

DISPUTES

Is South Africa in a state of procurement limbo? Where to from here, for now?

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Public procurement in South Africa

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Public procurement in South Africa is undeniably tied to the country's socio-economic objectives and is an important tool to achieve transformation. Recently, the Constitutional Court ("ConCourt") in the matter of *Minister of Finance v Aribusiness NPC and Others* (CCT 279/20) [2022] ZACC 4 confirmed the decision of the Supreme Court of Appeal ("SCA") which found that the Preferential Procurement Regulations, 2017 ("the 2017 Regulations") promulgated by the Minister of Finance ("the Minister") on 20 January 2017 in terms of the Preferential Procurement Policy Framework Act 5 of 2000 ("the Act") were invalid.

Preferential Procurement Regulations, 2017

The declaration of invalidity comes pursuant to a review application launched by Aribusiness in 2017. Aribusiness sought an order reviewing and setting aside the 2017 Regulations on the basis that the Minister had acted beyond the scope of his powers in promulgating regulations 3(b), 4, and 9, and therefore that the 2017 Regulations are invalid. The High Court held that the Minister was authorised to promulgate the 2017 Regulations, and in so doing rejected the contention that the Minister had exceeded his powers.

That Court, therefore, held that the 2017 Regulations were rational and lawful. Aribusiness appealed to the SCA, which found that the Minister had failed to act within the scope of his powers under the Act. Consequently, it held that the Minister's promulgation of regulations 3(b), 4, and 9 was unlawful and declared the 2017 Regulations invalid as they were inconsistent with the Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months.

The ConCourt's decision has caused confusion, with some stakeholders going to the extent of questioning whether procurement in the country is in a state of limbo. The main cause of the uncertainty is based on the lack of clarity on when the suspension period begins to run. Is it from the date of the SCA's order, meaning that the period of suspension expired on 2 November 2021, or does the invalidity take effect from 16 March 2022, being the date of the ConCourt judgement?

Exemption in terms of section 3(c)

In response to this uncertainty, National Treasury, on 25 February 2022, issued a note *inter alia* advising organs of state not to issue new tenders. This note resulted in much criticism from various stakeholders, and National Treasury has since issued a further advisory note explaining that until there is guidance from the ConCourt on the status of the 2017 Regulations or the new Regulations take effect, organs of state may request a public interest-based exemption in terms of section 3(c) of the Act. Organs of state such as Transnet have applied for exemption.

To answer the question relating to the suspension period, it is necessary to set out a brief timeline. The first event in the timeline was the handing down of the SCA's judgment on 2 November 2020. In terms of the SCA's order, the declaration of invalidity of the 2017 Regulations was suspended for a period of 12 months, which meant that the 2017 Regulations would cease to be of any force or effect 12 months from the date of the order being 2 November 2020. Section 18(1) of the Superior Courts Act 10 of 2013 provides that except in exceptional circumstances, the operation and execution of a decision that is the subject of an appeal are suspended pending the finalisation of the appeal.

Therefore, the Minister's appeal to the ConCourt had the effect of suspending the SCA's order (and consequently, the running of the period of suspension). When the ConCourt subsequently confirmed the SCA's order, the 12 month suspension period began to run, with the effect that the 2017 Regulations are valid until 16 March 2023. Until that date, the 2017 Regulations continue to be of full force and effect.

Framework for procurement

Even if the ConCourt finds that the suspension period expired in November 2021, we are of the view that it is incorrect to conclude that procurement in South Africa is in a state of limbo, that there is an absolute bar on preferential procurement, or that procurement should be halted until such time that new regulations are promulgated. The framework for procurement, being the Act, is still in place, and as such, the procurement process should be led by the Act, more specifically by section 2. It should be noted that the pre-qualification option in the Regulations did not replace the preferential point system encompassed in section 2 of the Act.

While it is true that limiting the tender process to section 2 may not appear to do much to further the transformation objectives that the 2017 Regulations envisaged, it permits organs of state to formulate their own criteria for tenders, which criteria must be consistent with the Act and section 217, with points for specific goals, such as gender and disability-based goals, that seek to achieve the objectives of preferential procurement.

The draft Regulations which were published on 10 March also appear to be a mere replication of section 2 of the Act and are a major departure from the 2017 Regulations.

Section 9(6) of the B-BBEE Act

An interesting question that arises is whether, given the change in stance reflected in the draft Regulations, this spells the end for pre-qualification criteria to the extent that they were in the 2017 Regulations. The Broad-Based Economic Empowerment Act 53 of 2003 ("B-BBEE Act") suggests perhaps not.

Section 9(1) allows for the Minister to, by notice in the *Gazette*, issue codes of good practice on black economic empowerment that may include qualification criteria for preferential purposes for procurement and other economic activities. Therefore, to this extent, organs of state may possibly still be able to issue tenders with pre-qualification criteria, provided that the Minister issues a notice in terms of section 9(6) of the B-BBEE Act.

For now, we find ourselves at an interesting juncture in the procurement space, eagerly awaiting the guidance of the ConCourt and most importantly, the draft Procurement Bill and the outcome of the public consultation on the draft Regulations.

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