
B-BBEE: ALL ORGANISATIONS ARE AFFECTED BY BLACK ECONOMIC EMPOWERMENT AND THE CODES

Johannesburg
27 October 2015

Article by Terrance M. Booysen and reviewed by Dr. Robin Woolley (Director: Transcend Capital)

With the release of the new Broad-Based Black Economic Codes ('B-BBEE') -- which became effective on 01 May 2015 -- there is no doubt that the previous Codes of Good Practice ('the Codes'), which were launched in 2013, did not have the desired effect. Narrow-based black economic empowerment ('BEE') continued to prevail with only a small percentage of black people truly benefitting from the much needed transformation. Accordingly, the Government's amendments to the Black Economic Empowerment Act 53 of 2003 ('the Act'), as well as the new Codes ('the revised Codes'), have sent a very strong message to all organisations in South Africa to enforce the implementation of B-BBEE.

With the amendments now in place, any organisation intending to do business with the Government or state owned entities will need to be compliant with the revised Codes. To the extent that an organisation actually manages to win tenders with the state; it will be largely determined by the manner in which the organisation has been scored in its new B-BBEE ratings.

For all intent and purpose, an organisation which scores a Level 1 B-BBEE rating is far more likely to win business with the Government as compared to an organisation that scores a lower level of say Level 2 or 3. And as the revised Codes have fundamentally changed with tougher and more punitive measures attached, organisations have become more concerned about maintaining or boosting their own levels of B-BBEE compliance. Expectedly, there has been a knock-on effect for (smaller) private companies who are increasingly being 'forced' by their larger clients in their supply chains to also be BEE compliant, or face losing their business. Indeed, if any organisation operating in South Africa -- local or foreign -- is serious about doing business in the country, then it has to understand the gravitas of these changes and they will need to be well prepared, and compliant with the revised Codes.

One of the contentious issues found in the previous Codes, was the issue of 'ownership' and its scoring within certain types of organisations. In the revised Codes, companies limited by guarantee, organs of state, public entities, higher education institutions and non-profit organisations have been classified as "specialised organisations". These entities have been provided guidance in respect of the 'ownership' element found within the B-BBEE Act and the revised Codes.

The B-BBEE scorecards are used to calculate the BEE levels of an organisation; but unlike the Generic Scorecard which is used in more traditional organisations where there is a shareholder component, a different scorecard must be used for "specialised organisations" where there are no traditional shareholders, neither any forms of actual ownership over the organisation.

The B-BBEE elements contained in the Specialised Scorecards, which were originally published in 2007, were amended to align themselves with the Generic Codes of Good Practice which were revised in 2013. It is important to note that specialised organisations are not capable of the evaluation of black ownership and, as such, do not contain the element of 'ownership' akin to that of the Generic Scorecard.

Accordingly, the elements used to calculate the B-BBEE level of Specialised Generic and Specialised Qualifying Small Enterprises ('QSE') have been reduced from six to four elements. These elements include (i) Management Control, (ii) Skills Development, (iii) Enterprise and Supplier Development, and (iv) Socio-Economic Development.

The elements of all the B-BBEE scorecards contained in the revised Codes of Good Practice are the same, except for the Ownership element which does not apply to specialised organisations.

Whilst the points to measure the B-BBEE level for all four elements have changed significantly, for specialised organisations (including QSEs) to either maintain or try and improve their B-BBEE levels, it would be wise not to simply pass this responsibility to the HR department, in the belief that this is 'just another human capital' issue. Moreover, whilst the elements used to calculate the BEE levels of Specialised Generic and Specialised QSEs have been reduced, most people in these sectors will agree that trying to remain BEE compliant with good ratings is becoming much more difficult to achieve, especially for non-profit and public benefit organisations.

Organisations with an annual turnover of R10 million or less are known as Exempt Micro Enterprises ('EME') and if they fall in the 'specialised organisation' category, then they are expected to use the Specialised Generic Scorecard in order to measure their B-BBEE status. But those with an annual turnover of R10 million to R50 million are known as Qualifying Small Enterprises (QSE) and they are expected to use the Specialised QSE scorecard.

Under the revised Codes, specialised EMEs with at least 75% black beneficiaries automatically qualify for a B-BBEE rating of Level 1, whereas previously EMEs had to have 100% black ownership to qualify for a Level 1 B-BBEE rating. Similarly, specialised QSEs with at least 75% black beneficiaries will now automatically qualify for a B-BBEE rating of Level 1, whereas Generic QSEs with 100% black ownership automatically qualify for a B-BBEE rating of Level 1. Under the revised Code, specialised EMEs and QSEs are now required to submit an affidavit as evidence of their B-BBEE compliance. This requirement must be repeated annually to confirm the percentage level of black beneficiaries as well as their respective annual turnovers and that these are below the thresholds mentioned earlier.

Again, it is important to note that the revised Codes compels every organ of State (and public entity) to apply the specialised scorecards for specialised organisations when issuing licences or concessions in respect of any economic activity, or when they implement a procurement policy as just two examples of the various conditions found in the revised Codes. Following these strict conditions, it will be quite unlikely for any organisation wishing to transact with the Government (or public entities) to do so if their BEE credentials are not 100% in order.

Any organisation attempting to "front" their BEE credentials, such where they directly or indirectly undermine the Act and or the revised Codes, they can expect the full wrath of the law. Fronting is widely defined in the Act and there are criminal offences attached to any form of misrepresentation, including when organisations provide false information regarding their B-BBEE status. A B-BBEE Commission has been established to fulfil an oversight function and their powers permit them to investigate any B-BBEE complaints relating to BEE, including transactions involving BEE. Organisations caught undermining the Act -- specifically where they engage in fronting -- can expect a fine of up to 10 percent of their annual turnover and or a ten year prison sentence for any individual involved in this practice. Moreover, whilst these penalties will be imposed on organisations caught for

A few critical success factors when developing your transformation strategy are:

1. *Make your transformation strategy an integral part of your entire company strategy and not a separate document.*
2. *Develop a transformation team that can assist in developing the strategy and help build a critical mass in the organisation.*
3. *Ensure that transformation does not occur at the expense of the performance of your company (but don't make this an excuse to not transform).*
4. *Approach transformation differently under conditions of high growth versus low growth economic conditions.*
5. *Be sensitive in your implementation approach, as this topic has the potential to polarise staff. Many deep rooted issues are just below the friendly surface. Seek specialist consultants to assist here if you have any doubt about achieving absolute success.*
6. *Involve your entire organisation in input and in giving feet to your strategy.*

Source: Everyone's Guide to BBBEE updated against the Revised Codes of Good Practice

Author: Dr Robin Woolley and C. Smith



such practices, they will also be banned from doing business with the Government and public entities for a period of ten years. Following this, it is therefore not surprising that organisations caught fronting and or providing their false BEE information to Government (and public entities) can have their existing contracts immediately cancelled.

Finally, organisations that are listed on the JSE (Johannesburg Stock Exchange) - they too are obligated to provide a report to the B-BBEE Commission stating their compliance with BEE. Given these substantial changes, there is no question that all organisations are affected by the revised Codes. And if organisations do nothing more as compared to what they had done in respect of their previous BEE efforts, they will be automatically downgraded and this will have serious implications, particularly where customers require their suppliers to have a minimum BEE level for trading purposes. Therefore organisations must not treat the revised Codes lightly; getting this wrong will most certainly have a negative impact on an organisation's ability to trade in the South African economy and supply chain. If B-BBEE is not properly included within the organisation's strategy, this will undoubtedly have dire implications on the sustainability of the organisation and ultimately the local economy.

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Words: 1,367

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