

## **B-BBEE REQUIREMENTS FOR JOINT VENTURES**

### **1. Who are we?**

The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is established as an entity within the administration of the Department of Trade, Industry and Competition (“**the dtic**”) by the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”). Its role includes overseeing the implementation of the B-BBEE Act and acting against fronting practices.

### **2. The Purpose of the Brochure**

This brochure aims to provide guiding principles for the measurement of joint ventures within the context of B-BBEE.

### **3. What is a Joint Venture?**

Structures in business are not always simple. The implementation of B-BBEE has revealed various complex structures, which include joint ventures.

The legal dictionary (<https://legaldictionary.net/joint-venture/>) defines a joint venture as a business arrangement wherein two or more parties, whether as individuals or entities, enter into an agreement to combine resources for a specific business undertaking for profit.

Two types of joint ventures may be used. Firstly, an incorporated joint venture, which means that an entity has been incorporated and governed in terms of the Companies Act. In that case, the incorporated entity will have to determine its own B-BBEE

measurement in line with the principles outlined in paragraphs 4, 5 and 6 of Statement 000 of the Codes of Good Practice (the Codes). Secondly, there is also an unincorporated joint venture, and this is where there is no incorporated entity, and in that case, a consolidated B-BBEE scorecard is required for the joint venture.

An unincorporated joint venture will be governed by the joint venture agreement, stating the responsibility of each party, how profits will be shared, and responsibility for losses incurred and the costs attached therein.

#### **4. REASONS FOR ESTABLISHING A JOINT VENTURE**

There are various reasons why entities or parties decide to enter a joint venture arrangement and that may include, among others, the need for:

- a) Exploring new markets;
- b) Increasing skills and resources;
- c) Growth and diversification;
- d) Collaboration and spreading costs; and
- e) Skills and knowledge transfer.

#### **5. B-BBEE Requirements for Unincorporated Joint Venture Certificates**

When parties choose to access any economic benefit through an unincorporated joint venture, in terms of the B-BBEE Act, the joint venture must submit its own consolidated B-BBEE certificate or sworn affidavit.

##### **5.1 Before 1 December 2019**

When amendments to the Codes came into effect on 1 May 2015, including the prescription for the use of sworn affidavits for Exempted Micro-Enterprise (EMEs) and 51% and 100% black-owned Qualifying Small Enterprises (QSEs), the Codes did not provide guidance on the consolidation of B-BBEE sworn affidavits where

parties who qualify as EMEs or a 51% and 100% black-owned QSE opted to form an unincorporated joint venture.

This oversight meant that an unincorporated joint venture for entities relying on sworn affidavits before 1 December 2019 were invalid. (The invalidity did not apply to entities that are governed by the amended Construction Sector Code which specifically included rules for joint ventures).

However, entities that qualified for the use of a B-BBEE Certificate issued by a verification professional accredited by the South African National Accreditation System, were able to determine a consolidated B-BBEE scorecard for the unincorporated joint venture. This provision meant that the entities only had to approach a SANAS accredited verification agency/professional with their individual B-BBEE Certificates, for the verifier to produce the joint venture B-BBEE Certificate.

## **5.2 After 1 December 2019**

As a result of the amendments effected to the Codes through Notice Number 303 of Government Gazette Number 42496 gazetted on 31 May 2019, entities that use B-BBEE sworn affidavits and B-BBEE Certificates are now able to use a consolidated unincorporated joint venture scorecard. This is how it works:

- a) The parties will need to first obtain a valid B-BBEE sworn affidavit or B-BBEE Certificate for their individual enterprises. Should the individual entity's B-BBEE Certificate or Sworn Affidavit be invalid, the joint venture certificate will also be invalid.
  
- b) The parties will then need to consolidate the compliance data based on a weighting in accordance with the joint venture agreement. This means that the parties scores will be weighed according to their proportionate share in the joint venture and added together for a combined score of 100.

- c) The consolidation of the compliance data shall be based on a weighting in accordance with the joint venture agreement relevant to the specific joint venture. Therefore, should two or more companies enter an unincorporated joint venture their respective scores in terms of the relevant Codes of Good Practice will be weighted according to their proportionate share in the joint venture.
- d) Should an entity qualify in terms of the QSE scorecard, its B-BBEE score of 100 must be used to calculate the consolidated score.
- e) 51% black-owned EMEs and QSEs will qualify for a score of 95 points, while 100% black-owned EMEs and QSEs will qualify for a score of 100 points.
- f) EMEs with less than 51% black ownership will qualify for a score of 85 points

The process described in part (b) and (f) can only be done by a SANAS accredited verification agency/professional.

A consolidated joint venture will determine its B-BBEE status in line with the principles of Statement 000 of the Codes of Good Practice based on whether the entity is an EME, QSE or large entity.

## **6. Validity of an Unincorporated Joint Venture Certificate**

The same process outlined in the Practice Guide 01 of 2018 issued by the B-BBEE Commission on determining the validity of a B-BBEE verification certificate, B-BBEE Certificate and Sworn Affidavit must be utilised to test the validity of an unincorporated joint venture certificate.

A joint venture certificate is valid for a period of twelve (12) months, and only applicable to a specific project. This means that the parties will need a new joint

venture certificate every time they want to access a new project opportunity or initiative.

## **7. B-BBEE requirements got Incorporated Joint Venture Certificates**

An incorporated joint venture refers to a formally incorporated entity registered with the Companies and Intellectual Property Commission (CIPC). In this instance the consolidated B-BBEE joint venture certificate will not suffice. The incorporated joint venture will determine its B-BBEE measurement in line with the requirements outlined in the general principles under Statement 000.

The incorporated joint venture will determine its B-BBEE measurement based on annual total revenue and it can either be a:

- **Exempted Micro Enterprises (EME):** an entity that generates a revenue of R10 million or less per annum. An EME is exempt from compulsory B-BBEE scorecard compliance, but can still benefit from B-BBEE initiatives.
- An EME is deemed to have a B-BBEE level 4 contributor status. However, an EME which is at least 100% black owned based on the flow through principle qualifies for elevation to a B-BBEE level 1 contributor, and an EME, which is at least 51% black owned, also based on the flow through principle qualifies for elevation to B-BBEE level 2 contributor status.
- EMEs will use a B-BBEE sworn affidavit or certificate issued by the CIPC. The CIPC certificate is an equivalent of a B-BBEE sworn affidavit.
- **Qualifying Small Enterprises (QSE):** an entity generating a revenue of between R10 million and R50 million per annum. QSEs have a simplified B-BBEE scorecard (Statement 600) with lower weighting on elements such as ownership, management

control, skills development, enterprise and supplier development including socio-economic development. All QSEs must be verified by a verification agency accredited by the South African Accreditation System (SANAS) to obtain a B-BBEE certificate.

- However, a QSE that is 100% black-owned using the flow through principle will automatically receive a B-BBEE level 1 contributor status and a QSE that is 51% black-owned, also using the flow through principle will automatically have a B-BBEE level 2 contributor status. These QSEs use a QSE sworn affidavit.

**Large Enterprises:** These are entities with an annual revenue of R50 million and above and are required to comply with the full B-BBEE scorecard assessment across all elements: Ownership, Management Control, Skills Development, Enterprise Development, Socio-Economic Development, and Supplier Development. All large enterprises must be verified by a SANAS accredited verification agency to obtain a B-BBEE certificate

- Please take note that where an entity falls in a sector that has a B-BBEE sector Code, the revenue threshold prescribed for that sector must be used. All the gazetted B-BBEE sector codes can be accessed on the B-BBEE Commission website using this link <https://www.bbbee.commission.co.za/b-bbee-codes-of-good-practice/>

## **8. Important Point regarding treatment of Joint Ventures**

- a) All institutions that receive a joint venture B-BBEE certificate need to note that following: Users cannot create their own B-BBEE requirements for joint ventures and need to follow the set B-BBEE requirements. Organs of state and public entities can only deviate from the set requirements after following due process and obtaining approval from the Minister of Trade, Industry and Competition in line with the requirements of section 10 (2) of the B-BBEE Act read with regulation 20 of the B-BBEE Regulations.

- b) An unincorporated joint venture cannot be classified as an EME, QSE or large entity including having a B-BBEE contributor status level. This is because an unincorporated JV certificate is made out JV member individual B-BBEE certificates or sworn affidavit and not the total annual revenue generally utilised for classification of entities.
  
- c) Recipients of the joint venture B-BBEE documents need to conduct due diligence to determine validity of such documentation using the Practice Guide 01 of 2022 issued by the B-BBEE Commission. Please note that any procurement spends based on invalid B-BBEE documentation cannot be used for B-BBEE recognition.

**9. Sector code joint venture requirements that are different from generic codes**

**Construction Sector Code:**

The measurement of Joint Ventures will be done as follows:

Unincorporated Joint Ventures are required to compile a consolidated verification certificate. A consolidated verification certificate will consolidate the scorecard points scored by each of the joint venture partners in accordance with paragraph below as if those Measured Entities were a single Measured Entity.

The consolidation of scorecard points shall be based on a weighting in accordance with the joint venture agreement relevant to the specific joint venture. Therefore, should two companies enter into an Unincorporated Joint Venture their respective scores will be weighted according to their proportionate Economic Interest rights in the joint venture and added together for a combined score.

QSE's that are less than 51% Black Owned must be measured in terms of the QSE Scorecard. Such an Entity must use its score in terms of the QSE Scorecard to calculate the consolidated score.

QSE's that are at least 51% Black Owned or 100% Black Owned and all EME's are awarded automatic B-BBEE Status Levels without having achieved a specific score. Therefore, in order to appropriately weight such an entity's contribution to the B-BBEE Status of a JV, the following scores are imputed to them based on their respective automatic BBEE Status level as enhanced or discounted:

a Level 1 Contributor qualify for a score of 105 points;

a Level 2 Contributor qualify for a score of 97.5 points;

a Level 3 Contributor qualify for a score of 92.5 points;

a Level 4 Contributor qualify for a score of 85 points;

a Level 5 Contributor qualify for a score of 77.5 points;

a Level 6 Contributor qualify for a score of 72.5 points.

Where all the partners in the joint venture are Empowering Suppliers the Unincorporated Joint Venture will also qualify as an Empowering Supplier. If not, the compliance of the Unincorporated Joint Venture with the Empowering Supplier requirements must be measured as though it is a single Measured Entity with each partner contributing, to the categories of measurement for Empowering Supplier status, in proportion to its share in the joint venture.

If an incorporated joint venture is required to be formed after the commencement of a contract, the unincorporated joint venture scorecard will be applicable for the first year of the contract where after a scorecard will be required for the incorporated entity.



In respect of public sector procurement an entity may not sub-contract more than 25% of the value of a contract to another entity that does not have an equal or better B-BBEE status level than the entity awarded the contract unless the work is sub-contracted to an EME that has the capability to execute the work and the work is below the EME threshold. In such cases in respect of public sector procurement where more than 25% of the project costs flow to the other entity that does not have an equal or better B-BBEE status level, joint ventures or consortia should be formed with a combined scorecard for all entities in the joint venture or consortium, in line with applicable regulations

## **10. General Matters**

During the execution of its mandate, the B-BBEE Commission has noted the following concerns (not an exhaustive list) regarding joint venture structures:

- a) The absence of an agreement governing the relationship between the parties, such as outlining their roles and responsibilities, including among others how profits will be shared.
- b) The use of joint venture initiatives to partner with black people or a black-owned entity merely to access economic opportunities, and not to empower black people.
- c) Limitations or restrictions on the participation of black people in decision-making over the affairs of the joint venture.
- d) Lack of good corporate governance in relation to the affairs of the joint venture such as limiting black people from accessing the financial records of the joint venture.
- e) What is implemented in practice is different from the commitment in the joint venture agreement, resulting in conflict and fronting. For example, not having a

separate financial account for the joint venture or deviating from the profit-sharing arrangement to the disadvantage of black people.

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