMOGRAPHICS AT LOWER MANAGEMENT LEVELS

It is encouraging to note that the pool of candidate percentages at lower management levels is more equitably represented. The statistics below show the candidate positions that would hold Junior Management positions, as follows:

SACPCMP		
4. Candidate Construction Manager (684)	684	
Black - 381	381	55.70%
White- 227	227	33.19%
Indian - 32	32	4.68%
Coloured - 44	44	6.43%
Female - 115	115	16.81%
Male- 569	569	83.19%

STATS EXTRACT REF 3

Table 2: Candidate Category Registration Statistics

Candidate Engineer		
		Total Registrations
TOTALS		10287
Gender	Male	8035
	Female	2252
Race	Black	4118
	White	4712
	Indian	1173
	Coloured	284

STATS EXTRACT REF 2

ITEM 8

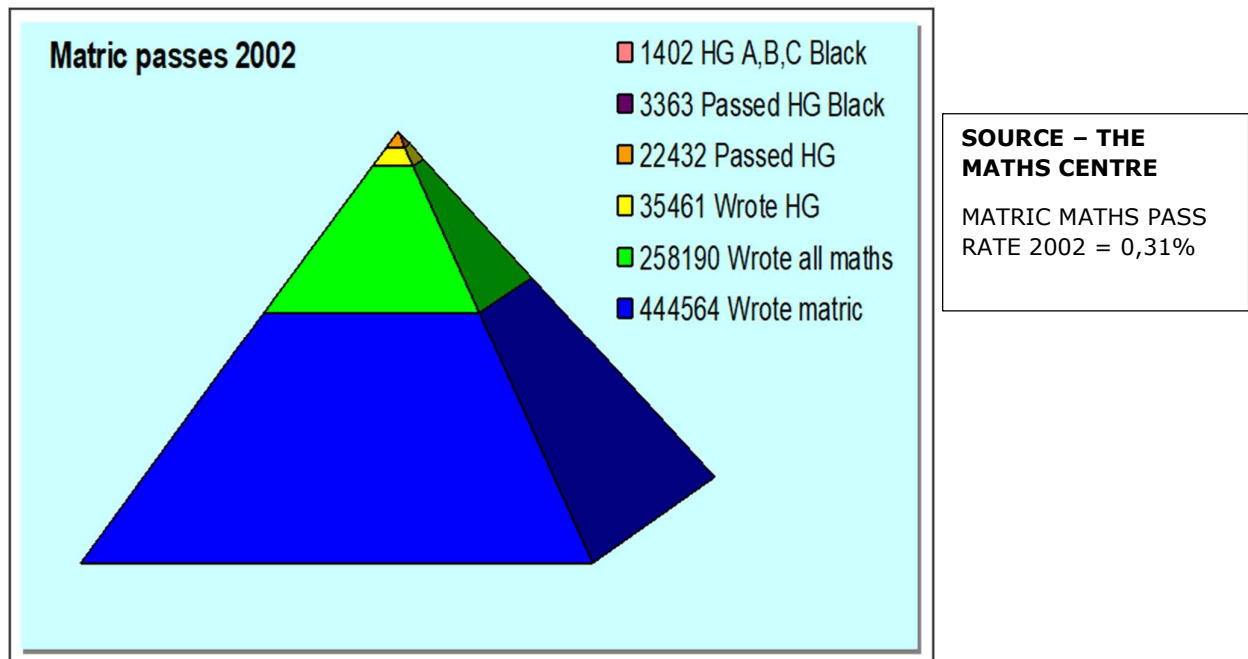
OUTPUT OF SCHOOL CANDIDATES

It is evident that the shortage of skills at Top and Senior Management to equitably represent the population is a direct result of past injustices in education; and the fact that this has changed at junior levels is a source of encouragement. There is no Sector that is more concerned about the standard of Education in our country than the Construction Sector that faces skills shortages at all levels of management on a daily basis.

Although some political commentary may dismiss the Education issue as a convenient deflection tactic of "Old Pale Males" the current situation must be urgently addressed by the Commission of Employment Equity. **This situation affects the future of every South African child, but mostly those from disadvantaged communities who cannot afford costly private education.**

The following issues reveal the issues of contention and concern specific to the Construction Sector as follows:

- 8.1 The previous discussion regarding the Contracting growth and development period will show that the current occupants of positions at Top Management levels would rely on candidates who matriculated from 2000 – to 2005. The black maths pass rate in 2002 is shown below:



- 8.2 The point of departure is an enabling Secondary Education, how many students graduate from Grade 12? Below is a table representing the 2017 – 2019 Grade 10 to Grade 12 throughput rate:

Source: <https://www.news24.com/SouthAfrica/News/da-eff-dispute-2019-matric-pass-rate-say-real-number-is-much-lower-20200108>

Province	Class of 2019				
	Grade 10 (2017)	Grade 12 (2019) candidates	% Grade 10 2017 writing NSC 2019	Total Gr 12 candidates passed	"Real" Pass Rate (%)
Eastern Cape	139 962	63 198	45,2	48 331	34,5
Free State	58 933	25 572	43,4	22 602	38,4
Gauteng	188 069	97 829	52,0	85 342	45,4
KwaZulu-Natal	240 713	116 937	48,6	95 017	39,5
Limpopo	168 847	70 847	42,0	51 855	30,7
Mpumalanga	93 136	43 559	46,8	34 995	37,6
North West	62 766	26 819	42,7	23 272	37,1
Northern Cape	24 008	9 138	38,1	6 990	29,1
Western Cape	75 646	50 404	66,6	41 502	54,9
National	1 052 080	504 303	47,9	409 906	39,0

The Statistics of the 2017 Grade 12 results shows that only **9.2%** or approximately **236 000** achieved an average of above **70%**, **irrespective of race and gender**. In the 2019 matric class only **2,5%** or **4415** learners, **of all races**, achieved between 80 and 100% for mathematics, and these students will be shared between medicine, engineering, and commerce.

8.3

Why does this matter?

The drop in numbers of pupils writing the grade 12 mathematics exam should be of great concern. Performance in mathematics matters for university entrance. Without it, school leavers are not eligible for programmes at university in science or engineering or some in commerce. A decline signals the closing of the doors of opportunity in these fields to a growing number of students. This will only increase inequality. Economics researcher Nic Spaull's research has shown that the top 200 high schools in the country produce 97% of the mathematics distinctions. The majority of these schools charge significant fees.

The deterioration in performance is also of great concern. Getting a pass (30%) may secure a diploma or university entrance but these low pass marks will not prepare students to succeed at mathematics at university level.

This development runs contrary to the needs of the fourth industrial revolution, which requires highly competent graduates in the science, technology, engineering and maths areas. Strong performance in mathematics is essential for careers in computing, programming, finance and machine learning.

Source: <https://theconversation.com/why-south-africas-declining-maths-performance-is-a-worry-129563>

In order to have any chance of passing Engineering at University, the minimum matric requirement is as follows:

UCT and Stellenbosch Civil Engineering Entry Requirements:

OFFER LEVELS FOR AN ACADEMIC PLACE			
	BAND A Admission Guaranteed	BAND B Admission Likely	BAND C Admission Possible
	All applicants	All applicants	Targeted redress race groups 1 and 2 only
Chemical Engineering	FPS 510 Mathematics ≥ 80% Physical Sciences ≥ 70% NBT scores of Proficient for AL, QL and Maths	WPS 480 Mathematics ≥ 80% Physical Sciences ≥ 70% NBT scores of Intermediate or Proficient for AL, QL and Maths	FPS 420 Mathematics ≥ 80% Physical Sciences ≥ 70% NBT scores of Intermediate or Proficient for AL, QL and Maths
Civil Engineering	FPS 500 Mathematics ≥ 75% Physical Sciences ≥ 70% NBT scores of Proficient for AL, QL and Maths	WPS 480 Mathematics ≥ 75% Physical Sciences ≥ 70% NBT scores of Intermediate or Proficient for AL, QL and Maths	FPS 450 Mathematics ≥ 75% Physical Sciences ≥ 70% NBT scores of Intermediate or Proficient for AL, QL and Maths

8.4

Amnesty International reported on the *State of Education in South Africa* in March 2020– extracts of their findings, contained in the press, claim that:

*It found that “more than three-quarters of children aged 9 could not read for meaning in some provinces. Out of a total of **100** pupils that start school, 50-60 would make it to matric, 40 – 50 would pass matric, and only **14** would go to university.”*

The skills of thousands of teachers, in specialist areas such as maths and science, were questionable, as they were either unqualified or under-qualified. “A study in March 2018 found that South African teachers could not pass simple mathematics and English tests, with some scoring as low as 10% for English first additional language and 5% for mathematics” it said.

ITEM 9

GEOGRAPHIC FOOTPRINT OF CONSTRUCTION COMPANIES

Construction companies in South Africa vary widely in the scope of services as well as geographic footprint. A very large number of companies operate in a constrained geographical footprint and are, in some cases, limited to a particular greater metropolitan area or province. This is dictated by their ability and capacity to maintain effective management and control over large distances coupled with logistical challenges and cost of operation.

As a consequence of the above, the application of a national, provincial or even greater municipal EAP impacts both recruitment and the eventual possible employment equity profile of the enterprise.

The wholesale application of a national EAP in target setting and measurement would thus prejudice companies and give rise to exceptions.

The sector targets must take regional EAP’s into account.

ITEM 10

FACTORS DESTABILISING THE EMPLOYMENT PROFILE OF CONSTRUCTION COMPANIES RELATED TO ECONOMIC ACTIVITY

The highly volatile nature of the construction market forces construction companies to frequently adjust their levels of employment. This complicates long term career and, frequently employment equity planning. This must be taken into account when establishing targets and considering how motivations for not reaching sector targets will be handled.

The Basic Conditions of Employment Act which regulates retrenchments and alternatives thereto normally favours long term employees at the cost of employment of shorter term employees which impacts employment equity planning significantly.

Procurement legislation and **tender rules** frequently limit the ability of an employer to move staff onto site where local employment and sub-contracting targets are contractually dictated. This impacts the deployment of a long term permanent workforce and reduces permanent positions with the commensurate career development and promotion prospects.

The **requirement to sub-contract** large portions of the work impacts the employment profile of established contractors without significantly enhancing the employment profile of smaller sub-contractors not able to offer the required career paths.

The above factors are unique to construction companies and contribute to the motivation of establishing separate targets for construction companies.

ITEM 11

CYCLICAL NATURE OF THE CONSTRUCTION INDUSTRY

Consideration should be given how the matter of a cyclical and volatile construction economy is going to be dealt with, as drastic reductions in employment cannot always follow the EAP when a market is in decline. The economy is in recession with Construction experiencing a drastic contraction prior to the Covid pandemic.

The non-issuing of a Certificate of Compliance , or the withdrawal of this, will have a devastating effect on construction companies, in many cases prohibiting them to trade totally. This further exacerbates an economic downturn and will lead to wholesale job losses in the company.

The mechanism and enforcement of both the issuance and withdrawal of Compliance Certificates must be thoroughly ventilated and agreed prior to enforcement.

ITEM 12

CONSIDERATIONS IN THE PREPARATION OF MEANINGFUL CONSTRUCTION INDUSTRY EE TARGETS

SAFCEC members make an effort in supporting extensive technical training and bursary support in an attempt to alleviate the academic shortfalls that entrants to this industry may be facing. This is evident in the requirements of the Amended Construction Sector Codes.

Likewise SAFCEC would like to actively engage with both DOEL and CEE to explore interventions that overcome the issues presented in this document; and it is believed that this can take place with further study and information sourcing.

It is considered that meaningful engagement can take place when the following information is obtained by the Council of Employment Equity (CEE):

1. Economic projections based on present data and post Covid.
2. Statistics of the attrition rate in Construction must be considered, together with the recent decimation of the industry.
3. Professional bodies like ECSA and CESA must be required to submit stats of registered Professionals per Engineering and Construction Sector, together with race and gender for accurate knowledge of the candidate pool available at each Level of Management, and whether these professionals are located in Construction Companies or Consulting Engineers.
4. It must be accepted that any target setting for Contractors and Consultants cannot be the same, nor can this be applicable to Construction Material Suppliers who fall under the Construction Sector Codes, but report under "Manufacturing" on their EE reports to DOEL.
5. Tertiary institutions should be required to make submissions to the CEE regarding their enrolment and graduation stats in terms of qualifications / race / gender and nationality. This will form the basis of future modelling for all economic sectors.
6. Similarly, the Department of Education should be required to make submissions to the CEE regarding their enrolment, throughput and Grade 12 pass rate in terms of race, gender, nationality and subjects that enable registration for engineering.
7. For construction, an analysis of the current CIDB Company registrations per Grade can be used to model the future industry requirements in terms of engineers and related professions upon which realistic targets can be set.
8. Local vs National demographic targets must be taken into consideration.
9. Contractual requirements that enforce the employment of local labour, typically on a fixed-term contract basis equivalent to the duration of the Contract does not lend itself to long-term permanent work opportunities and related career development. These must be considered in Procurement Legislation.
10. The combined affects of legislation must be viewed in totality to measure the affect on Construction Companies who rely on State Contracts, ie The Procurement Bill, B-BBEE Act and the Employment Equity Act.
11. Prior to the acceptance of changes to the EE Bill; the proposed Regulations, that the Bill will empower the Minister to enforce; must be published for Public comment.
12. The reporting mechanism, that identifies "acceptable reasons" for failure of a Company not to achieve their plan, must be discussed and agreed. Like wise the power of the DOEL officers to investigate Companies and withdraw certificates of Compliance must be clearly identified, agreed and published.
13. To enable rational and considered decision making, it is proposed that an independent institution such as a academic institution offering construction management or a business school be commissioned to collect, collate, interpret and report on the data sets required to firstly set and review targets and subsequently plot performance.

REFERENCES

- 1 19th Commission for Employment Equity Annual Report 018/209
- 2 Annual Report 2018/2019 Engineering Council of South Africa
- 3 South African Council of Project and Construction Management Professionals – updated Stats issued by Executive 2 April 2020
- 4 Occupational Health and Safety Act 181 of 1993
- 5 National Qualification Framework Act 2000 (Act 67 of 2000)
- 6 Engineering Profession Act 2000 (Act 46 of 2000)
- 7 Amended Construction Sector Codes of 1 December 2017 , gazette 41287 (Notice 931 of 2017)
- 8 Basic Conditions of Employment Act 75 of 1997

Additional references:

1. <https://businesstech.co.za/news/government/353883/this-is-south-africas-real-school-pass-rate/>
2. <https://businesstech.co.za/news/government/353575/south-africas-university-pass-rate-shocker/>
3. <https://businesstech.co.za/news/business/353051/south-africa-unemployment-1994-vs-2019/>
4. <https://mybroadband.co.za/news/government/334354-south-africas-matric-pass-rate-1995-to-2019.html>
5. <https://mybroadband.co.za/news/government/326215-south-africas-big-matric-maths-problem.html>
6. <https://www.news24.com/SouthAfrica/News/da-eff-dispute-2019-matric-pass-rate-say-real-number-is-much-lower-20200108>
7. <https://businesstech.co.za/news/government/363996/concern-over-south-africas-matric-maths-marks/>
8. <https://businesstech.co.za/news/lifestyle/231111/school-pass-marks-in-south-africa-vs-the-rest-of-the-world/>
9. http://www.ebe.uct.ac.za/sites/default/files/image_tool/images/50/Apply/2020/2021%20NSC%20Entry%20requirements.pdf

Annexure 2

Submission to BUSA on September 2020 EEAB

Business Unity South Africa
Attention: Sino Moabalobelo
Via email: Saneliswe.jantjies@busa.org.za

7 October 2020

Dear Sirs

Update (For Input): Circular 67/2020 Call for Input Employment Equity Bill from BUSA – 21 September 2020 – RESPONSE FROM SAFCEC EMPLOYMENT EQUITY BILL OF 2018 AND 2020, AND PROPOSED INDUSTRY SPECIFIC TARGETS.

BACKGROUND

The South African Forum of Civil Engineering Contractors (SAFCEC); as a significant Construction Sector stakeholder, submitted comments relating to the Act above, when it was published in draft in 2018, during the commentary period. SAFCEC have had no feedback to our constructive engagement, and none of our commentary appears to have been considered. In addition, we are aware of the submission by BUSA, representing South African Business at NEDLAC of 21 November 2018; where it was noted that the consultation process that had taken place at NEDLAC has also not been taken into consideration.

A few Construction Industry member organisations were invited to a meeting on 28 February 2020 at the DOEL, where a presentation of the proposed targets for the Construction Sector were presented. (***attached DOEL presentation – Appendix 1, and minutes Appendix 2***)

In response to the proposals made at this meeting, a substantial submission was made by SAFCEC to the DOEL, the CEE and the Parliamentary Portfolio Committee on 18 June 2020. (***see attachments – Appendix 3***) There has been no formal acknowledgement of these submissions, or engagement on the proposals made in these submissions.

We welcome the opportunity now to respond directly to BUSA in this matter, as per the **Update (For Input): Circular 67/2020 Call for Input Employment Equity Bill**, as we believe that the concerns raised by SAFCEC will be shared by all industry sectors, who rely on State business, and now face the consequences of a “Non-Compliance” EE certificate, or the cancellation of this by a DOEL Inspector.

A review of the most recent CEE report (overleaf) will show the actual stats in various industries at Top Management. The DOEL has suggested the alignment of these to the BEE Codes, or the various Sector Specific Codes, with the planned achievement of these in 3 years.



	LEVEL	AFRICAN		COLOURED		INDIAN		WHITE		F NATIONALS	
		M	F	M	F	M	F	M	F	M	F
Agriculture	Top	5.8	2.0	2.7	1.9	1.1	0.3	72	13.3	0.8	0.1
	Senior	9.1	3.5	4.3	2.1	1.5	0.8	58.1	19.4	1.1	0.2
Mining	Top	20.5	7.1	2.6	0.7	2.5	1.2	54.3	7.8	3	0.4
	Senior	21.9	5.8	2.5	0.8	4	1.9	51.6	8.8	2.3	0.4
Manufacture	Top	5.8	3	3.3	1.6	9.3	2.8	58.7	10.4	4.5	0.5
	Senior	9.7	4.5	5.8	2.9	9.7	4	44.7	15.4	2.9	0.5
CONSTRUCTION	Top	13.8	5.3	5.5	2	5.9	2.5	55.9	6.7	2.2	0.3
	Senior	17	6.5	6.3	2.1	5.8	1.8	46.2	11.3	2.5	0.5
Retail Motor	Top	4.7	2	3.3	2	8.9	2.8	59.8	14.8	1.4	0.2
	Senior	11	6.3	6.4	4.8	8.4	4	38.2	19.3	1.2	0.4
Commercial	Top	4.7	2.8	2.7	1.4	10.7	3.7	55.9	14.7	2.8	0.6
	Senior	9.5	5.6	4.4	3.7	11.1	4.9	37.7	20.2	2.3	0.6
Catering	Top	8.9	5.6	2.4	2.3	4.5	2.4	49.3	20.4	3.6	0.8
	Senior	14.2	11.2	4.5	5.2	4	2.8	29.5	25.1	2.5	1
Transport	Top	11.5	6.4	3.4	2.4	9.4	4.2	46.7	11	4.6	0.4
	Senior	15.4	8.2	4.9	2.9	9.6	4.5	33.9	15.6	4.1	0.9
Finance	Top	9.4	5.7	2.7	2.3	5.8	3.4	50.3	16.2	3.3	0.9
	Senior	10	7.8	3.7	3.4	7.7	5.8	35	22	3.2	1.4
Private Sector Average	Top	7.9	3.9	3.2	1.9	7.1	2.9	56.4	13.2	3	0.5
	Senior	10.8	5.9	4.7	3.2	7.7	4.1	41	19.1	2.7	0.8
DOEL Proposed Sector Targets	Top	25,9	25,9	3,2	3,2	0,9	0,9	20,0	20,0	0,0	0,0

It should be noted that the Construction Sector, has almost double the percentage of African Male at Top and Senior Management, despite the worst contraction in living memory. The requirement tabled by DOEL at the 28 February 2020 presentation, is double what is being achieved.

ISSUES OF CONCERN

1. The proposal to use the EE targets contained in the BEE Codes for company EE Targets is considered disingenuous, for reasons pertaining specifically to Construction, but will certainly apply to other industries. These are as follows:
 - There are 5 elements in a Scorecard so Companies can invest in other elements of the scorecard to make up scoring in the event of unforeseen EE events, (like key staff attrition)- i.e. additional spend on Training and the Company can still have a scorecard and win state tenders. All the targets are also targets with none of them having an absolute disqualification.
 - The Construction Sector Codes (CSC) encompass Built Environment Professionals (BEP) whose business operational parameters and conditions are very different to Contractors.
 - The CSC also include Suppliers to the Construction Industry, e.g. cement suppliers, steel companies, brick manufacturers, who report under different Sectors to the DOEL.
 - The DOEL EE report can never be used for a scorecard audit – “to reduce red tape” as suggested during the DOEL presentation. Scorecards expire at all times and audits are done on previous years financials, ensuring that 2 elements are measured **in the month of audit, i.e. ownership**

and employment equity. DOEL EEA2 reports are submitted at the end of each year, with possibly different employment statistics during the next years scorecard audit.

- **Black owned business with turnover less than R50m do not have employment equity measured for their scorecard, but are most likely employing more than 50 employees. They will now be required to conform to the industry targets in order to do state business. This puts two Acts in conflict with each other.**
 - Regional Companies can elect to be measured on Regional EAP targets in their scorecard, while DOEL requires National EAP targets
2. The decimation of Industry during this recession, prior to the Covid-19 Pandemic, has been catastrophic. It is untenable therefore that further prohibitive measures are now being contemplated to prevent Companies engaging in State Contracts via the requirement to have a Compliance Certificate that will be withdrawn if these unachievable targets are not reached.
 3. In this regard, the following must be considered:
 - Legislation is being tabled giving the Minister power to issue regulations prior to these regulations being agreed
 - The consideration and acceptance of “*acceptable circumstances*”, for not achieving targets set by the Minister and determining the issuance of a Compliance Certificate when companies submit their EEA2 reports. These terms must be agreed and imbedded in the Act
 - The implementation measures allowed by DOEL inspectors, and the circumstances of revoking a Compliance Certificate which effectively puts a Company out of business, and the real possibility of abuse and corruption attached to this situation that will inevitably lead to extensive job losses
 - The amendment of Section 16 where Company EE Forums are replaced with engagement with representatives of trade unions only, requires clarity and if this is the intention; is a concern, as not all employees are union members.
 - What measures are being contemplated to penalise other businesses in the private sector, who do not meet their Plan, but do not require a Compliance Certificate as they do not engage in State Contracts? Will foreign companies be exempt from this requirement?
 4. We note with concern, that the Memorandum in the Bill says that NEDLAC engagement and Industry responses to the 2018 Bill were taken into account

3. CONSULTATION

- 3.1 The proposed amendments to the Act and regulations relating thereto were tabled at NEDLAC. The Employment Equity Task Team commenced with the negotiations in October 2017 and concluded its work in April 2018.
- 3.2 The Bill was published for public comment and public hearings in all nine provinces were conducted during October 2018. The Bill, therefore, has taken into account the public comments submitted through written and oral submissions made by interested parties.

REVIEW OF LEGISLATIVE PROVISIONS – EMPLOYMENT EQUITY AMENDMENT BILL (EEAB)

- This section seeks to highlight the proposed legal amendments (common threads) that raise material concerns in respect of the unintended consequences they will give rise to, if written into law. It will be evident that there is a strong argument in respect of potential unconstitutionality, the flouting of joint consensus-seeking engagements with stakeholders, the absence of well researched and data-based methodologies in setting specific sectoral targets (or sub-sectoral targets) as well as incongruencies with other statutes/ regulations such as the Constitution, the BBBEE Codes and the Preferential Procurement Policy Framework Act (PPPFA). For example, the EEAB compliance certificate requirement nullifies the PPPFA points allocation structures. Hence, if the EEAB provisions are promulgated, they would be afforded a greater impact than the actual PPPFA itself (s63 of the Employment Equity Act states that it enjoys preference to any other law, other than the Constitution).
- The unintended consequences hereof would include economic and social prejudice as well as organisations and their employee’s futures being placed in in the hands of, inter alia, labour inspectors. This would be done off the back of Sectoral Targets that may be irrational, unjustifiable and unachievable.
- The amendments propose the addition of s15A as set out below and it is worth noting that there is reference to “consulting” with the **National Wage Commission** regarding the identification of sectors as well as representation by “suitably qualified people” (SQP). There is no mention of reaching consensus on the Sectors themselves, regarding realistic targets! Despite the assurance in the memorandum (in 4. above) that consultation has taken place; the nature and extent of the engagement by the Department of Employment and Labour (DOEL) to date has fallen desperately short of consultation. This was referenced in the introduction. We do not believe that the national Wage Commission; has empirical data in respect of the prevalence of Suitably Qualified People.

“Determination of sectoral numerical targets

15A. (1) The Minister may, by notice in the *Gazette*, identify national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa. 10

(2) The Minister may prescribe criteria that must be taken into account in identifying sectors and sub-sectors for the purposes of this section. 15

(3) The Minister may, after consulting the National Minimum Wage Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the *Gazette* set numerical targets for any national economic sector identified in terms of subsection (1). 20

(4) A notice issued in terms of subsection (3) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor.

(5) A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (3) must be published in the *Gazette*, allowing interested parties at least 30 days to comment thereon.” 25

- Section 20 of the Act is amended to ensure that every Company in a Sector complies with the targets set by the Minister for that Sector as follows:

6. Section 20 of the principal Act is hereby amended by the insertion after 35 subsection (2) of the following subsection:

“(2A) The numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies to that employer.”.

- Section 36 is amended to give authority to a labour inspector or **any person acting on behalf of a labour inspector** to issue compliance orders that could result in the revoking of a compliance certificate
Amendment of section 37 of Act 55 of 1998, as amended by section 14 of Act 47 of 2013

10. Section 37 of the principal Act is hereby amended—

- (a) by the substitution for subsection 1 of the following subsection: 50
 “(1) A labour inspector, or any person acting on behalf of a labour inspector, may [issue] serve a compliance order [to] on a designated employer in the prescribed manner if that employer has failed to comply with section 16, 17, 19, 22, 24, 25 or 26 of this Act.”; and
- (b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 55
 “A compliance order [issued] contemplated in [terms of] subsection (1) must be issued by a labour inspector and must set out—”.

- In addition, in section 42 a labour inspector could be given the authority to determine that the designated employer has not met sectoral targets (refer s42(1)(aA) and hence will not be issued with a certificate of compliance under s53.

Amendment of section 42 of Act 55 of 1998, as substituted by section 16 of Act 47 of 2013

11. Section 42 of the principal Act is hereby amended by the insertion in subsection (1) after paragraph (a) of the following paragraph:

“(aA) whether or not the employer has complied with any sectoral target set in terms of section 15A applicable to that employer.” 5

Section 42(4) currently provides that **“In any assessment of its compliance with this Act or in any court proceedings, a designated employer may raise any reasonable ground to justify its failure to comply.”** Exactly how this is to be addressed has not been embedded into the EEAB.

- In addition to and further to the above, section 53 is proposed to be amended as follows

12. Section 53 of the principal Act is hereby amended by the addition of the following subsection: 10

- “(6) The Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that—
- (a) the employer has complied with a numerical target set in terms of section 15A that applies to that employer;
 - (b) in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42(4); 15
 - (c) the employer has submitted a report in terms of section 21;
 - (d) there has been no finding by the CCMA or a court within the previous three years that the employer breached the prohibition on unfair discrimination in Chapter 2; and 20
 - (e) the CCMA has not issued an award against the employer in the previous three years for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018).”.

It is evident from the above that the designated employer would have to embark on a process to challenge the findings of the labour inspector or other person, all during which the said employer would be excluded from Public Sector business.

SHORTCOMINGS OF THE EMPLOYMENT EQUITY AMENDMENT BILL (EEAB)

The most legal and other serious shortcomings of the EEAB are set out below.

- The absence of a “joint consensus-seeking” approach to the amendments and specifically to the matter of setting legal and other rational, justifiable and achievable sectoral targets, raises material legal concerns. Limited stakeholder representatives attended sessions run by the DOEL and targets aligned to BBBEE were put to stakeholders as the broad targets for Employment Equity as well.
- The engagements that have taken place with DOEL in respect of sectoral targets have not incorporated data on the nature and extent of skills sets across occupational levels, occupational categories, race, gender and disability categories. Instead, most of the information was presented by DOEL and focused on the employment lifecycle which does not include a consideration of skills and skills pipelines.
- The consequences of not meeting the sectoral targets would eliminate organisations from transacting with the State and destroy their revenue resulting in liquidation and the consequences thereof. It is illogical that organisations who derive their revenue primarily from the private sector (and who therefore do not require a compliance certificate) would not be prejudiced, despite the fact that they may not have taken any reasonable steps in regard to employment equity.
- How these amendments would impact foreign organisations must be factored into the consultations and presents considerable uncertainty particularly in that they may be lagging in the representation of designated persons for justifiable and objective reasons. The impact of the flight of foreign investment, skills and service delivery should be a material concern to Government.
- The BBBEE Codes recognise that businesses with an annual turnover of less than R50m per annum are Qualifying Small Enterprises (QSE’s). They are as a result able to achieve BBBEE credentials without pursuing Management Control/ Employment Equity. Many of these organisations employ more than 50 employees and will now have to comply with EEAB sectoral targets in order to do business. This is irrational.
- The fact that labour inspectors have the broad-based powers to determine compliance under section 42 which includes reference to the factors stated in s15, is incomprehensible given that the result thereof could be the very closure of an organisation and as a result economic growth declining and unemployment levels increasing. Corruption and abuse of power is a serious threat in this context.
- Ultimately, the test would be whether the EEAB passes the muster of S217 of the Constitution and it is evident that s53 of the EEAB does not provide a framework within which public procurement is to be conducted as is required under the section of the Constitution set out below.

217. Procurement—

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) [Subsection \(1\)](#) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing 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.

- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

REMEDIES

The following requirements would assist in addressing many of the above-mentioned concerns and should be seriously considered by DOEL.

- A regulatory impact assessment which includes:
 - skills sets per sector and sub-sector as well as the availability of SQP across occupational levels and categories per race, gender and disability classification
 - impact on foreign businesses
 - conflict and/ or congruence with the BBBEE Codes, the PPPFA and the Labour Relations Act (joint consensus seeking).
- Sectoral and sub-sectoral targets to be set based on an assessment and appreciation of economic realities, labour market information (especially in respect of professional and other qualifications and competencies), growth and recovery prospects and the like.
- Targets to be set in a manner that demonstrates joint consensus-seeking intent with meaningful representation from industry, sector and sub-sector stakeholders.
- Additional objective factors that represent justifiable grounds and reasons for not meeting sectoral targets to be listed in the EEAB and in addition, the process for designated employers to apply for exemption therefrom is to be codified into the EEAB.
- Prior to the acceptance of changes to the EEAB, the proposed Regulations that empower the Minister to enforce must be engaged on and published for public comment.

EDUCATIONAL CONSTRAINTS

A review of the SAFCEC submission (attached) will illustrate the constraint on “suitably qualified” candidates, in all races and genders. It is believed that this reality will be shared by a lot of industry and professions. These specifics were outlined to the DOEL as follows:

5. **ITEMS 2 and 3** in the attachment outlines the legislative requirements for the selection of Operational staff in Senior and Top Management in Construction Companies as well as education and qualifications required. **ITEM 4** is current data showing the small pool of candidates available for selection in these positions, irrespective of race and gender. The lack of equitable representation at Top and Senior levels is accepted as being a direct result of past injustices in Education as well as the government’s inability to provide or improve access to quality education in the majority of public schools especially the lower quintile schools. These facts have to be taken into consideration when ascribing targets.
6. **ITEM 5** compares the comparison of actual race percentages of qualified candidate’s vs the DOEL proposed targets at Top Management, showing that these will take at least 20 years to achieve,
7. **ITEM 6** shows the gender gap in Construction and Engineering, with no available statistics in which Sector of Engineering these Registered Female Professionals are employed. These statistics are for all women, yet DOEL require EE stats that reflect demographics.
8. **ITEM 7** shows detail of the talent pool at lower management levels, which is a positive sign for the future.
9. **ITEM 8** details the restriction on all youth pursuing academic qualifications and the current situation in our Education system, where excellence in Maths and Science is mostly achieved in private schooling. This situation is a great source of concern as it demonstrates that unless there is immediate redress, then

under privileged children may forever be trapped in a cycle of poverty, despite the best intentions of the CEE, and the efforts of industry.

10. **ITEMS 10 and 11** describe the complexities in Legislation and Tender rules that are unique to Construction and the cyclical nature of Construction that require permanent adjustment to employment figures. These include prescriptive tender requirements for “local” employment, and the requirement to sub-contract contracts to Emerging Contractors. These factors further illustrate the need for Contractor- specific “**acceptable reasons**” to deviate from a Contractors EE Plan; which will form part of the EEA2 annual submission to DOEL.

THE WAY FORWARD

The concern expressed by the DOEL and CEE is shared by all industry and highlights the real need for private Industry to engage and workshop the good intentions of the DOEL and the CEE, with accurate information and research.

It is considered that meaningful engagement can take place when the following information is obtained by the Commission for Employment Equity (CEE)

1. Economic projections based on present data and post Covid.
2. Statistics of the attrition rate per Industry must be considered, together with the recent decimation of the industry.
3. Professional bodies in all Industry must be required to submit stats of registered Professionals, together with race and gender for accurate knowledge of the candidate pool available at each Level of Management.
4. It must be accepted that any target setting with Sectors cannot be the same, and sub-sectors must be taken into account.
5. Tertiary institutions should be required to make submissions to the CEE regarding their enrolment and graduation stats in terms of qualifications / race / gender and nationality. This will form the basis of future modelling for all economic sectors.
6. Similarly, the Department of Education should be required to make submissions to the CEE regarding their enrolment, throughput and Grade 12 pass rate in terms of race, gender, nationality and subjects that enable registration for each industry or profession.
7. For construction, an analysis of the current CIDB Company registrations per Grade can be used to model the future industry requirements in terms of engineers and related professions upon which realistic targets can be set.
8. Local vs National demographic targets must be taken into consideration.
9. Contractual requirements that enforce the employment of local labour, typically on a fixed-term contract basis equivalent to the duration of the Contract does not lend itself to long-term permanent work opportunities and related career development. These must be considered in Procurement Legislation.
10. The combined effects of legislation must be viewed in totality to measure the effect on Companies who rely on State Contracts, ie The Procurement Bill, B-BBEE Act and the Employment Equity Act. This should include a total legal review of the potential constitutional challenges highlighted.
11. Prior to acceptance of changes to the EE Bill; and the proposed Regulations, a revised Bill including all areas of concern, regulations, prescripts and protocol; must be published for Public comment.

- 12 The reporting mechanism, that identifies “acceptable reasons” for failure of a Company not to achieve their plan, must be discussed, agreed, and prescribed in the Act. Like- wise the power of the DOEL officers to investigate Companies and withdraw certificates of Compliance must be clearly identified, agreed and published.
13. To enable rational and considered decision making, it is proposed that an independent institution such as an academic institution or a business school be commissioned to collect, collate, interpret and report on the data sets required to firstly set and review targets and subsequently plot performance.

We trust that this response to BUSA will trigger support within all industry to halt the potential disastrous consequences to private business that this Act will prompt. We also trust that this is seen as a prelude to constructive engagement and the willingness to engage and find solutions; now that the reality of our industry has been outlined in detail

We hold ourselves available to clarify any issues contained in this communication if required.

Yours faithfully

South African Forum of Civil Engineering Contractors



Mr Webster Mfebe – Chief Executive Officer

Attachments:

Appendix 1 – DOEL presentation on 28 February 2020

Appendix 2 – DOEL Minutes of meeting 28 February 2020

Appendix 3 – SAFCEC Submission to the Minister of Labour and the Commission for Employment Equity – 18 June 2020



AGENDA

SECTOR STAKEHOLDER ENGAGEMENTS BETWEEN THE DEPARTMENT OF EMPLOYMENT & LABOUR AND THE CONSTRUCTION SECTOR REGARDING THE SETTING OF EE SECTOR TARGET IN THE CONSTRUCTION SECTOR

DATE : Friday, 28 February 2020
VENUE : Dept. of Employment & Labour, 215 Francis Baard Street, Laboria House, PTA, Africa Room, 2nd Floor
TIME : 10H00 – 13H00

Time	ITEMS FOR DISCUSSION	RESPONSIBLE
09H30 – 10H00	REGISTRATION & TEA	ALL
10H00 – 10H10	OPENING & WELCOME	Chairperson – Commission for Employment Equity (CEE)
10H10 – 10H20	OBJECTIVE OF SECTOR ENGAGEMENTS	Chairperson – Commission for Employment Equity (CEE)
10H20 – 11H20	PRESENTATION ON PROPOSED TARGET IN THE SECTOR	Department of Employment & Labour
11H20 – 12H30	DISCUSSIONS	ALL
12H30 – 12H45	WAY-FORWARD	ALL
12H45 – 13H00	CLOSURE	Chairperson – (CEE)



employment & labour

Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA

Postal Address: Private Bag X117, PRETORIA, 0001 • Street Address: Laboria Building, Francis Baart Street, PRETORIA
Tel: 012 309 4040 Fax: (012) 309 4739

Enq: Masilo Lefika
Tel: 012 309 4214

Ms. Christelle Brown
The Chief Executive Officer
Association of SA Quantity Surveyors

Tel: 011 315 4140

Email: Christelle@prodigious.co.za or Pa-directors@asaqs.co.za

Dear Ms. Brown

POSTPONEMENT OF A MEETING TO DISCUSS THE SETTING OF SECTOR SPECIFIC EE NUMERICAL TARGETS IN THE CONSTRUCTION SECTOR AS PER THE EMPLOYMENT EQUITY AMENDMENT BILL, 2018

Our letter dated 02 December 2019 has reference.

Please note that the meeting scheduled for Friday, 31st January 2020 regarding engagement in the setting of EE Sector targets in the Construction Sector has been postponed due to limited confirmations by organizations/associations in the Construction Sector.

The Department of Employment & Labour ("the Department") would like to engage comprehensively and collectively with the stakeholders in the sector in order to reach consensus regarding the setting of the EE Sector targets.

We apologise for the short notice and the inconveniences caused.

The new date of the meeting is rescheduled as follows:

Venue : Department of Employment & Labour offices, 215 Francis Baard Street, Laboria House, Pretoria
Date : 28 February 2020
Time : 10h00 – 13h00

Please confirm your attendance of the meeting, including the submission of the names of 2 delegates by 14 February 2020 for logistical arrangement.

LEFAPHA LA BADIRI • LEFAPHA LA NESEBETSI • UMNYANGO WEZEMISEBENZI • MUHASHO
WA ZWA MISHUMO • DEPARTEMENT VAN ARBEID • KGORO YA MERERO YA BA-'SFOMI •
NDZAWULO YA TA MINTIRHO • LITIKO LETEMISEBENTI • ISEBE LEZEMISEBENZI •
UMNYANGO WEZORUSEBENZI

Your commitment of transformation in the Construction Sector and the Labour Market as a whole will be highly appreciated.

Yours sincerely



NTSOAKI MAMASHELA (MRS)
DIRECTOR: EMPLOYMENT EQUITY
DATE: 30 January 2020

CONSTRUCTION SECTOR ENGAGEMENT

28/02/2020



employment & labour

Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA



CONTENT OUTLINE

- **Sector Target objectives & Legal Framework**
- **Current EE Status for four middle-to upper occupational levels (2019)**
- **Discussion of EE Targets in the Construction Sector**
- **Way Forward**

LEGAL FRAMEWORK - EEA BILL 2019

Section 15A of EEA on the establishment of sectoral targets states that the Minister:

- may publish a notice in the Gazette identifying national economic sectors having regard to any relevant code contained in the Standard Industrial Classification published by Statistics South Africa.
- may, after consulting the relevant sectors and with the advice of the Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce set numerical targets for any sector or part of a sector.
- may set different numerical targets for different occupational levels, or regions within a sector or on the basis of any other relevant factor.
- may issue regulations prescribing the criteria to be taken into account in determining a numerical target.

EAP	AFRICAN	COLOURED	INDIAN	WHITE	TOTAL	
NATIONAL	TOTAL	78.5%	9.6%	2.8%	9.1%	100.0%
	Male	43%	5%	2%	5%	54.7%
	Female	35.8%	4.4%	1.1%	4.0%	45.3%
	Male	41.80%	5.30%	0.60%	4.00%	51.7%
	Female	40.30%	4.70%	0.30%	3.00%	48.3%
	TOTAL	82.10%	10.00%	0.90%	7.00%	100.0%
Eastern Cape	Male	48.70%	1.20%	0.60%	3.00%	53.5%
	Female	43.60%	1.10%	0.10%	1.60%	46.4%
	TOTAL	92.30%	2.40%	0.70%	4.60%	100.0%
Free State	Male	45.20%	1.30%	1.80%	7.30%	55.6%
	Female	35.80%	1.40%	1.20%	6.00%	44.4%
	TOTAL	81.00%	2.70%	3%	13.40%	100.1%
Gauteng	Male	44.40%	0.90%	5.30%	2.00%	52.6%
	Female	41.90%	0.90%	3.30%	1.20%	47.3%
	TOTAL	86.30%	1.90%	8.60%	3.30%	100.1%
KwaZulu-Natal	Male	53.50%	0.30%	0.60%	1.70%	56.1%
	Female	42.80%	0.30%	0.00%	0.70%	43.8%
	TOTAL	96.30%	0.70%	0.50%	2.30%	99.8%
Limpopo	Male	50.30%	0.30%	0.20%	3.30%	54.1%
	Female	43.20%	0.20%	0.70%	2.10%	46.2%
	TOTAL	93.50%	0.50%	0.90%	5.40%	100.3%
Mpumalanga	Male	54.20%	0.70%	0.60%	3.60%	59.1%
	Female	37.70%	0.60%	0.00%	2.70%	41.0%
	TOTAL	91.90%	1.30%	0.60%	6.30%	100.1%
North West	Male	27.80%	22.80%	0.60%	4.00%	55.2%
	Female	21.10%	17.70%	0.30%	3.00%	42.1%
	TOTAL	48.80%	40.60%	0.90%	7.00%	97.3%
Northern Cape	Male	20.30%	25.20%	0.50%	8.20%	54.2%
	Female	17.40%	21.20%	0.40%	6.80%	45.8%
	TOTAL	37.70%	46.40%	0.90%	15.00%	100.0%

CONSTRUCTION CHARTER (DECEMBER 2017)

	Black	Black Female
Board	60%	30%
Executive/Top Management	60%	30%
Senior Management	60%	30%
Professionally Qualified/ Middle Management	75%	35%
Skilled Technical/Junior Management	88%	35%
Employees with disabilities	2% as a percentage of all employees reflective of national or provincial demographics	

TOP MANAGEMENT	GENDER	A	C	I	W	BLACK	TOTAL
NATIONAL OR PROVINCIAL EAP	Total	78.5%	9.6%	2.8%	9.1%	90.9%	100.0%
	Male	43%	5%	2%	5%	49.6%	54.7%
	Female	35.8%	4.4%	1.1%	4.0%	41.3%	45.3%
PROPORTION OF EAP WITHIN BLACK GROUP	Total	86.4%	10.6%	3.1%		100.0%	BLACK TARGET
PROPOSED TARGETS	Total	51.8%	6.3%	1.8%		60.0%	60.0%
	Male	25.9%	3.2%	0.9%		30.0%	30.0%
	Female	25.9%	3.2%	0.9%		30.0%	30.0%
CHARTER 5-YEAR TARGET	Total	51.8%	6.3%	1.8%		60.0%	60.0%
	Male	25.9%	3.2%	0.9%		30.0%	30.0%
	Female	25.9%	3.2%	0.9%		30.0%	30.0%
WORKFORCE PROFILE 2019 WITHOUT FOREIGN NATIONALS	Total	21.0%	7.9%	8.5%	60.2%	37.4%	97.6%
	Male	14.5%	5.7%	5.9%	53.9%	26.1%	80.1%
	Female	6.5%	2.2%	2.6%	6.3%	11.3%	17.6%
WORKFORCE PROFILE 2018 WITHOUT FOREIGN NATIONALS	Total	19.1%	7.5%	8.3%	62.6%	35.0%	97.6%
	Male	13.8%	5.5%	5.9%	55.9%	25.2%	81.1%
	Female	5.3%	2.0%	2.5%	6.7%	9.8%	16.5%

SENIOR MANAGEMENT	GENDER	A	C	I	W	BLACK	TOTAL
NATIONAL EAP	Total	78.5%	9.6%	2.8%	9.1%	90.9%	100.0%
	Male	42.7%	5.2%	1.7%	5.1%	49.6%	54.7%
	Female	35.8%	4.4%	1.1%	4.0%	41.3%	45.3%
PROPORTION WITHIN BLACK GROUP		86.4%	10.6%	3.1%		100.0%	BLACK TARGET
PROPOSED 5-YEAR TARGETS	Total	51.8%	6.3%	1.8%		60.0%	60.0%
	Male	25.9%	3.2%	0.9%		30.0%	30.0%
	Female	25.9%	3.2%	0.9%		30.0%	30.0%
CHARTER 5-YEAR TARGET	Total	51.8%	6.3%	1.8%		60.0%	60.0%
	Male	25.9%	3.2%	0.9%		30.0%	30.0%
	Female	25.9%	3.2%	0.9%		30.0%	30.0%
WORKFORCE PROFILE 2019 WITHOUT FOREIGN NATIONALS	Total	28.7%	8.3%	7.3%	53.3%	44.2%	97.5%
	Male	20.0%	6.2%	5.3%	42.5%	31.5%	74.0%
	Female	8.7%	2.1%	2.0%	10.7%	12.7%	23.5%
WORKFORCE PROFILE 2018 WITHOUT FOREIGN NATIONALS	Total	23.5%	8.5%	7.6%	57.5%	39.5%	97.0%
	Male	17.0%	6.3%	5.8%	46.2%	29.1%	75.3%
	Female	6.5%	2.1%	1.8%	11.3%	10.5%	21.7%

PROFESSIONALLY QUALIFIED							
	GENDER	A	C	I	W	BLACK	TOTAL
NATIONAL EAP TARGETS	Total	78.5%	9.6%	2.8%	9.1%	90.9%	100.0%
	Male	42.7%	5.2%	1.7%	5.1%	49.6%	54.7%
	Female	35.8%	4.4%	1.1%	4.0%	41.3%	45.3%
PROPORTION WITHIN BLACK GROUP	Black proportion	86.4%	10.6%	3.1%		100.0%	
PROPOSED 5-YEAR TARGETS	Total	64.8%	7.9%	2.3%		75.0%	75.0%
	Male	38.9%	4.8%	1.4%		45.0%	45.0%
	Female	25.9%	3.2%	0.9%		30.0%	30.0%
CHARTER 5-YEAR TARGET	Total	64.8%	7.9%	2.3%		75.0%	75.0%
	Male	38.9%	4.8%	1.4%		45.0%	45.0%
	Female	25.9%	3.2%	0.9%		30.0%	30.0%
WORKFORCE PROFILE 2018 WITHOUT FOREIGN NATIONALS							
WORKFORCE PROFILE 2019	Total	41.6%	8.7%	5.9%	40.7%	56.2%	96.9%
	Male	29.1%	6.8%	4.1%	30.8%	40.0%	70.8%
	Female	12.5%	1.9%	1.8%	9.9%	16.1%	26.1%
WORKFORCE PROFILE 2018	Total	35.4%	9.3%	6.5%	45.1%	51.2%	96.3%
	Male	25.8%	7.4%	4.6%	34.8%	37.9%	72.6%
	Female	9.6%	1.9%	1.9%	10.3%	13.3%	23.6%

SKILLED									
	GENDER	A	C	I	W	BLACK	TOTAL		
NATIONAL EAP TARGETS	Total	78.5%	9.6%	2.8%	9.1%	90.9%	100.0%		
	Male	42.7%	5.2%	1.7%	5.1%	49.6%	54.7%		
	Female	35.8%	4.4%	1.1%	4.0%	41.3%	45.3%		
PROPORTION WITHIN BLACK GROUP		86.4%	10.6%	3.1%		100.0%	BLACK TARGET		
PROPOSED 5-YEAR TARGETS	Total	76.0%	9.3%	2.7%		88.0%	88.0%		
	Male	37.1%	4.5%	1.3%		43.0%	43.0%		
	Female	30.2%	3.7%	1.1%		35.0%	35.0%		
CHARTER 5-YEAR TARGET	Total	76.0%	9.3%	2.7%		88.0%	88.0%		
	Male	37.1%	4.5%	1.3%		43.0%	43.0%		
	Female	30.2%	3.7%	1.1%		35.0%	35.0%		
		A	C	I	W	BLACK			
WORKFORCE PROFILE 2019 WITHOUT FOREIGN NATIONALS	Total	66.3%	9.2%	3.4%	18.5%	78.9%	97.4%		
	Male	50.6%	7.0%	2.1%	12.4%	59.6%	72.0%		
	Female	15.7%	2.3%	1.3%	6.1%	19.3%	25.4%		
WORKFORCE PROFILE 2018 WITHOUT FOREIGN NATIONALS	Total	62.0%	10.3%	3.9%	21.0%	76.2%	97.2%		
	Male	50.0%	7.9%	2.5%	14.3%	60.4%	74.7%		
	Female	12.0%	2.4%	1.4%	6.7%	15.8%	22.5%		

DISABILITY	TOTAL	TARGET
CHARTER 5-YEAR TARGET	Total	2.0%
	Male	0.0%
	Female	0.0%
PERCENTAGGE OF ANNUAL TARGETS REACHED IN 2018 & 2019		
WORKFORCE PROFILE 2019	Total	0.9%
WORKFORCE PROFILE 2018	Total	0.8%

Way Forward & Thank you

- Table Bill in 6th Parliament
- Envisaged legislative and regulatory processes to be finalised.
- Enactment, gazetting and commencement date.
- Sector Target setting to be aligned to EE Reporting period and automated.
- All support documents and forms to made available on Department Website, EE Online Services
- All support documents and forms to be distributed to designated employers in the EE System Database.



MINUTES OF FOLLOW-UP MEETING WITH THE CONSTRUCTION SECTOR HELD ON FRIDAY, 28 FEBRUARY 2020, DEL'S OFFICES (AFRICA ROOM) FROM 10H00-12H00

Attendees from Construction Sector:

1. Gregory Mofokeng
2. Larry Feinberg
3. Ingrid Campbell
4. Priscilla Mdlalose
5. Xolile Zondo
6. Terrance Mwase
7. German Mphahlele
8. Ntando Skosana

Attendees from Department of Employment and Labour:

1. Ntsoaki Mamashela
2. Stephen Rathai
3. Niresh Singh
4. Lucia Rayner
5. Masilo Lefika
6. Jullian Mohale

Apologies

1. Thembinkosi Mkalipi
2. Chairperson of CEE (Tabea Kabinde)

OPENING & WELCOME

- Mrs Mamashela did the opening as the chairperson and requested all delegates to introduce themselves, including the associations/organisations they are representing.

ADOPTION OF THE AGENDA

- The Agenda of the meeting was adopted with no additional items.

OBJECTIVE OF THE SECTOR ENGAGEMENTS

- Mrs Mamashela explained in detail the objective of the sector engagements for the benefit of those representatives from other associations who attended the meeting for the first time.
- She focused on the legal framework of the EE Amendment Bill, 2019 covering critical areas that

include:

- ✓ Section 15A as a critical provision, which is a new insertion aimed at empowering the Minister to set Sector Specific EE targets with the purpose of ensuring equitable representation of suitably qualified people from the designated groups (Blacks; Women; and Persons With Disabilities) at all occupational levels; and
- ✓ Promulgation of Section 53 to issue EE Certificate (“Certificate”) confirming an employer’s compliance with Chapter II or Chapter II and III. She explained that the criteria for assessment of compliance, includes, meeting the requirements of the National Minimum Wage Act; and not having an adverse Award made by the CCMA or any court of law in terms of Chapter II of the Employment Equity Act. This certificate will serve as a pre-condition to conclude State contracts.

DISCUSSIONS

- Mrs Mamashela explained the two tests of issuing of an EE Compliance Certificate varied from employers as follows:
 - a) **Employers who employ “0 to 49” employees** must not submit EE reports, but in order to be issued with compliance certificate, they must ensure that:
 - ✓ Minimum Wage is paid; and
 - ✓ There is no adverse arbitration award against the company for unfair discrimination in terms of Chapter 2 of the EE Act.
 - b) **Employers who employ “50 and more” employees** must ensure that they have:
 - ✓ submitted Annual EE reports;
 - ✓ Achieved annual targets set by them towards the realisation of the agreed Sector Targets published in the Government Gazette by the Minister;
 - ✓ complied with the payment of Minimum Wage or any exemption granted in terms of the Minimum Wage Act; and
 - ✓ Confirmed that there is no adverse arbitration awards against the company for unfair discrimination in terms of Chapter 2 of the EE act
- It was also presented to the Construction Sector (“the Sector”) that the Sector targets must not be interpreted as “quotas” because there will be flexibility for employers to provide the Department of Employment & Labour (“the Department”) with justifiable reasons for not achieving their annual targets.
- However, the Sector was cautioned that employers that have provided justifiable reasons and issued with a Certificate will be audited for authentication of the reasons provided, and if found wanting, the certificate will be withdrawn.
- The Sector was informed that the Department has held inter-departmental deliberations such as the National Treasury and the Department of Trade and Industry (DTI) and also with the statutory body such as the CCMA.
- The purpose with each stakeholder were as as follows:
 - ✓ The National Treasury to take into account the proposed EE Compliance Certificate when drafting the Procurement Bill, and that the Certificate should be a precondition for accessing of State contracts.
 - ✓ DTI to ensure that BBBEE Rating Agencies must not re-assess employers for Employment

Equity if they produce an EE Certificate because the Department would have already assessed such employers and proved that they complied.

- ✓ The Department to link the EE system with that of CCMA's Case management system in order to automatically verify any arbitration award for unfair discrimination in terms of Chapter 2 of the EE Act before issuing the Certificate.
- ✓ The Department to link the EE system with the departmental system dealing with minimum wages to verify compliance with the requirements of the National Minimum Wage Act, in particular, the exemptions granted.
- Mrs Mamashela presented the proposed targets by the Department in the four Occupational levels (Top Management; Senior Management; Professionally Qualified; and Skilled level)
- She emphasised that the targets proposed by the Department in the four Occupational levels are aligned to the EE targets contained in the 5 -Year Construction Charter, and in the absent of Charters, the BBBEE generic Score Cards will be taken into account as the base for the setting of EE targets.
- The Sector representatives advised the Department that they are operating on a 7-year Charter and not 5-year Charter and that they are in their 3rd year of implementation of the Charter, and therefore the Department must align the presentation.
- The presentation in each Occupational level reflected comparison of the the 2018 and 2019 workforce profiles of the Sector, and it was found that there were challenges of representation of Blacks, particularly Africans and Coloured females at Top Management; Senior Management and Professionally Qualified and at the Skilled Technical levels even though, there was a slight improvement in realising the targets set in the Charter.
- Regarding representation of Persons with Disabilities (PwDs) the Sector showed progress of 0.1%, from 0.8% in 2018 to 0.9% in 2019. The proposed EE target was 2% in line with the Charter.
- The Sector shared in the meeting that employers in the Construction Sector are always encouraged to achieve targets set, and those that failed are held accountable.
- The Sector was clarified on the questions asked, that included the following:
 - ✓ When will the Bill be signed by the President?
 - ✓ Is Minimum Wage applicable to the Sector as a whole or only to individual companies?
 - ✓ What is the duration of the EE Certificate?
 - ✓ How are employers in the Manufacturing of Cement, such as PPC being classified in terms of the sectors because they currently form part of the Construction Charter?
- The Sector emphasised that a blanket approach should not be adopted for failure to achieve targets because of economic conditions, and that companies that perform should be incentivised.

WAY-FORWARD

- The sector to submit a list that includes the names of their suppliers and professional bodies so that the Department can be able to check under which sectors they have reported.
- The Department to send a copy of the EE Amendment Bill, 2019 to be tabled in Parliament, and copy of the Regulations published for public comments on 21 September 2018.
- The Sector to submit consolidated submission reflecting its position regarding the proposed targets in the four Occupational levels by 01 May 2020 after the release of the Commission for Employment Equity Annual Report by Minister in April 2020, including a copy of the 2019 Public Register.
- A follow-up meeting will then be scheduled during May 2020 to finalize the engagement for setting of

EE targets.

18 June 2020

Director of Employment Equity

Department of Employment and Labour

Attention : The Honourable Chairperson Ms Ntsoaki Mamashela - ntsoaki.mamashela@labour.gov.za

The Commission of Employment Equity

Via : The Chairperson Ms Tabea Kabinde - tabea@wefindtalent.co.za

Dear Sirs / Madam

EMPLOYMENT EQUITY BILL OF 2018, AND PROPOSED TARGETS FOR THE CONSTRUCTION SECTOR, AS TABLED BY DOEL.

The South African Forum of Civil Engineering Contractors (SAFCEC); as a significant Construction Sector stakeholder, submitted comments relating to the Act above, when it was published in draft during the commentary period. SAFCEC have had no feedback to our constructive engagement, and none of our commentary appears to have been considered. In addition, we are aware of the submission by BUSA, representing South African Business at NEDLAC of 21 November 2018; where it was noted that the consultation process that had taken place at NEDLAC has also not been taken into consideration.

We attended a meeting on 28 February 2020 at the DOEL, where a presentation of the proposed targets for the Construction Sector were presented.

This submission is in response to both the EE Bill and its potential consequences, and to the targets suggested by the DOEL on 28 February. Attached to this submission discussion document, is a data analysis which is referenced, and provides more in-sight and explanation to the Items discussed. Reference **ANNEXURE A** attached

1. Firstly, it must be acknowledged that SAFCEC shares the concern by the Commission for Employment Equity on the lack of equitable representation at Top and Senior levels in the Business Sector. It is our sincere hope that once the specifics of our industry are understood in this submission; that SAFCEC has the opportunity to workshop solutions to the challenges experienced. Our commitment to Transformation is evidenced by the highest Black

ownership, Procurement and Employment Equity targets in the Amended Construction Sector Codes.

2. This commitment is further evidenced by the Construction Sectors percentage of the largest EAP grouping, being African Male at Top Management, being almost double that of the private sector average **REF ITEM 1**.
3. The proposal to use the EE targets contained in the Amended Construction Sector Codes in the Construction Sector for their company EE Targets is considered disingenuous, for the following reasons:

- There are 5 elements in a Scorecard so Companies can invest in other elements of the scorecard to make up scoring in the event of unforeseen EE events, (like key staff attrition)- i.e. additional spend on Training and the Company can still have a scorecard and win state tenders.
- The Construction Sector Codes (CSC) encompass Built Environment Professionals (BEP) whose business operational parameters and conditions are very different to Contractors.
- The CSC also include Suppliers to the Construction Industry, eg cement suppliers, steel companies, brick manufacturers; who report under different Sectors to the DOEL.
- The DOEL EE report can never be used for a scorecard audit – “to reduce red tape” as suggested during the DOEL presentation. Scorecards expire at all times and audits are done on previous years financials, ensuring that 2 elements are measured in the month of audit, ie ownership and employment equity. DOEL EEA2 reports are submitted at the end of each year, with possibly different employment statistics during the next years scorecard audit.
- Black owned business with turnover less than R50m do not have employment equity measured for their scorecard, but are most likely employing more than 50 employees. They will now be required to conform to the industry targets in order to do state business.
- Regional Contracting Companies can elect to be measured on Regional EAP targets in their scorecard, while DOEL requires National EAP targets (*refer ITEM 9*).

4. The decimation of the Construction Industry during this recession, prior to the Covid pandemic, has been catastrophic. It is untenable therefore that further prohibitive measures are now being contemplated to prevent Contractors engaging in State Contracts via the requirement to have a Compliance Certificate. In this regard, the following must be considered:

- Legislation is being tabled giving the Minister power to issue regulations prior to these regulations being agreed?
- The consideration and acceptance of "acceptable circumstances", for not achieving targets and determining the issuance of a Compliance Certificate when companies submit their EEA2 reports.
- The implementation measures allowed by DOEL inspectors, and the circumstances of revoking a Compliance Certificate which effectively puts a Contractor out of business, and the real possibility of abuse and corruption attached to this situation
- What measures are being contemplated to penalise other businesses in the private sector, who do not meet their Plan, but do not require a Compliance Certificate as they do not engage in State Contracts? The table below will illustrate the performance of Construction vs Private Sector Average vs Proposed DOEL Targets – (extract from **ITEM 1.**)

INDUSTRY	LEVEL	AFRICAN		COLOURED		INDIAN		WHITE		F NATIONALS	
		M	F	M	F	M	F	M	F	M	F
CONSTRUCTION	Top	13.8	5.3	5.5	2	5.9	2.5	55.9	6.7	2.2	0.3
	Senior	17	6.5	6.3	2.1	5.8	1.8	46.2	11.3	2.5	0.5
Private Sector Average	Top	7.0	3.9	3.2	1.9	7.1	2.9	56.4	13.2	3	0.5
	Senior	10.8	5.9	4.7	3.2	7.7	4.1	41	19.1	2.7	0.8
DOEL Proposed Sector Targets	Top	25.9	25.9	3.2	3.2	0.9	0.9	20.0	20.0	0.0	0.0

5. The perception and interpretation of member companies that these targets in numerical form assume the prescription of quotas, in contravention of the Constitution and the ILO 111 Convention, which poses the very real prospect of legal challenge.
6. **ITEMS 2 and 3** in the attachment outlines the legislative requirements for the selection of Operational staff in Senior and Top Management in Construction Companies and the education and qualifications required. **ITEM 4** is current data showing the small pool of candidates available for selection in these positions, irrespective of race and gender. The lack of equitable representation at Top and Senior levels is accepted as being a direct result of past injustices in Education, but cognisance has to be made of these facts when ascribing targets.

7. **ITEM 5** compares the comparison of actual race percentages of qualified candidates vs the DOEL proposed targets at Top Management, showing that these will take at least 20 years to achieve,
8. **ITEM 6** shows the gender gap in Construction and Engineering, with no available statistics in which Sector of Engineering these Registered Female Professionals are employed. These statistics are for all women, yet DOEL require EE stats that reflect demographics.
9. **ITEM 7** shows detail of the talent pool at lower management levels, which is a positive sign for the future.
10. **ITEM 8** details the restriction on all youth pursuing academic qualifications and the current situation in our Education system, where excellence in Maths and Science is mostly achieved in private schooling. This situation is a great source of concern because it indicates that unless there is immediate redress, then under privileged children may forever be trapped in a cycle of poverty, despite the best intentions of the CEE, and the efforts of industry.
11. **ITEMS 10 and 11** described the complexities in Legislation and Tender rules that are unique to Construction and also the cyclical nature of Construction that require permanent adjustment to employment figures. These include prescriptive tender requirements for "local" employment, and the requirement to sub-contract contracts to Emerging Contractors. These factors further illustrate the need for Contractor- specific "acceptable **reasons**" to deviate from a Contractors EE Plan; which will form part of the EEA2 annual submission to DOEL.

The final Item is the attached document is repeated here to further emphasise the need of our Industry to engage and workshop the good intentions of the DOEL and the CEE, with accurate information and research.

SAFCEC would like to actively engage with both DOEL and CEE to explore interventions that overcome the issues presented in this document; and it is believed that this can take place with further study and information sourcing.

It is considered that meaningful engagement can take place when the following information is obtained by the Council of Employment Equity (CEE)

1. Economic projections based on present data and post Covid.
2. Statistics of the attrition rate in Construction must be considered, together with the recent decimation of the industry.
3. Professional bodies like ECSA and CESA must be required to submit stats of registered Professionals per Engineering and Construction Sector, together with race and gender for

accurate knowledge of the candidate pool available at each Level of Management, and whether these professionals are located in Construction Companies or Consulting Engineers.

4. It must be accepted that any target setting for Contractors and Consultants cannot be the same, nor can this be applicable to Construction Material Suppliers who fall under the Construction Sector Codes, but report under "Manufacturing" on their EE reports to DOEL.
5. Tertiary institutions should be required to make submissions to the CEE regarding their enrolment and graduation stats in terms of qualifications / race / gender and nationality. This will form the basis of future modelling for all economic sectors.
6. Similarly, the Department of Education should be required to make submissions to the CEE regarding their enrolment, throughput and Grade 12 pass rate in terms of race, gender, nationality and subjects that enable registration for engineering.
7. For construction, an analysis of the current CIDB Company registrations per Grade can be used to model the future industry requirements in terms of engineers and related professions upon which realistic targets can be set.
8. Local vs National demographic targets must be taken into consideration.
9. Contractual requirements that enforce the employment of local labour, typically on a fixed-term contract basis equivalent to the duration of the Contract does not lend itself to long-term permanent work opportunities and related career development. These must be considered in Procurement Legislation.
10. The combined affects of legislation must be viewed in totality to measure the affect on Construction Companies who rely on State Contracts, ie The Procurement Bill, B-BBEE Act and the Employment Equity Act.
11. Prior to the acceptance of changes to the EE Bill; the proposed Regulations, that the Bill will empower the Minister to enforce; must be published for Public comment.
12. The reporting mechanism, that identifies "acceptable reasons" for failure of a Company not to achieve their plan, must be discussed and agreed. Like wise the power of the DOEL officers to investigate Companies and withdraw certificates of Compliance must be clearly identified, agreed and published.
13. To enable rational and considered decision making, it is proposed that an independent institution such as a academic institution offering construction management or a business

school be commissioned to collect, collate, interpret and report on the data sets required to firstly set and review targets and subsequently plot performance.

Finally, we trust that this extensive response is accepted in the spirit of constructive engagement and the willingness to engage and find solutions; now that the reality of our industry has been outlined in detail

We hold ourselves available to clarify any issues contained in this communication if required.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Webster Mfebe', with a large, stylized flourish at the end.

Webster Mfebe
Chief Executive Officer

South African Forum of Civil Engineering Contractors

Schedule of Annexure Items

**Submission to the Department of Labour and the Commission of Employment Equity
Regarding The Employment Equity Amendment Bill as well as the Associated Setting of
Sector Specific Guidelines to the Construction Industry**



ITEM 1

STATISTICS EXTRACT FROM LAST AVAILABLE EE REPORT 2018-2019 ¹

(PERIOD 2019 -2020 NOT YET PUBLISHED)

The table below indicates comparative statistics of top and senior management from different industries (excluding state owned enterprises) percentages, highlighting the comparison between construction and other sectors.

INDUSTRY	LEVEL	AFRICAN		COLOURED		INDIAN		WHITE		F NATIONALS	
		M	F	M	F	M	F	M	F	M	F
Agriculture	Top	5.8	2.0	2.7	1.9	1.1	0.3	72	13.3	0.8	0.1
	Senior	9.1	3.5	4.3	2.1	1.5	0.8	58.1	19.4	1.1	0.2
Mining	Top	20.5	7.1	2.6	0.7	2.5	1.2	54.3	7.8	3	0.4
	Senior	21.9	5.8	2.5	0.8	4	1.9	51.6	8.8	2.3	0.4
Manufacture	Top	5.8	3	3.3	1.6	9.3	2.8	58.7	10.4	4.5	0.5
	Senior	9.7	4.5	5.8	2.9	9.7	4	44.7	15.4	2.9	0.5
CONSTRUCTION	Top	13.8	5.3	5.5	2	5.9	2.5	55.9	6.7	2.2	0.3
	Senior	17	6.5	6.3	2.1	5.8	1.8	46.2	11.3	2.5	0.5
Retail Motor	Top	4.7	2	3.3	2	8.9	2.8	59.8	14.8	1.4	0.2
	Senior	11	6.3	6.4	4.8	8.4	4	38.2	19.3	1.2	0.4
Commercial	Top	4.7	2.8	2.7	1.4	10.7	3.7	55.9	14.7	2.8	0.6
	Senior	9.5	5.6	4.4	3.7	11.1	4.9	37.7	20.2	2.3	0.6
Catering	Top	8.9	5.6	2.4	2.3	4.5	2.4	49.3	20.4	3.6	0.8
	Senior	14.2	11.2	4.5	5.2	4	2.8	29.5	25.1	2.5	1
Transport	Top	11.5	6.4	3.4	2.4	9.4	4.2	46.7	11	4.6	0.4
	Senior	15.4	8.2	4.9	2.9	9.6	4.5	33.9	15.6	4.1	0.9
Finance	Top	9.4	5.7	2.7	2.3	5.8	3.4	50.3	16.2	3.3	0.9
	Senior	10	7.8	3.7	3.4	7.7	5.8	35	22	3.2	1.4
Private Sector Average	Top	7.0	3.9	3.2	1.9	7.1	2.9	56.4	13.2	3	0.5
	Senior	10.8	5.9	4.7	3.2	7.7	4.1	41	19.1	2.7	0.8

ITEM 2

LEGISLATIVE REQUIREMENTS FOR PROFESSIONAL ENGINEERS AND CONTRACT MANAGERS, IN SENIOR AND TOP MANAGEMENT POSITIONS

The **Occupational Health and Safety Act and Construction Regulations** ⁴ place onerous obligations on line managers in construction companies. This is done for good reason as **construction projects are high risk environments with the potential to harm employees and members of the public**. Recent high profile safety incidents within our industry attest to this. It is evident that investigations into these incidents also focus on the competency of site managers as well as temporary works inspectors and designers.

The onerous obligations and consequences faced by construction company line managers and leaders require competent persons and at the core of the requirement lies the definition of competence as defined in the Construction Regulations which read as follows:

“**competent person**” means a person who-

- (a) has in respect of the work or task to be performed the required knowledge, training and experience and, where applicable, qualifications, specific to that work or task: Provided that where appropriate qualifications and training are registered in terms of the provisions of the **National Qualification Framework Act, 2000 (Act No.67 of 2000)**, ⁵ those qualifications and that training must be regarded as the required qualifications and training; and
- (b) is familiar with the Act and with the applicable regulations made under the Act;

The above definition prohibits people without recognised qualifications to be appointed under the act. Of particular importance in the career path and appointment scope of construction company leaders at the professional, senior and top management levels is the clause 8.1 appointment of construction manager which is defined as:

“**construction manager**” means a competent person responsible for the management of the physical construction processes and the coordination, administration and management of resources on a construction site;

The appointment obligation is described as :

- 8. (1) A principal contractor must in writing appoint one full-time **competent** person as the construction manager with the duty of managing all the construction work on a single site, including the duty of ensuring occupational health and safety compliance, and in the absence of the construction manager an alternate must be appointed by the principal contractor.
- (2) A principal contractor must upon having considered the size of the project, in writing appoint one or more assistant construction managers for different sections thereof: Provided that the designation of any such person does not relieve the construction manager of any personal accountability for failing in his or her management duties in terms of this regulation.

Also of importance in the professional and senior management levels will be appointments as construction supervisor defined as:

“**construction supervisor**” means a **competent** person responsible for supervision construction activities on a construction site;

Contractors have design responsibilities often undertaken on site by construction employees at professional and senior manager levels. This either where they manage design and construct projects, do temporary works design or supervise and inspect temporary works design. For these functions the appointment as designer is of importance where:

“**designer**” means-

- (a) a competent person who-
- (i) prepares a design;

- (ii) checks and approves a design;
- (iii) arranges for a person at work under his or her control to prepare a design, including an employee of that person where he or she is the employer; or
- (iv) designs temporary work, including its components;
- (b) an architect or engineer contributing to, or having overall responsibility for a design;
- (c) a building services engineer designing details for fixed plant;
- (d) a surveyor specifying articles or drawing up specifications;
- (e) a contractor carrying out design work as part of a design and building project; or
- (f) an interior designer, shop-fitter or landscape architect;

These persons must be professionally registered with ECSA and are specifically referred to in the regulations as:

“Professional Engineer or Professional Certificated Engineer” means a person holding registration as either a Professional Engineer or Professional Certificated Engineer in terms of the **Engineering Profession Act, 2000 (Act No. 46 of 2000);** ⁶

“Professional Technologist” means a person holding registration as a Professional Engineering Technologist in terms of the Engineering Profession Act, 2000; ⁶

ITEM 3

REGISTRATION REQUIREMENTS

The Engineering Professions Act of 2000 ⁶ places further obligation on registered persons in professional, senior and top management positions in construction companies. In addition, requirements by **clients and insurers of construction companies** and projects require that leaders be registered with professional bodies.

The Engineering Council of South Africa (ECSA) identifies work that may only be done by professional persons in accordance with the Engineering Professions Act. This should include certain roles and responsibilities of construction engineers.

The ILLUSTRATIVE career path table, below, serves to illustrate the time and background in meeting candidacy requirements prior to registration that must be gone through. Only once registered can such persons be appointed under the regulations and start gaining experience at the particular level on site. This is then followed by further appointments overseeing many sites usually at a senior management position and thereafter at a top management position.

ILLUSTRATIVE TYPICAL CAREER PATH TABLE

Professional Qualification	4- 5years of study	Minimum entrance- requirement: Advance 70% Math and science at 60% plus	5 years
Candidacy program for Professional Registration	Minimum 5 years	Minimum entrance requirement: <ul style="list-style-type: none">• Professional Qualification• Structured Mentorship programme	10 years
Middle Management	5 to 10 years	<ul style="list-style-type: none">• Professional work experience and further academic development• On the job Coaching programme	10 - 15 years
Senior Management	Minimum 5 years at Middle Management level	<ul style="list-style-type: none">• Broader business experience and academic development• Leadership development	15 – 20 years
Top Management	Minimum 5 years at Senior Management level	In depth strategic and business development experience and professional development	20-25 years

The table above illustrates that it could take from 15 to 20 years for a construction leader to reach senior and top management levels coming through the ranks. It thus follows that senior and top managers that wrote their Senior Certificate, Gr 12, exam in 2000 to 2005 are only now at the levels of senior management. The pool of incumbents from designated groups is small given the numbers leaving school with adequate maths and science marks, (refer to **ITEM 8**) showing maths pass rates in 2002). This pool was by no means fully available to the construction market and is contested by other industries offering much better salaries, working conditions with lower responsibility levels.

Construction companies rarely appoint persons to line management positions and ultimately senior and top management without the incumbent having undergone the above process. This is driven by the requirement that construction leaders need to meet statutory prescripts and be able to lead teams who require valuable industry experience, and can make contractual, bidding and commercial decisions based on their broad experience.

This philosophical argument is often counteracted by corporates who believe leading construction companies is simply a management function not requiring specific construction experience. The track record of organisations holding this belief is evident in failures of large construction businesses here and abroad where leadership lose touch with the business of construction and the soul of the

construction people employed at all levels in the organisation. Senior and top management in particular must make critical bidding, technical, safety, contractual and commercial decisions which are not similar to normal management tasks. These require the prerequisite experience. Ultimately the failure of the company negatively impacts firstly all the employees and then of course the shareholders and the national economy.

ITEM 4

CURRENT STATISTICS OF REGISTERED PROFESSIONALS – (REQUIRED BY LEGISLATION TO HOLD TOP MANAGEMENT OPERATIONAL POSITIONS IN CONSTRUCTION COMPANIES)

CESA ² published the number of registered professionals in the industry. **By far the most do not work in construction companies!** From statistics it is difficult to sometimes isolate Civil Engineers which should be considered in isolation when considering our industry

Table 1: Professional Category Registration Statistics

Professional Engineer		
		Total Registrations to date
TOTALS		21446
Gender	Male	20315
	Female	1131
Race	Black	2338
	White	17932
	Indian	926
	Coloured	250

STATS EXTRACT REF 2

SACPCMP		
3. Professional Construction Manager (910)	910	
Black - 158	158	17.36%
White- 676	676	74.29%
Indian - 38	38	4.18%
Coloured -38	38	4.18%
Female - 18	18	1.98%
Male- 892	892	98.02%

STATS EXTRACT REF 3

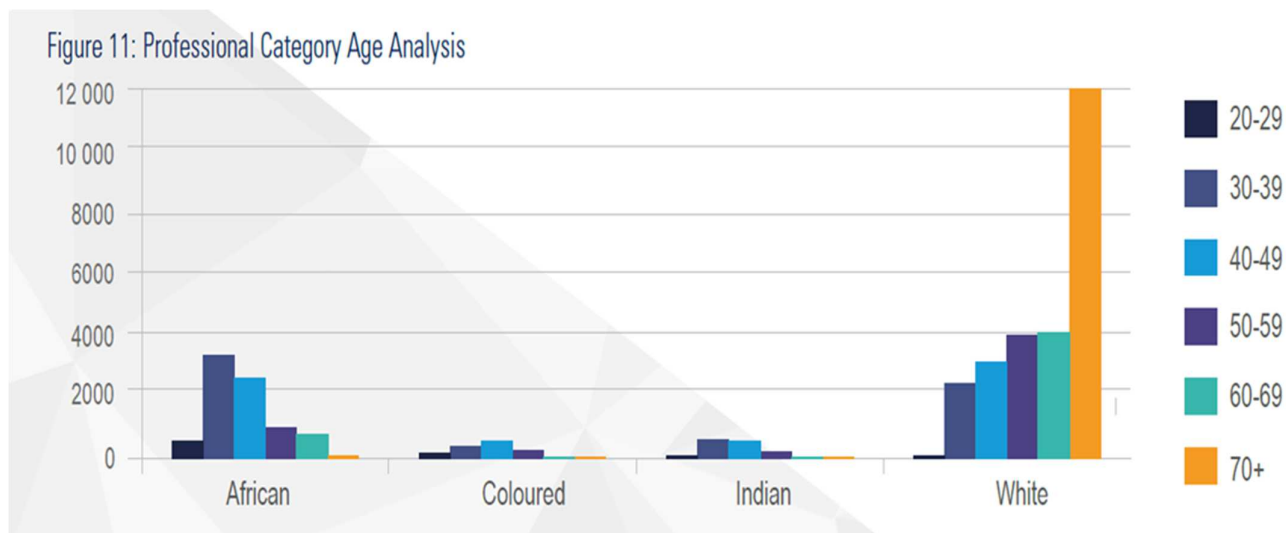
In terms of legal requirements the above figures show that there are a total of **3 514** black Registered Professional Engineers in **all fields of engineering, not just civil engineering, much less construction**, a total of **16.4 %**. The number of black registered Professional Construction Managers totals **234** .

The total number of CIDB Construction companies Grade 7 to 9 requiring certified Professionals total **3040**.

If you compare the number of professionally registered SACPCMP Construction Managers with the number of Construction Companies in the (CIDB 7 -9) category, there is less than one (1) registered professional for every two (2) companies. These stats take into account all persons registered as a

Professional Construction Managers across race and gender. If you remove the white people from this equation, the figure drops to a staggering low figure of less than one (1) for every 10 companies.

This is further illustrated when the age and race of registered professionals is reviewed:²



ITEM 5

COMPARISON OF ACTUAL RACE PERCENTAGES VS PROPOSED DOEL TARGETS *Comment on Race Target (African) TOP MANAGEMENT*

It was suggested by the Department of Education and Labour at a Construction Industry presentation on 28 February 2020, that agreed new EE targets in Construction should be aligned to those contained in the Revised Construction Sector Codes ⁷.

This document has illustrated in great depth; the requirement for Registered Professionals in Top Management positions in construction companies. It is therefore appropriate again to look at these Top Management Targets vs Industry available candidates.

In **ITEM 4**, industry statistics show the total number of registered professionals in race and gender categories. The statistics are of all registered Professional Engineers in all categories ie mining, electrical, mechanical etc and therefore only a small percentage will be in the construction industry. It is from this category that Top Management must align with proposed Construction Sector Code Targets.

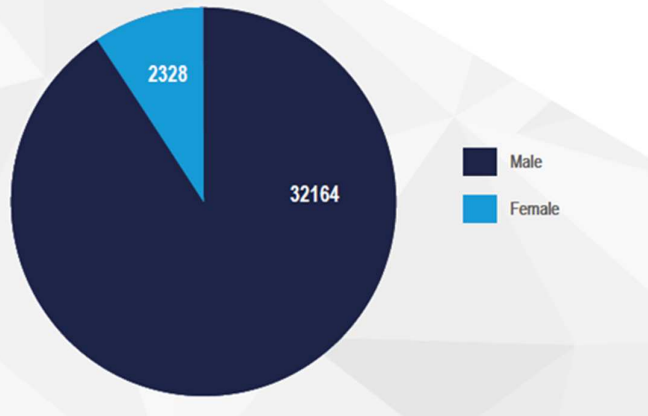
The stats show all industry **African = 10.9%** DOEL suggested target is **51,8%** (African male and female).

ITEM 6

GENDER ISSUE IN CONSTRUCTION

Few women, of all races qualify as Engineers, and those that do usually join Consulting Engineers not Construction Companies. The registration statistics of women from CESA #②, are shown below:

Figure 2: Professional Category Registration Statistics By Gender and Category



Actual Females percentage of **all races** = **7.2%**
 Proposed DOEL target at Top Management = **30%, excluding white females**

The chart above reflects the status of Females, in all race groups and all categories of Engineering that will be eligible for Top Management positions.

ITEM 7

DEMOGRAPHICS AT LOWER MANAGEMENT LEVELS

It is encouraging to note that the pool of candidate percentages at lower management levels is more equitably represented. The statistics below show the candidate positions that would hold Junior Management positions, as follows:

SACPCMP		
4. Candidate Construction Manager (684)	684	
Black - 381	381	55.70%
White- 227	227	33.19%
Indian - 32	32	4.68%
Coloured - 44	44	6.43%
Female - 115	115	16.81%
Male- 569	569	83.19%

STATS EXTRACT REF 3

Table 2: Candidate Category Registration Statistics

Candidate Engineer		
		Total Registrations
TOTALS		10287
Gender	Male	8035
	Female	2252
Race	Black	4118
	White	4712
	Indian	1173
	Coloured	284

STATS EXTRACT REF 2

ITEM 8

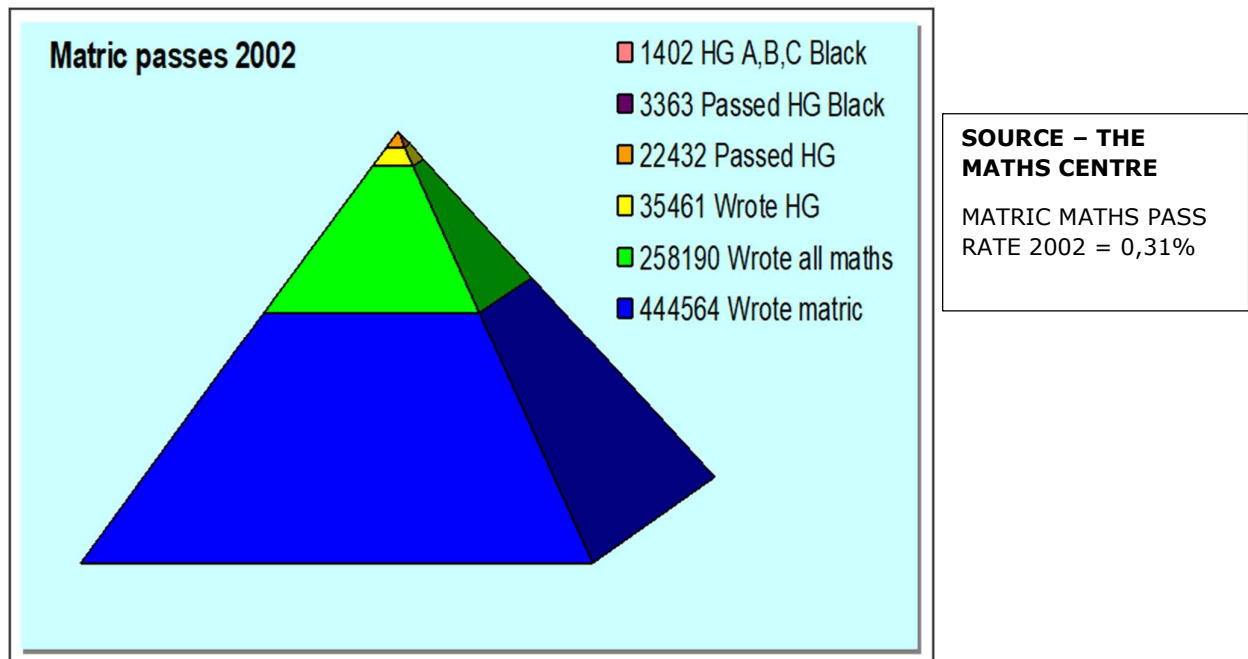
OUTPUT OF SCHOOL CANDIDATES

It is evident that the shortage of skills at Top and Senior Management to equitably represent the population is a direct result of past injustices in education; and the fact that this has changed at junior levels is a source of encouragement. There is no Sector that is more concerned about the standard of Education in our country than the Construction Sector that faces skills shortages at all levels of management on a daily basis.

Although some political commentary may dismiss the Education issue as a convenient deflection tactic of "Old Pale Males" the current situation must be urgently addressed by the Commission of Employment Equity. **This situation affects the future of every South African child, but mostly those from disadvantaged communities who cannot afford costly private education.**

The following issues reveal the issues of contention and concern specific to the Construction Sector as follows:

- 8.1 The previous discussion regarding the Contracting growth and development period will show that the current occupants of positions at Top Management levels would rely on candidates who matriculated from 2000 – to 2005. The black maths pass rate in 2002 is shown below:



- 8.2 The point of departure is an enabling Secondary Education, how many students graduate from Grade 12? Below is a table representing the 2017 – 2019 Grade 10 to Grade 12 throughput rate:

Source: <https://www.news24.com/SouthAfrica/News/da-eff-dispute-2019-matric-pass-rate-say-real-number-is-much-lower-20200108>

Province	Class of 2019				
	Grade 10 (2017)	Grade 12 (2019) candidates	% Grade 10 2017 writing NSC 2019	Total Gr 12 candidates passed	"Real" Pass Rate (%)
Eastern Cape	139 962	63 198	45,2	48 331	34,5
Free State	58 933	25 572	43,4	22 602	38,4
Gauteng	188 069	97 829	52,0	85 342	45,4
KwaZulu-Natal	240 713	116 937	48,6	95 017	39,5
Limpopo	168 847	70 847	42,0	51 855	30,7
Mpumalanga	93 136	43 559	46,8	34 995	37,6
North West	62 766	26 819	42,7	23 272	37,1
Northern Cape	24 008	9 138	38,1	6 990	29,1
Western Cape	75 646	50 404	66,6	41 502	54,9
National	1 052 080	504 303	47,9	409 906	39,0

The Statistics of the 2017 Grade 12 results shows that only **9.2%** or approximately **236 000** achieved an average of above **70%**, **irrespective of race and gender**. In the 2019 matric class only **2,5%** or **4415** learners, **of all races**, achieved between 80 and 100% for mathematics, and these students will be shared between medicine, engineering, and commerce.

8.3

Why does this matter?

The drop in numbers of pupils writing the grade 12 mathematics exam should be of great concern. Performance in mathematics matters for university entrance. Without it, school leavers are not eligible for programmes at university in science or engineering or some in commerce. A decline signals the closing of the doors of opportunity in these fields to a growing number of students. This will only increase inequality. Economics researcher Nic Spaull's research has shown that the top 200 high schools in the country produce 97% of the mathematics distinctions. The majority of these schools charge significant fees.

The deterioration in performance is also of great concern. Getting a pass (30%) may secure a diploma or university entrance but these low pass marks will not prepare students to succeed at mathematics at university level.

This development runs contrary to the needs of the fourth industrial revolution, which requires highly competent graduates in the science, technology, engineering and maths areas. Strong performance in mathematics is essential for careers in computing, programming, finance and machine learning.

Source: <https://theconversation.com/why-south-africas-declining-maths-performance-is-a-worry-129563>

In order to have any chance of passing Engineering at University, the minimum matric requirement is as follows:

UCT and Stellenbosch Civil Engineering Entry Requirements:

OFFER LEVELS FOR AN ACADEMIC PLACE			
	BAND A Admission Guaranteed	BAND B Admission Likely	BAND C Admission Possible
	All applicants	All applicants	Targeted redress race groups 1 and 2 only
Chemical Engineering	FPS 510 Mathematics ≥ 80% Physical Sciences ≥ 70% NBT scores of Proficient for AL, QL and Maths	WPS 480 Mathematics ≥ 80% Physical Sciences ≥ 70% NBT scores of Intermediate or Proficient for AL, QL and Maths	FPS 420 Mathematics ≥ 80% Physical Sciences ≥ 70% NBT scores of Intermediate or Proficient for AL, QL and Maths
Civil Engineering	FPS 500 Mathematics ≥ 75% Physical Sciences ≥ 70% NBT scores of Proficient for AL, QL and Maths	WPS 480 Mathematics ≥ 75% Physical Sciences ≥ 70% NBT scores of Intermediate or Proficient for AL, QL and Maths	FPS 450 Mathematics ≥ 75% Physical Sciences ≥ 70% NBT scores of Intermediate or Proficient for AL, QL and Maths

8.4

Amnesty International reported on the *State of Education in South Africa* in March 2020– extracts of their findings, contained in the press, claim that:

*It found that “more than three-quarters of children aged 9 could not read for meaning in some provinces. Out of a total of **100** pupils that start school, 50-60 would make it to matric, 40 – 50 would pass matric, and only **14** would go to university.”*

The skills of thousands of teachers, in specialist areas such as maths and science, were questionable, as they were either unqualified or under-qualified. “A study in March 2018 found that South African teachers could not pass simple mathematics and English tests, with some scoring as low as 10% for English first additional language and 5% for mathematics” it said.

ITEM 9

GEOGRAPHIC FOOTPRINT OF CONSTRUCTION COMPANIES

Construction companies in South Africa vary widely in the scope of services as well as geographic footprint. A very large number of companies operate in a constrained geographical footprint and are, in some cases, limited to a particular greater metropolitan area or province. This is dictated by their ability and capacity to maintain effective management and control over large distances coupled with logistical challenges and cost of operation.

As a consequence of the above, the application of a national, provincial or even greater municipal EAP impacts both recruitment and the eventual possible employment equity profile of the enterprise.

The wholesale application of a national EAP in target setting and measurement would thus prejudice companies and give rise to exceptions.

The sector targets must take regional EAP’s into account.

ITEM 10

FACTORS DESTABILISING THE EMPLOYMENT PROFILE OF CONSTRUCTION COMPANIES RELATED TO ECONOMIC ACTIVITY

The highly volatile nature of the construction market forces construction companies to frequently adjust their levels of employment. This complicates long term career and, frequently employment equity planning. This must be taken into account when establishing targets and considering how motivations for not reaching sector targets will be handled.

The Basic Conditions of Employment Act which regulates retrenchments and alternatives thereto normally favours long term employees at the cost of employment of shorter term employees which impacts employment equity planning significantly.

Procurement legislation and **tender rules** frequently limit the ability of an employer to move staff onto site where local employment and sub-contracting targets are contractually dictated. This impacts the deployment of a long term permanent workforce and reduces permanent positions with the commensurate career development and promotion prospects.

The **requirement to sub-contract** large portions of the work impacts the employment profile of established contractors without significantly enhancing the employment profile of smaller sub-contractors not able to offer the required career paths.

The above factors are unique to construction companies and contribute to the motivation of establishing separate targets for construction companies.

ITEM 11

CYCLICAL NATURE OF THE CONSTRUCTION INDUSTRY

Consideration should be given how the matter of a cyclical and volatile construction economy is going to be dealt with, as drastic reductions in employment cannot always follow the EAP when a market is in decline. The economy is in recession with Construction experiencing a drastic contraction prior to the Covid pandemic.

The non-issuing of a Certificate of Compliance , or the withdrawal of this, will have a devastating effect on construction companies, in many cases prohibiting them to trade totally. This further exacerbates an economic downturn and will lead to wholesale job losses in the company.

The mechanism and enforcement of both the issuance and withdrawal of Compliance Certificates must be thoroughly ventilated and agreed prior to enforcement.

ITEM 12

CONSIDERATIONS IN THE PREPARATION OF MEANINGFUL CONSTRUCTION INDUSTRY EE TARGETS

SAFCEC members make an effort in supporting extensive technical training and bursary support in an attempt to alleviate the academic shortfalls that entrants to this industry may be facing. This is evident in the requirements of the Amended Construction Sector Codes.

Likewise SAFCEC would like to actively engage with both DOEL and CEE to explore interventions that overcome the issues presented in this document; and it is believed that this can take place with further study and information sourcing.

It is considered that meaningful engagement can take place when the following information is obtained by the Council of Employment Equity (CEE):

1. Economic projections based on present data and post Covid.
2. Statistics of the attrition rate in Construction must be considered, together with the recent decimation of the industry.
3. Professional bodies like ECSA and CESA must be required to submit stats of registered Professionals per Engineering and Construction Sector, together with race and gender for accurate knowledge of the candidate pool available at each Level of Management, and whether these professionals are located in Construction Companies or Consulting Engineers.
4. It must be accepted that any target setting for Contractors and Consultants cannot be the same, nor can this be applicable to Construction Material Suppliers who fall under the Construction Sector Codes, but report under "Manufacturing" on their EE reports to DOEL.
5. Tertiary institutions should be required to make submissions to the CEE regarding their enrolment and graduation stats in terms of qualifications / race / gender and nationality. This will form the basis of future modelling for all economic sectors.
6. Similarly, the Department of Education should be required to make submissions to the CEE regarding their enrolment, throughput and Grade 12 pass rate in terms of race, gender, nationality and subjects that enable registration for engineering.
7. For construction, an analysis of the current CIDB Company registrations per Grade can be used to model the future industry requirements in terms of engineers and related professions upon which realistic targets can be set.
8. Local vs National demographic targets must be taken into consideration.
9. Contractual requirements that enforce the employment of local labour, typically on a fixed-term contract basis equivalent to the duration of the Contract does not lend itself to long-term permanent work opportunities and related career development. These must be considered in Procurement Legislation.
10. The combined affects of legislation must be viewed in totality to measure the affect on Construction Companies who rely on State Contracts, ie The Procurement Bill, B-BBEE Act and the Employment Equity Act.
11. Prior to the acceptance of changes to the EE Bill; the proposed Regulations, that the Bill will empower the Minister to enforce; must be published for Public comment.
12. The reporting mechanism, that identifies "acceptable reasons" for failure of a Company not to achieve their plan, must be discussed and agreed. Like wise the power of the DOEL officers to investigate Companies and withdraw certificates of Compliance must be clearly identified, agreed and published.
13. To enable rational and considered decision making, it is proposed that an independent institution such as a academic institution offering construction management or a business school be commissioned to collect, collate, interpret and report on the data sets required to firstly set and review targets and subsequently plot performance.

REFERENCES

- 1 19th Commission for Employment Equity Annual Report 018/209
- 2 Annual Report 2018/2019 Engineering Council of South Africa
- 3 South African Council of Project and Construction Management Professionals – updated Stats issued by Executive 2 April 2020
- 4 Occupational Health and Safety Act 181 of 1993
- 5 National Qualification Framework Act 2000 (Act 67 of 2000)
- 6 Engineering Profession Act 2000 (Act 46 of 2000)
- 7 Amended Construction Sector Codes of 1 December 2017 , gazette 41287 (Notice 931 of 2017)
- 8 Basic Conditions of Employment Act 75 of 1997

Additional references:

1. <https://businesstech.co.za/news/government/353883/this-is-south-africas-real-school-pass-rate/>
2. <https://businesstech.co.za/news/government/353575/south-africas-university-pass-rate-shocker/>
3. <https://businesstech.co.za/news/business/353051/south-africa-unemployment-1994-vs-2019/>
4. <https://mybroadband.co.za/news/government/334354-south-africas-matric-pass-rate-1995-to-2019.html>
5. <https://mybroadband.co.za/news/government/326215-south-africas-big-matric-maths-problem.html>
6. <https://www.news24.com/SouthAfrica/News/da-eff-dispute-2019-matric-pass-rate-say-real-number-is-much-lower-20200108>
7. <https://businesstech.co.za/news/government/363996/concern-over-south-africas-matric-maths-marks/>
8. <https://businesstech.co.za/news/lifestyle/231111/school-pass-marks-in-south-africa-vs-the-rest-of-the-world/>
9. http://www.ebe.uct.ac.za/sites/default/files/image_tool/images/50/Apply/2020/2021%20NSC%20Entry%20requirements.pdf

Annexure 3

SAFCEC Transformation Declaration

TRANSFORMATION DECLARATION

Members of the **South African Forum of Civil Engineering Contractors (SAFCEC)** agree that they have a critical role to play in the pursuance and attainment of the country's developmental agenda and acknowledge and accept the obligations and responsibilities with this endeavour.

Against this contextual background, SAFCEC hereby declares its support and commitment to sustainable and meaningful socio-economic transformation of the sector in particular and the country in general; to broaden economic participation, drive growth, job creation, skills development and transfers, poverty alleviation and capacity building for social cohesion and nation building.

We believe that transformation must be driven by a genuine desire for the creation of a more demographically representative, just, fair, equitable, ethical and inclusive sector and society. As our point of departure, we therefore commit ourselves: -

- ◆ To adhere to and respect the letter and spirit of all applicable laws and the Constitution of the Republic of South Africa and its associated preamble and all other values espoused therein;
- ◆ To further adhere to and respect our own organisational constitution and values (HUMANITY, HARMONY, DEMOCRACY), including all codes of conduct and good practice applicable to our industry;
- ◆ To prioritise the adoption, adherence and institutionalisation of this Transformation Declaration and aspirations contained herein for the fulfillment of this vision;
- ◆ To the development of transparent, specific, realistic and measurable transformation strategies;
- ◆ To support, promote and align to the sector and country's transformation imperatives;
- ◆ To encourage and promote principles of equality, non-discrimination and diversity;
- ◆ To further endeavor to actively eradicate all forms of corporate racism and sexism and uphold the dignity of each person;
- ◆ To actively promote our industry as accessible and inclusive of all South Africans who historically had restricted access to opportunities in the Construction Industry trades, occupations and/or professions;
- ◆ To introduce measures aimed at identifying and ensuring the elimination of barriers to entry or assimilation and integration of emerging contractors into the mainstream of the country's construction economy value chain through the introduction of SMME development and incubation programmes;
- ◆ To introduce programmes that support sustainable and ethical business practices to build the necessary skills within our sector in such a way that we reflect the country's diversity and demographics in terms of race, gender, youth and social status;
- ◆ To partner, form alliances and collaborative with like-minded industry stakeholders for the progressive realisation of this Declaration;
- ◆ To be sensitive to the broader socio-economic and environmental context within the sector and strive to make meaningful contributions to South Africa's developmental challenges;
- ◆ To strive to create a climate of mutual respect, trust, commitment and co-operation within SAFCEC for the achievement of the foregoing.

**THUS ADOPTED BY SAFCEC COUNCIL AND SIGNED ON BEHALF OF
MEMBERS AT JOHANNESBURG ON THIS THE 26TH DAY OF JUNE 2018**



WEBSTER MFEBE
CHIEF EXECUTIVE OFFICER

ISABELLA MAKUTA
PRESIDENT

Annexure 4

Supplementary information to support Legal Commentary.

Extracts from relevant legislation to which reference is made in these submissions

Annexure

Extracts from relevant legislation to which reference is made in these submissions

The Constitution

217 Procurement

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing 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.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[Sub-s. (3) substituted by s. 6 of the Constitution Seventh Amendment Act of 2001 (wef 26 April 2002).]

9 Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social

origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The Employment Equity Act 55 Of 1998¹

[ASSENTED TO 12 OCTOBER 1998] [DATE OF COMMENCEMENT: 9 AUGUST 1999] (Unless otherwise indicated)

15 Affirmative action measures

- (1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.

[Sub-s. (1) substituted by s. 7 (a) of Act 47 of 2013 (wef 1 August 2014).]

- (2) Affirmative action measures implemented by a designated employer must include-
 - (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
 - (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
 - (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
 - (d) subject to subsection (3), measures to-

¹ In its current form

- (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and

[Sub-para. (i) substituted by s. 7 (b) of Act 47 of 2013 (wef 1 August 2014).]

- (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.
- (3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.
 - (4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

42 Assessment of compliance

- (1) In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act may, in addition to the factors stated in section 15, take the following into account:
 - (a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;
 - (b) reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;
 - (c) reasonable steps taken by a designated employer to implement its employment equity plan;
 - (d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;

- (dA) reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and
 - (e) any other prescribed factor.
- (2) The Minister, after consultation with NEDLAC, may issue a regulation in terms of section 55 which must be taken into account by any person who is required to determine whether a designated employer is implementing employment equity in compliance with this Act.
 - (3) Without limiting subsection (1) (a), the regulation made in terms of subsection (2) may specify the circumstances under which an employer's compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population.
 - (4) In any assessment of its compliance with this Act or in any court proceedings, a designated employer may raise any reasonable ground to justify its failure to comply.

[S. 42 substituted by s. 16 of Act 47 of 2013 (wef 1 August 2014).]

[Date of commencement of s. 42: 1 December 1999.]

CHAPTER VI

GENERAL PROVISIONS (ss 53-65)

53 State contracts ²

- (1) Every employer that makes an offer to conclude an agreement with any organ of state for the furnishing of supplies or services to that organ of state or for the hiring or letting of anything-
 - (a) must-

² A footnote to the section provides that Regulations under section 13 of the State Tender Board, Act 86 of 1986, may provide that supplies and services shall not be procured for and on behalf of the State, unless an employer has attached to its offer a certificate in terms of section 53 (1) (b) (i) or a declaration in terms of section 53 (1) (b) (ii) of the Employment Equity Act.

- (i) if it is a designated employer, comply with Chapters II and III of this Act; or
 - (ii) if it is not a designated employer, comply with Chapter II of this Act;
- and
- (b) attach to that offer either-
 - (i) a certificate in terms of subsection (2) which is conclusive evidence that the employer complies with the relevant Chapters of this Act; or
 - (ii) a declaration by the employer that it complies with the relevant Chapters of this Act, which, when verified by the Director-General, is conclusive evidence of compliance.
- (2) An employer referred to in subsection (1) may request a certificate from the Minister confirming its compliance with Chapter II, or Chapters II and III, as the case may be.
- (3) A certificate issued in terms of subsection (2) is valid for 12 months from the date of issue or until the next date on which the employer is obliged to submit a report in terms of section 21, whichever period is the longer.
- (4) A failure to comply with the relevant provisions of this Act is sufficient ground for rejection of any offer to conclude an agreement referred to in subsection (1) or for cancellation of the agreement. 5
- (5) The Minister may in the code of good practice set out factors that must be taken into account by any person assessing whether an employer complies with Chapter II or Chapter III.

[Sub-s. (5) added by s. 20 of Act 47 of 2013 (wef 1 August 2014).]

[Date of commencement of s. 53: to be proclaimed.]

54 Codes of good practice

- (1) The Minister may, on the advice of the Commission-

- (a) issue any code of good practice;³ and
 - (b) change or replace any code of good practice.
- (2) Any code of good practice, or any change to, or replacement of, a code of good practice must be published in the Gazette.

55 Regulations

- (1) The Minister may, by notice in the Gazette and on the advice of the Commission, make any regulation regarding-
- (a) any matter that this Act requires or permits to be prescribed; and
 - (b) any administrative or procedural matters that may be necessary or expedient to achieve the proper and effective administration of this Act.
- 2) The Minister may by notice in the Gazette make a regulation providing for separate and simplified forms and procedures in respect of the obligations created by sections 19, 20, 21, 25 and 26 for employers that employ fewer than 150 employees.

[Sub-s. (2) substituted by s. 21 of Act 47 of 2013 (wef 1 August 2014).]

Preferential Procurement Policy Framework Act 5 Of 2000

[ASSENTED TO 2 FEBRUARY 2000]

[DATE OF COMMENCEMENT: 3 FEBRUARY 2000]

³ Footnote 6 in the EEA provides as follows - This is an enabling Act. The codes of good practice are intended to provide employers with information that may assist them in implementing this Act, particularly Chapter III.

Issues that are likely to be the subject of codes include the following-

- preparation of employment equity plans;
- advertising, recruitment procedures and selection criteria;
- special measures to be taken in relation to persons with disabilities including benefit schemes;
- special measures to be taken in relation to persons with family responsibilities;
- sexual harassment and racial harassment;
- internal procedures to resolve disputes about the interpretation or application of this Act; and sector-specific issues;
- guidelines for employees on the prioritisation of certain designated groups.

2 Framework for implementation of preferential procurement policy

- (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:
 - (a) A preference point system must be followed;
 - (b)
 - (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
 - (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
 - (c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
 - (d) the specific goals may include-
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette 16085 dated 23 November 1994;
 - (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
 - (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
 - (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled

at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

- (2) Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance.

The Bill

\“15A Establishment of sectoral targets

- (1) The Minister may publish a notice in the Gazette identifying national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa.
- (2) The Minister may, after consulting the relevant sectors and with the advice of the Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any sector or part of a sector identified in terms of subsection (1).
- (3) A notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, or regions within a sector or on the basis of any other relevant factor.

- (4) A draft of any notice that the Minister proposes to issue in terms of subsection (3) must be published in the Gazette and interested parties must be permitted at least 30 days to comment on the draft notice.”
- (5) The Minister may issue regulations prescribing the criteria to be taken into account in determining a numerical target in terms of subsection (2).