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REGULATORY

Broad-Based Black Economic Empowerment ("BBBEE") pre-qualification criteria for state tenders declared invalid

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1. The Supreme Court of Appeal ("**SCA**") has declared that the Preferential Procurement Regulations ("**Regulations**") issued by the Minister of Finance in 2017 are invalid. The Regulations were issued in terms of the Preferential Procurement Policy Framework Act ("**PPPFA**") and allowed governmental, parastatal and state owned entities to disqualify tenderers upfront (without first considering their tender price and other conditions) if they did not comply with the following pre-qualification criteria set out in the Regulations:

   1.1 having a stipulated minimum BBBEE rating;

   1.2 being an Exempted Micro-Enterprise ("**EME**") or Qualifying Small Enterprise ("**QSE**"). An EME is a firm with annual revenue of R10 million or less and a QSE is a firm with annual revenue of between R10 million and R50 million;

   1.3 subcontracting at least 30% of the tender to an EME or QSE which is at least 51% owned by Black People, Black youth, Black women, Black people with disabilities, Black People living in rural or underdeveloped areas or townships or Black People who are military veterans.

2. The PPPFA provides that tenders must first be assessed in terms of a preference point system where price is the dominant basis on which procurement decisions must be made. The PPPFA provides that at least 80 out of 100 points must be allocated based on price for tenders between R30 000 and up to R50 million and at least 90 out of 100 points must be allocated based on price for tenders over R50 million. The remaining points may take non price considerations like BBBEE into account.
3. The Regulations were challenged by Afribusiness, a non-profit organisation representing about 10 500 businesspeople. Another non-profit organisation, the South African Property Owners Association supported Afribusiness' application as a "friend of the court" or amicus curiae.
4. The SCA found that the pre-qualification criteria in the Regulations deviated from section 217(1) of the Constitution which requires organs of state and "institutions identified in national legislation" to procure good or services in accordance with a "system which is fair, equitable, transparent, competitive and cost effective". The Regulations did not create a framework for the application of the pre-qualification criteria and this could lend itself to abuse. The Minister's decision to allow pre-qualification criteria also contradicted and deviated from the "90/10" and "80/20" framework set out in the PPPFA and he had accordingly exceeded his powers. The SCA however found "nothing objectionable" with the regulation which allowed the use of BBBEE criteria to break a deadlock where tenderers had equal scores.
5. Because of the interconnectedness of the Regulations, the SCA declared the Regulations invalid in their entirety (and not just the portion of the Regulations dealing with pre-qualification criteria). However this order was suspended for 12 months from the date of the order (8 September 2020) to allow the Minister of Finance time to remedy the defects.

6. The SCA decision has very significant implications especially as procurement by governmental, parastatal and state owned entities totals about R2 trillion annually. Although the declaration of invalidity has been suspended, any tenders during the 12 month suspension period which involve pre-qualification criteria are likely to be open to challenge. The suspension of the Regulations in their entirety unfortunately also causes uncertainty. The Broad Based Black Economic Empowerment Commission ("**Commission**") has argued that, notwithstanding the invalidity of the Regulations, the Broad Based Black Economic Empowerment Act ("**BBBEE Act**") provides an alternative framework for governmental, parastatal and state owned entities to apply BBBEE criteria. The Commission's argument is based on the provisions of the BBBEE Act which state that:

   6.1 the Minister of Trade and Industry "may" issue codes of good practice on BBBEE which "may" include "qualification criteria for preferential purposes for procurement and other economic activities";

   6.2 every organ of state and public entity "must" (i.e. they are obliged to) apply any relevant code of good practice issued in terms of the BBBEE Act in developing and implementing a preferential procurement policy;

   6.3 the Minister of Trade and Industry "may", if requested to do so, permit organs of state and public entities to specify "qualification criteria for preferential purposes for procurement and other economic activities" which exceed those set by the Minister in the codes.

7. The following issues arise with regard to the Commission's argument:

   7.1 the codes of good practice which have been issued to date do not deal with "qualification criteria for preferential purposes for procurement" but rather with the interpretation and definition of BBBEE, different categories of BBBEE entities, indicators and weightings to be used in measuring BBBEE and guidelines to draw up sector transformation charters and codes of good practice;

   7.2 in the absence of codes of good practice dealing with "qualification criteria for preferential purposes for procurement", the Commission's argument would not have any immediate practical application to the procurement policies of governmental, parastatal and state owned entities;

   7.3 although the BBBEE Act provides that it prevails if it conflicts with any law in force as at 24 October 2014 (which would include the PPPFA), any codes of good practice dealing with "qualification criteria for preferential purposes for procurement" would (like the Regulations) be subject to the Constitution and the SCA's test with regard to pre-qualification criteria in the Afribusiness case would also apply to codes of good practice issued under the BBBEE Act.

8. The laws governing public procurement are currently being reviewed and a draft Public Procurement Bill has been published which would repeal the PPPFA. The Bill provides for the Minister of Finance to prescribe a framework for preferential treatment and procurement which must "consider" the BBBEE Act and include a preference point system and applicable thresholds and "measures for preference to set aside the allocation of contracts" to promote a category or categories of persons or businesses or a sector, South African manufactured goods, local technology, services by South African citizens, job creation and enterprises in townships, rural or undeveloped areas or in a particular province or municipality. The Bill also proposes to remove the power of the Minister of Trade and Industry in the BBBEE Act to issue codes of good practice on "qualification criteria for preferential purposes for procurement". This would mean that any BBBEE criteria for public procurement would fall outside the scope of the BBBEE Act (and the powers of the Minster of Trade and Industry) and be regulated by the proposed new Public Procurement Act under the Minister of Finance. The Bill has however not yet been passed by Parliament and the final Act and any framework subsequently issued by the Minister of Finance would still be subject to the Constitutional requirements for public procurement. The SCA decision in the Afribusiness case is accordingly likely to remain relevant going forward.



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