

# **GENDER-RESPONSIVE PUBLIC PROCUREMENT UNDER THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT: BENEFITS AND CHALLENGES**

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## **ABSTRACT**

Public procurement is an influential lever with which to incentivise policy reform. In this light, the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act), relies on public procurement to effect economic transformation in South Africa. Women in South Africa are generally underrepresented in economic activity and form an important class of previously disadvantaged persons at whom specific empowerment strategies should be aimed. Thus, the current analysis focuses on the empowerment of South African women using public procurement – known as Gender-responsive public procurement (GRPP) – which is embedded in the current B-BBEE framework. Given the important function GRPP serves, this analysis critically analyses the challenges and benefits which arise in the implementation of GRPP as provided for in the B-BBEE framework. The benefits discussed include: reputational benefits which perpetuate a culture of gender equality throughout various sectors at both micro and macro level, social and economic empowerment as a result of preferential procurement, and enhanced competition in the long run amongst women owned businesses. The challenges canvassed by the analysis include corruption, fronting, high institutional resource costs, biases in favour of larger businesses, empowerment over enrichment, and finally, poor data collection and a failure to include White women in the GRPP policy. The analysis furthermore, makes recommendations to alleviate the identified challenges associated with the implementation of GRPP. To combat fronting, conditions implemented at the contract phase have been suggested. As regards high institutional resource costs, biases in favour of large businesses and empowerment over enrichment, flexible and less stringent criteria for qualifying female SMEs and informal sector businesses have been proposed. Additionally, the notion of tying supplier development to procurement so as to modify the inherent incentive of preferential procurement has also been proffered. Finally, to combat poor data collection and a failure to include White women in the B-BBEE scorecard, an alternative GRPP matrix or scorecard is suggested.

# **GENDER-RESPONSIVE PUBLIC PROCUREMENT UNDER THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT: BENEFITS AND CHALLENGES**

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## **1 Introduction**

According to the Commission for Employment Equity's 2020/2021 annual report, women constitute 44.6% of the economically active population in South Africa.<sup>1</sup> However, while males of all races occupy 75.1% of top management jobs in South Africa, women collectively account for 24.9% of officeholders.<sup>2</sup> In turn, the Quarterly Labour Force Survey, quotes the expanded unemployment rate among women in the second quarter of 2021 at 48.7% – 8.1 percentage points higher than that of their male counterparts. The unemployment rate among Black African women was 41% during this period compared to 8.2% among White women, 22.4% among Indian women and 29.9% among Coloured women.<sup>3</sup> Additionally, South Africa has the sixth largest pay gap between men and women in Africa, and it is estimated that at the current trajectory, this gap will only close within a period 217 years.<sup>4</sup> Thus, based on these statistics – which constitute only a piece of a nuanced social and economic gender

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<sup>1</sup> The economically active population includes women already in the job market, women who are unemployed but seeking to enter the job market, and women in the job market who are underemployed.

<sup>2</sup> Commission for Employment Equity, 2021.

<sup>3</sup> Department of Statistics SA, 2021.

<sup>4</sup> World Economic Forum, 2018.

equality puzzle in South Africa – it is clear that there is a need for gender equality policy promotion in the country, from the formal through to the informal sector. Furthermore, these statistics demonstrate that Black women bear the brunt of gendered socio-economic inequality and therefore, gender policies should justifiably focus on alleviating gendered intersectional disadvantage.

While public procurement constitutes a means of providing goods and services to the public, it is also a powerful legal instrument with which to catalyse and incentivise gender-based policy reform. The use of public procurement to incentivise policy change is a global phenomenon.<sup>5</sup> Notably, in South Africa the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) promotes economic transformation, through public procurement, so as to enable the meaningful participation of previously disadvantaged people<sup>6</sup> in the South African economy.<sup>7</sup> The B-BBEE Act secondarily promotes other categories of Black, disadvantaged people, including women, youth, disabled persons and those who live in rural areas.<sup>8</sup> Thus, gender-responsive public procurement (GRPP) – a form of gender mainstreaming which seeks to increase the equal gender distribution of economic resources – is embedded in the B-BBEE Act.<sup>9</sup> In this light, the B-BBEE Act seeks to “increase the extent to which Black women own and manage existing and new enterprises, and increase access to economic activities, infrastructure, and skills training”.<sup>10</sup> This objective serves as the focus of the following analysis into the benefits and challenges of the current gender equality framework in South African public procurement as provided for in the B-BBEE Act.

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<sup>5</sup> Various international examples of the use of public procurement to bring about policy change are set out in Medina-Arnaíz 2010:542.

<sup>6</sup> S 1 of the B-BBEE Act provides that previously disadvantaged people are Black people, and in this regard, Black people include Coloured, Indian and African persons.

<sup>7</sup> It is important to note that gender-responsive public procurement can be rooted in the Constitution of the Republic of SA, 1996 (“Constitution”). S 9 of the Constitution entrenches substantive equality, and thereby affirmative action policies. Additionally, s 217 of the Constitution inherently sanctions affirmative action in procurement. The following Constitutional Court judgments depict both the constitutionality and importance of affirmative action policies in South African economic life: *SA Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) and *Minister of Justice and Constitutional Development v SA Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC).

<sup>8</sup> Broad-Based Black Economic Empowerment Commission, 2017.

<sup>9</sup> Kneeshaw 2021.

<sup>10</sup> S 2 of the B-BBEE Act.

Thus, the current analysis seeks to critically analyse the current GRPP framework embedded in the B-BBEE Act. This critical analysis takes the form of a broad cost-benefit analysis which examines some of the key benefits and challenges of the B-BBEE based GRPP framework. Benefits which have been identified include reputational benefits, social and economic benefits, and competition-based benefits. Various challenges are thereafter identified, including corruption, fronting, high institutional resource costs, bias in favour of larger businesses, empowerment over enrichment, and finally, poor data collection and a failure to include white women in the GRPP policy. These pitfalls are critically analysed, and on this basis, recommendations which may alleviate associated challenges, are made.

## **2 Cost-benefit analysis of gender-responsive procurement in B-BBEE**

This section identifies and critically analyses the advantages and disadvantages of B-BBEE in the context of gender-responsive procurement.

### **2 1 Benefits**

#### **2 1 1 Reputational imperative**

Bear, Rahman and Post argue that gender diversity amongst directors on company boards enhance the company's corporate social responsibility (CSR) ratings, and in so doing enhances its corporate reputation.<sup>11</sup> An institution's gender diversity and gender equality policies thus, connote a clear indicator of an organisation's commitment to diversity and, on this basis, speaks to good corporate citizenship more generally.<sup>12</sup> Thus, if public procurement policy incentivises gender equality amongst competitor companies, this arguably holds institutional reputational benefits for these corporations. At a broader level, government's commitment toward improving female participation in procurement activities symbolises a willingness to achieve gender equality in procurement markets, and in turn, the economy at large.<sup>13</sup> Thus, in South Africa gender-responsive procurement establishes and perpetuates a culture of

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<sup>11</sup> Bear *et al* 2010:221.

<sup>12</sup> Hills 2015:178.

<sup>13</sup> Oluka *et al* 2020:212.

female empowerment at a micro and a macro level, in both the public and private sectors.

### *2 1 2 Social and economic empowerment*

The B-BBEE Act endeavours to increase the participation of Black women in the ownership, management, expertise and control of businesses. Moreover, the B-BBEE Act seeks to provide Black women with access to resources, infrastructure and training; thereby, directly empowering Black women – both socially and economically. Additionally, preferential procurement requires involvement in development and socio-economic projects, which ensures that communities (and specifically the women in these communities) benefit from CSR efforts – an indirect benefit of the B-BBEE Act.<sup>14</sup>

Furthermore, studies demonstrate that targeted procurement policies improve social and economic stability among policy-favoured groups.<sup>15</sup> The impact of preferential procurement policy is equitable growth, generally equal economic outcomes and improved employment opportunities for women.<sup>16</sup> In addition, gender responsive procurement incentivises entrepreneurship in a group of persons who generally under-participate in the economy – a fundamental factor in driving long-term economic growth as well as economic development.<sup>17</sup> Socially enhanced gender equality (thus, increased female empowerment) is linked to lower gender-based violence rates and femicide rates, among others.<sup>18</sup> Consequently, in the South African socio-economic context, where gender-based violence and femicide is also rife, female socio-economic empowerment is arguably essential.

### *2 1 3 Enhances the competitiveness of women-owned businesses*

A public procurement policy that encourages small enterprises and minority-owned businesses to compete for public contracts enhances their trading or business activity, and in so doing, their competitiveness (i.e., products and services of reasonable

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<sup>14</sup> Juggernath *et al* 2011:8228.

<sup>15</sup> Oluka *et al* 2020:220.

<sup>16</sup> Oluka *et al* 2020:220.

<sup>17</sup> Adeyeye *et al* 2011:3604.

<sup>18</sup> Marais 2019.

quality at competitive prices) in the long run.<sup>19</sup> This is exactly the long-term female empowerment we seek for women-owned businesses in South Africa.<sup>20</sup> Critically, long-term empowerment, alongside development, is arguably essential because it means that at some point, GRPP policies may no longer be necessary.

## **2 2 Challenges**

Based on the above, the importance of targeted gender-responsive procurement (currently in the form of B-BBEE) in South Africa, as well as the benefits thereof, are apparent. However, B-BBEE in its current implementation is not without pitfalls and consequential challenges. Thus, what follows is a critical analysis of these challenges in the South African context, alongside recommendations on how some of these challenges could be curbed.

### **2 2 1 Corruption**

Academic literature demonstrates that corruption seriously impedes the effective implementation of B-BBEE policies.<sup>21</sup> Pike, Puchert, and Chinyamurindi argue that the present B-BBEE model promotes tender corruption. For example, a number of awards are made to incompetent or non-compliant firms due to deliberate, corrupt activities employed by these firms to bypass stringent procurement requirements (which in the first place, have been instated to uphold the fundamental tenets of procurement policy).<sup>22</sup> Tender corruption takes a huge toll on the South African economy and, thus, should be taken very seriously.<sup>23</sup> However, on a critical note, the increased risks of corrupt practice due to B-BBEE policies should not all together bar the implementation of policy promotion – and thereby a transformative agenda – in procurement. This is,

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<sup>19</sup> For example, the International Trade Centre *Annual Report* (2014) illustrates that in Chile, GRPP increased the competitiveness of women-owned businesses specifically targeted by the procurement policy.

<sup>20</sup> Oluka *et al* 2020:212.

<sup>21</sup> Shai *et al* 2019:17.

<sup>22</sup> Pike *et al* 2018:18.

<sup>23</sup> Some broad estimates state that flawed tender processes and tender corruption could be costing SA anywhere around R400 billion a year – about half of government's annual procurement spending. Mahlaka 2018.

however, arguably a complex problem which requires a nuanced set of solutions – an endeavour this analysis cannot do justice to.

### 2 2 2 *Fronting*

Fronting constitutes a notable challenge to the B-BBEE strategy in South Africa.<sup>24</sup> According to the Department of Trade and Industry, fronting in the context of B-BBEE manifests in three ways.<sup>25</sup> First, fronting presents as the introduction or appointment of Black persons (or Black women in the context of this investigation) to the procuring business solely based on their race or gender. However, often these women are discouraged from participating in important business decision-making.<sup>26</sup> The second is benefit diversion: where a tender is awarded to a business based on a favourable gender equality standing, but the ultimate benefits are nonetheless diverted away from the Black women on whom these ratings are based in the first place.<sup>27</sup> Finally, fronting can be seen as opportunism, whereby firms undertake joint venture arrangements with Black women-owned businesses to boost their gender equality status. However, ultimately these arrangements often outsource the work to non-compliant companies or suppliers who assume the bulk thereof.<sup>28</sup>

Fronting, consequently, undermines the very objectives B-BBEE seeks to achieve. However, this should not bar the implementation of gender-responsive procurement in South Africa. Arguably, continuous legislative and policy evaluation and development are essential to firstly, tackle existing fronting practices, and secondly, stay abreast of innovative new fronting practices. Additionally, policy makers should not only implement gender targets in the selection and award phases of procurement practices, but also at the contracting phase. Thus, a recommendation would be to implement contract performance conditions which could undercut fronting practices.

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<sup>24</sup> S 1 of the B-BBEE Act defines fronting as “a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the [affirmative action policies or regulations]”.

<sup>25</sup> Department of Trade and Industry, 2009.

<sup>26</sup> Department of Trade and Industry, 2009.

<sup>27</sup> Department of Trade and Industry, 2009.

<sup>28</sup> This has for example been acknowledged by the Department of Trade and Industry (see Department of Trade and Industry, 2012), and served as a primary justification for revising the B-BBEE Act in 2013.

For example, the firm who ultimately executes the contract (including any subcontractor) should adhere to equal pay practices between men and women, within a leeway of for example 5%. In addition, the final contractor should employ a minimum number of female employees when executing the specific contract at hand. These contract phase conditions could be implemented on a contextual or flexible sliding scale. Hence, if, for example, the final contract is to be executed by an auditing firm (a profession in which a higher concentration of women are employed), a higher target of close to at least 30% to 40% of women in *management* positions could be required. However, if the final contract is a construction contract (an area where there is a limited supply of female workers) 20% to 30% of *all employees* who implement the contract should constitute women.

### 2 2 3 *High institutional resource costs*

Public procurement is a highly regulated process: bid preparation demands a high level of skill and knowledge and thus, is a resource dense process.<sup>29</sup> Preferential procurement requirements heighten the level of institutional resources required to prepare a bid.<sup>30</sup> Economically, an increase in participation costs disincentivise bidders from participating in procurement. The risk is that firms resultantly leave the bidding market, placing upward pressure on prices as a result of reduction in supply, as well as decreased competition in the specific market. The state-owned entity (and ultimately taxpayers) bear the brunt of reduced competition and higher prices.

Given the fact that procurement is already a resource dense process, large, sophisticated bidders would arguably be systemically prepared for the high costs involved in bid preparation, including additional marginal costs involved in implementing B-BBEE. In South Africa, this can arguably be seen by the significant percentage of suppliers registered on the Central Supplier Depository (CSD) having attained various levels of B-BBEE status – with 66.7% of suppliers on the depository at a level 1 B-BBEE status in 2017.<sup>31</sup> Critically, however, small or informal bidders

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<sup>29</sup> Sarter 2020:80.

<sup>30</sup> Sarter 2020:67.

<sup>31</sup> Shai *et al* 2019:13.



cannot compete because they cannot meet high institutional bid preparation costs (especially if they are newcomers in the marketplace) and would often be hampered when these costs escalate even at a marginal level. Female-owned small and medium enterprises (SME) are thus most vulnerable to increased institutional procurement costs, which may bar them from entering the procurement market all together. This is obviously a major concern as B-BBEE specifically seeks to empower women in the informal sector or working in small and medium enterprises, in the first place.<sup>32</sup>

#### *2 2 4 Bias towards larger businesses at the cost of SMEs*

Supplementing the above argument, a long-term objective of B-BBEE is to achieve structural change in new and existing enterprises. Hamann, Khagram and Rohan assert that B-BBEE is geared toward the formal economy and major enterprises in this sector, creating a bias in favour of large businesses at the cost of emerging SMEs and the informal sector.<sup>33</sup> This consequence undermines the South African B-BBEE's broad-based agenda and objective of empowering Black women in rural areas, or even in smaller firms. Anecdotally, SMEs have identified a lack of entrepreneurial skills, social capital and financial capital as barriers they face due to this biased design.<sup>34</sup> Moreover, low-value contracts that could arguably be satisfied by informal sector suppliers, still require of suppliers to participate in the formal sector. For example, all government suppliers, including those trading in low-value contracts, have to be registered on the CSD. This requires verification of the supplier's business registration, banking details, tax compliance status, and so forth – the underlying assumption being that all suppliers operate in the formal sector.<sup>35</sup> In the context of female empowerment, SME and rural community empowerment is essential, as some of the most economically vulnerable Black women are to be found in these sectors. However, alongside the high institutional resource costs pointed out in 2 2 3 above, these unintended biases and barriers borne out of stringent procurement requirements, hamper B-BBEE's own objectives of SME and rural community

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<sup>32</sup> This is one of the objectives of B-BBEE, as set out in s 2 of the B-BBEE Act. Additionally, recommendations to combat these unintended barriers are made in 2 2 4 below.

<sup>33</sup> Shai *et al* 2019:18.

<sup>34</sup> Shai *et al* 2019:18.

<sup>35</sup> Shai *et al* 2019:18.

empowerment, as well as the achievement of long-term structural change by means of public procurement. In this regard, one could look to review the current legislative framework for preferential procurement to allow for flexibility in different sectors of the economy – like those involving SMEs or the informal sector. Hence, SMEs and informal sector firms could for example, be subject to fewer and less stringent bid qualification requirements, or qualification requirements tailored specifically to the SME or informal sector context. Tenders for contracts where informal sector bidders are ample can, for example, be specifically tailored to informal sector bidders with requirements which they can practically meet. Although different from formal sector requirements, these requirements arguably would not hamper competition in the informal sector supplier market, or the quality or price competitiveness of the goods and services in question. The principles of a competitive bidders' marketplace are unaffected because the entire subset of informal sector bidders are subject to these contextual requirements. Moreover, formal sector bidders need not be barred from competing with their own formal sector bidding requirements, which in turn, maintains short and long-term competitiveness in the marketplace.

### *2 2 5 Enrichment versus empowerment*

The challenges set out in 2 2 1 to 2 2 4 above demonstrate that B-BBEE-based procurement has brought about enrichment at the cost of empowerment. Enrichment refers to “the unintended consequence of the design of B-BBEE [whereby a] few socially and politically connected Black people benefit from empowerment deals at the cost of the legislation’s broad-based targeted beneficiaries”.<sup>36</sup> Noon argues that procurement benefits large, Black-owned businesses at the cost of small and medium-sized Black entrepreneurs.<sup>37</sup> Thus, B-BBEE fails to effectively empower the majority of the South African labour market.<sup>38</sup> Consequently, racial inequality has merely decreased in the top of the income bracket.<sup>39</sup>

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<sup>36</sup> Shai *et al* 2019:18.

<sup>37</sup> Horwitz 2011:307.

<sup>38</sup> Horwitz 2011:297.

<sup>39</sup> Horwitz 2011:297.

Critically, this demonstrates that although procurement is a catalyst for meaningful transformation, it requires a supplier market which is empowered to participate, to bring about effective transformation. Although not without its faults, the South African B-BBEE framework is arguably comprehensive. However, inherent incentives to preferential procurement have not cut the barriers that Black, female entrepreneurs face. Thus, additional, alternative and context sensitive strategies are essential to empower especially Black women in informal or SME contexts. Perhaps, the answer lies in tying supplier development to procurement, so as to ensure that institutional and other barriers are directly reduced through BBEE compliance. Hence, one could for example supplement or develop the BBEE scorecard to focus on enterprise development. As suggested in 2.2.4 above, this could be accompanied by flexible procurement requirements, and compliance “breaks” for rural and SME actors.

#### *2.2.6 Poor data collection and exclusion of White women*

Finally, Shai, Molefinyana and Quinot refer to various problems associated with insufficient numerical data collection with which to analyse the progress of B-BBEE implementation in procurement.<sup>40</sup> While a lack of data and statistics on B-BBEE implementation is not a direct challenge of B-BBEE, it leads to unnecessary, indirect challenges when it comes to tracking meaningful transformative progress and making policy changes to improve the current framework. In the context of GRPP in South Africa, because female empowerment is embedded in the B-BBEE scorecard, it is difficult to elicit and track improvement in gender equality trends in public procurement. Moreover, B-BBEE as it currently stands, only favours Black women. However, given the gender statistics set out in the introduction, it is arguably clear that there is still a need to empower White women – even if to a comparatively limited extent.<sup>41</sup>

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<sup>40</sup> This problem is a prevalent theme throughout Shai *et al* 2019:18.

<sup>41</sup> From 2000 through to 2010, White women were classified as “Black” for the purpose of Black economic empowerment. However, by 2010, the B-BBEE scorecard was revised to exclude White women based on statistics that companies “over-invested” in White women to achieve certain B-BBEE levels, but not in their Black, Indian or Coloured counterparts to the same extent. Today, statistics seem to indicate this same trend but, instead Indian women are preferred over Black and Coloured counterparts. See Blumenthal 2021. Thus, any GRPP matrix should take cognisance of this consequence when it is designed.

For this reason, a separate, gender-based matrix in the B-BBEE scorecard, which will render data collection more straightforward, is suggested. This matrix should also be based on a sliding scale: Black and Coloured women in SMEs and in the informal sector get the most points, whereas Black and Coloured women in the formal sector get the second most points, with Indian women in the informal sector or in SMEs, garnering the third most points, and so forth, and employing gender empowerment statistics at any given point in time to draw up the scale. Thus, at the other lowest end of the spectrum (garnering the least amount of points) one would have White women in rural communities or SMEs, and thereafter, White women in the formal sector.

This would firstly, empower White women, but not at the expense of Black women. Secondly, it also ensures that women in the informal sector and women-owned SMEs are focused on separately and forcefully (which as demonstrated above, has been a failure of BBEE generally). Thirdly, it would allow for an objective, numerical basis from which to measure the inroads made in gender equality in various sectors and gender classes through public procurement. On this basis, one can continually develop and improve the gender responsive procurement strategy which, as has been elicited in this analysis, requires a contextual and dynamic strategy. For example, the matrix can be amended to continually target those groups who are statistically most in need of preference.

### **3 Conclusion**

Public procurement is a resource dense operation and constitutes a substantial proportion of government spending in South Africa. Thus, public procurement has shown itself to be a powerful legal instrument with which to incentivise policy reform. The B-BBEE Act promotes economic transformation, using various mechanisms through public procurement to enable the meaningful participation of previously disadvantaged people in the South African economy. GRPP is embedded in the B-BBEE framework – a clearly necessary policy given the disparate gender equality statistics in the South African economy at present. However, although GRPP is arguably essential, considering these statistics, the framework as it currently stands should nonetheless be subject to scrutiny and critical analysis. In this light, the above

cost-benefit analysis of the GRPP framework embedded within the B-BBEE Act critically considered the benefits and challenges of implementing GRPP in South Africa. It was found that there are various benefits to GRPP: reputational benefits which perpetuate a culture of gender equality throughout various sectors at a micro and macro level, social and economic empowerment as a result of preferential procurement, and enhanced competition in the long run amongst women-owned businesses. Consequently, these benefits, alongside unbalanced gender equality statistics, further strengthen the hypothesis that GRPP is necessary in South Africa. However, there are various challenges associated with the implementation of the BBBEE Act, and therefore with GRPP, as it currently stands. It is crucial to identify these challenges, analyse them critically, and provide recommendations which may alleviate the brunt of some of these challenges. These challenges include corruption, fronting, high institutional resource costs, biases in favour of larger businesses, empowerment over enrichment, and finally, poor data collection, and a failure to include white women in the GRPP policy. The problem of corruption is incredibly nuanced and complicated and, thus, recommendations have not been made in this context. As regards fronting, suggestions of conditions which can be implemented at the contract phase have been made. In relation to the problems associated with high institutional resource costs, biases in favour of large businesses and empowerment over enrichment, it is suggested that flexible and less stringent criteria for qualifying female SMEs and informal sector businesses are to be used. Moreover, tying supplier development to procurement can modify the inherent incentive of preferential procurement. Finally, to combat the difficulties related to poor data and a failure to include White women in the B-BBEE scorecard, an alternative GRPP matrix or scorecard is suggested.

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