

EMPLOYMENT

Constitutional Court confirms invalidity of Broad-Based Black Economic Empowerment (“BBBEE”) pre-qualification criteria for state tenders

2 March 2022 5 min read

Preferential Procurement Policy Framework Act

by Pieter Steyn, Director

1. In September 2020, the Supreme Court of Appeal (“SCA”) declared that the Preferential Procurement Regulations (“**Regulations**”) issued by the Minister of Finance in 2017 were invalid. The Minister of Finance appealed against this decision to the Constitutional Court which upheld the SCA’s decision in a judgment handed down on 16 February 2022.
2. 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. having a stipulated minimum BBBEE rating;
 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;
 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.
3. 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. As the 90:10 and 80:20 split is a statutory requirement, there can be no deviation from it unless the PPPFA is amended by Parliament.
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 split set out in the PPPFA and he had accordingly exceeded his powers.
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 Constitutional Court focussed on the narrow issue of whether the Minister of Finance had the power to issue prequalification criteria in the Regulations. The PPPFA provides that the Minister may issue regulations “regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act”. A five judge majority found that the Minister had exceeded his powers. A four judge minority however disagreed. The Court, unfortunately, did not deal with the key issue of whether or not pre-qualification

criteria in state tenders complied with the requirements of section 217(1) of the Constitution (this issue formed the basis for the SCA decision).

7. The Constitutional Court and SCA decisions have very significant implications especially as procurement by governmental, parastatal and state owned entities totals about R2 trillion annually. The SCA suspended its declaration of invalidity for 12 months but such 12 month period has expired. Any state tenders which involve pre-qualification criteria are open to challenge. The invalidity of the Regulations in their entirety causes serious uncertainty and it is hoped that the Minister will urgently take steps to rectify the situation.
8. The laws governing public procurement are currently being reviewed and a draft Public Procurement Bill has been published which would repeal the PPPFA. Significantly the Bill does not repeat the statutory 90:10 and 80:20 requirements in the PPFA. The Bill provides for the Minister of Finance to prescribe a framework for preferential treatment and procurement which must “consider” the Broad-Based Black Economic Empowerment 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.
9. 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 section 217(1) Constitutional requirements for public procurement, namely that the system must be “fair, equitable, transparent, competitive and cost effective”. Although section 217(2) of the Constitution states that section 217(1) does not prevent a preferential procurement policy for state tenders, it is clear that the section 217(1) requirements must be taken into account and a balance will have to be maintained in any future laws and regulations.



Pieter Steyn

Director

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