



# CRACKING THE PROPERTY CODE

The 2017 Property Sector Code replaces the B-BBEE Property Sector Code. But how does the amended Code impact your agency? Webber Wentzel partner Adam Ismail unpacks the legal issues

**F**or estate agents and agencies, the words BEE compliance and the 2017 Property Sector Code are frequently heard, but they may as well be Greek. Yet whether you're an estate agent, a franchisee or franchisor, unpacking the concept of BEE and the Property Sector codes is important. Fact is, they may not affect you – in other words, particularly as a residential estate agent, you probably have no need to concern yourself with BEE compliance. Still, understanding why BEE was introduced, why the laws pertaining to it were amended, what it means and why it matters to the country as a whole, does matter.

The first law around economic transformation in South Africa – the BEE Act – was introduced 10 years after our democracy was born. The government looked at international models from Canada to Malaysia and chose a system that encouraged people to transform the economy, rather than imposed an obligation on them to do so.

## COMPLIANCE FOR GOVERNMENT CONTRACTS

The BEE law works like this: if you want access to government spend, rights or contracts with any business that is dependent on government spend or rights, you need to be BEE-compliant. You need to tick a range of clearly specified boxes in terms of racial transformation in your business. For that, you accumulate points on a balanced scorecard and build up to levels of compliance. But if you are not compliant, there are no criminal sanctions or fines; there is nothing punitive. You just won't have access to a portion of the economy that requires BEE compliance to contract.

If you like, government can be considered to have used its power in a responsible way to encourage rather than to enforce it.

When the law was introduced, it had to be determined how BEE would be measured. That's when the codes of good practice were introduced. The first set of generic codes was set in 2007 and after that, →→

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amended in 2015. Various sector codes were established for different sectors of the economy. If there’s a sector code that governs the economic sector you’re in, then apply those rules; if there isn’t a code for your sector, then apply the generic code.

**REVISING THE PROPERTY SECTOR**

The property sector has its own code, which was put in place in June 2012. The revised property code is essentially the same law, only with a few changes in calculations. The principles all remain the same. So there is no new law being put in place; rather a revision of an existing law.

The 2007 generic codes were reviewed in 2012, and that resulted in the amended generic codes currently effective in 2015. The 2017 Property Sector Code replaces the B-BBEE Property Sector Code, which was published by the Department of Trade and Industry on 1 June 2012.

Why were they reviewed? Government saw that the BEE rules were not achieving the transformation objective in the required timeline (initially 10 years) – they weren’t seeing the deliverables they intended. They tightened up, and made it a little tougher to become BEE-compliant. But the principles remain the same.

There is no law that obliges an estate agent or agency to comply with BEE. It is entirely optional but it’s the right thing to do. Unless, for example, you were sourcing rented premises for government. You will not get that government mandate unless you have an acceptable level of BEE.

**THE RIPPLE EFFECT**

But BEE has a second tier. Other companies look to comply with BEE because their business either depends on government or depends on people who are dependent on government. In building their BEE scorecard, they want to procure services from businesses that are BEE-compliant.

Take a law firm – it doesn’t necessarily need to be BEE-compliant because it is not dependent on government for any work, but rather because it has clients who want to be BEE-compliant. Those clients will not use that legal firm as a service provider unless it is BEE-compliant. There is a ripple effect of BEE compliance – it can go very far down the chain to, say, the business that supplies the stationary used by that law firm.

**LEGAL STANDPOINT**

What about estate agents? There is no legal obligation for an estate agency to be BEE-compliant, and if the agency works in a space where its clients/customers do not require any BEE compliance, from a purely legal perspective it does not need to worry about BEE.

To use an analogy: anyone who sells products or services directly to the public need not be compliant. Customers walk into a retail store because it’s convenient or the price is right – they are not concerned about your BEE credentials. As a residential estate agent, clients come to you for your expertise or experience in a particular area and perhaps because your commission structure is favourable – you are selling your services to an individual, so there are no drivers for BEE compliance.

Essentially, if an estate agent is an employee, service provider or consultant to the franchisee or franchisor, there is no requirement to work towards any kind of BEE compliance. The agent piggybacks off the BEE compliance of the agency for which they work – it’s about the BEE credentials of the person who sends out the invoice. And that won’t be the estate agent but the agency.

But if that agency is going to derive a substantial amount of income either from government or corporate South Africa, in order to be competitive, it’s probably going to be necessary for the agency to be BEE-compliant.

**THE RIGHT THING TO DO**

BEE compliance will never just be about business in South Africa, given the large gap between rich and poor. It’s about an inclusionary economy, where the playing fields are levelled as far as possible. Many businesses are BEE-compliant because it’s beneficial to their business model. But many are simultaneously working towards a business model representative of the country’s demographics. Many businesses and industries, including the property sector, have understood that it’s the way to build South Africa. Equally, there’s still a long way to go, and it’s not purely about codes, it’s about intention and inclusion.

It also makes business sense to transform as the black middle class grows. Those agencies that are first to transform may just have a competitive advantage over competitors who are slower. PP

# Codes for agents

To minimise red tape and administration for small businesses, the government created a range of different thresholds for BEE compliance. Small businesses are automatically deemed compliant, in other words Level 4, which indicates 100% compliance.

Ordinarily a small business has a turnover of less than R10m (exempted micro enterprises) in terms of the generic codes. But, for the property sector, the government recognised that property service businesses such as estate agencies, brokers and property valuers that don’t have large revenues, but are crucial players in the transformation game in the sector, should be involved in transformation of the sector.

Annual revenue thresholds were lowered in this regard; these service businesses with an annual turnover of less than R2,5m are deemed to be BEE-compliant. Any property services business with an annual turnover of more than R35m has to comply with the full scorecard to be compliant – between R2.5m and R35m turnover, compliance with the qualifying small enterprise scorecard is required.

## BEE: GOOD FOR BUSINESS?

**IF AN AGENT WANTS ACCESS TO GOVERNMENT SPEND, RIGHTS OR CONTRACTS WITH ANY BUSINESS THAT IS DEPENDENT ON GOVERNMENT SPEND OR RIGHTS, THIS IS HOW IT WORKS:**



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