

DISPUTES

The shift in the evaluation criteria in South African public procurement

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South Africa is in the midst of what could prove to be one of the most significant reforms of its public procurement framework since democracy. Or it may not be, depending on what the Constitutional Court decides.

The Public Procurement Act 28 of 2024 (**“the Act”**) was assented to by the President on 18 July 2024 and published in Government Gazette No. 50967 on 23 July 2024, but it is not yet in force. Until it is, procurement decisions remain governed by the Preferential Procurement Policy Framework Act 5 of 2000 (**“PPPFA”**), the Public Finance Management Act 1 of 1999 and the Municipal Finance Management Act 56 of 2003, including the 90/10 and 80/20 preference point systems set out in section 2 of the PPPFA.

On 16 April 2026, National Treasury published the draft General Public Procurement Regulations, 2026 (**“the Regulations”**) and draft Public Procurement Tribunal Regulations, 2026, for public comment. The comment period has since been extended to 15 July 2026, which reflects the breadth of what is being proposed.

The new evaluation model

Under the current system, price drives the outcome. A bidder offering the lowest price will often prevail, provided it meets the basic threshold requirements and scores sufficient preference points.

Regulation 25 establishes a mandatory threshold-based model that departs materially from the current system. Procuring institutions must now assign weight across four criteria: capability and capacity to deliver, functionality and technical requirements, preference, and price. The first three criteria are each subject to a mandatory minimum threshold of 70%, and a bidder who fails any one is excluded before price is even considered.

Sections 17 to 19 of the Act reinforce the shift towards a threshold-driven model. Section 17 mandates outright set-asides for designated categories of suppliers; section 18 introduces prequalification thresholds that determine eligibility for participation, and section 19 imposes subcontracting obligations on successful bidders.

For contracts below R20 million, Regulation 56 requires procuring institutions to reserve certain procurement exclusively for identified categories of persons, including black people, black women, women, persons with disabilities, military veterans, youth, and small enterprises within a particular geographical area, provided the bidder demonstrates 100% ownership by that category. Where no qualifying bids are received, the procuring institution must re-advertise the bid or proceed with no preferential procurement, after making reasonable efforts and reporting to the Public Procurement Office and the relevant provincial treasury.

For contracts of R100 million and above, successful bidders must subcontract at least 25% of the total contract value to enterprises 100% owned by South African citizens. Draft Regulation 64(6) includes a direct payment mechanism: if a supplier defaults on payment to a subcontractor, the procuring institution may pay the subcontractor directly and deduct that amount from what is owed to the supplier. This is a meaningful protection for smaller businesses historically exposed to delayed or defaulted payments from main contractors, albeit it introduces a new layer of financial risk for suppliers.

Regulation 60 adds a retrospective eligibility requirement. To qualify under section 18, bidders must show that at least 40% of their prior procurement spend was on enterprises that are at least 51% owned and managed by black people, with proof of such compliance. Past procurement behaviour, not just a current B-BBEE certificate, now forms part of eligibility.

The concept of prequalification criteria is, however, not new, having been the subject of the legal challenge launched by Afribusiness, which made its way to the Constitutional Court in *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC) against the now repealed 2017 Preferential Procurement Regulations. Prequalification criteria are reintroduced in section 18 which establishes a framework, requiring procuring institutions to apply specified conditions, within prescribed thresholds, to promote the participation of historically disadvantaged groups. These criteria may include minimum requirements for bidders to demonstrate black economic empowerment participation or to subcontract a portion of the contract to qualifying small enterprises, particularly those owned by black people, women, youth, persons with disabilities, and military veterans. The section further provides that bidders who fail to meet these prequalification criteria must be disqualified and obliges procuring institutions to identify opportunities where such measures can support transformation in underrepresented sectors.

The constitutional question mark

The Western Cape Government, joined by the City of Cape Town and amaBhungane, has launched an application in the Constitutional Court for a declaration that the Act is unconstitutional and invalid, on the grounds that Parliament failed to facilitate reasonable public participation on material amendments as required by section 59(1)(a) of the Constitution. The matter was argued before the Constitutional Court on 18 and 19 May 2026.

The challenge is procedural, not substantive in that it targets how the Act was passed, not what it does. The Constitutional Court has long been clear that meaningful public participation in the legislative process is not a formality. In *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), the Court confirmed that a failure to facilitate genuine public involvement can render legislation invalid. If the Court finds that the passage of the Act fell short of that standard, the Act and the draft Regulations will fall with it. Until then, the Act remains signed, not commenced, and constitutionally contested.

One element likely to survive any outcome is the debarment framework under section 15. A central debarment register will be established and procuring institutions will be required to verify suppliers against the database before awarding contracts, and to ensure that every transaction is digitally traceable. As the Constitutional Court affirmed in *Allpay Consolidated Investment Holdings v CEO, South African Social Security Agency* 2014 (1) SA 604 (CC), compliance with procurement principles is a constitutional obligation, not a technical exercise. The debarment database will therefore strengthen this obligation.

Notwithstanding the current constitutional challenge, the direction of travel is clear. Whatever the Constitutional Court decides, the policy instinct behind the legislation i.e. tighter entry controls, traceable transactions and accountability for how preference is actually delivered is unlikely to disappear. A successful challenge would remit the Act back to Parliament for proper public participation and not completely bury the reform agenda.

For businesses bidding in the public sector, the practical message is to prepare now rather than awaiting certainty that may not arrive on a convenient timeline. Bidders must pressure-test their capability and technical documentation against the 70% thresholds, since these are now pass/fail gates. In addition, businesses relying on subcontracting models should review payment processes and contractual terms in light of direct payment mechanism, which shifts real financial exposure onto main contractors. Lastly, any business with a B-BBEE strategy built around point-in-time compliance should start tracking procurement spend given the retrospective threshold under Regulation 60.

One significant tension not resolved by the Regulations is that the measures designed to advance transparency and redress also add layers of threshold compliance, documentation and risk allocation which will likely lengthen procurement timelines, particularly for relatively small bidders without dedicated compliance resources. Whether the trade-off is justified is, in part, what the public comment process is for.

Readers are encouraged to participate in the public comment process before 15 July 2026. Comments can be submitted to DraftGeneralProcurementRegulations@treasury.gov.za.



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