

Circular

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PUBLICATION OF DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2022 FOR PUBLIC COMMENT

On Wednesday, 16 February 2022, the Constitutional Court handed down judgment in the Minister of Finance's Appeal against the judgment handed down by the Supreme Court of Appeal (See: *Afribusines NPC v the Minister of Finance [2020] ZASCA 140*) (the Supreme Court decision).

The Supreme Court decision concluded that the Minister of Finance exceeded his powers in terms of the Preferential Procurement Policy Framework Act, 2000 (the Act) which resulted in the Preferential Procurement Regulations, 2017 (the Regulations) being invalidated.

This resulted in widespread panic throughout the government procurement sphere because government can only procure goods or services through tendering processes that comply with the Preferential Procurement Regulations promulgated at the time.

The Supreme Court of Appeal set aside the Regulations based predominantly on the discretionary prequalification criteria stipulated in Regulation 4 which created an additional layer which neither Section 217 of the Constitution, nor Section 2 of the Act, authorised.

The Supreme Court of Appeal decision held that the Minister's promulgation of Regulations 3(b), 4 and 9 was unlawful and that he acted outside his powers under Section 5 of the Act.

There has been much press about the fact that government must now suspend virtually all procurement due to the fact that the Regulations have been set aside as they have been declared unconstitutional.

On 10 March 2022, National Treasury published the Draft Preferential Procurement Regulations, 2022 for public comment. A copy of the Government Gazette is **attached** hereto.

You will appreciate that National Treasury calls for written comments on the Draft Regulations to be submitted by 11 April 2022.

Thankfully, many of the contentious regulations in the Regulations have been removed. The prequalification criteria for preferential procurement have all been removed. Government can no longer stipulate or apply prequalifying criteria to advance certain designated groups and limit competition by doing so.

Of interest is the fact that the Draft Regulations have also omitted any reference to an evaluation on "functionality". "Functionality" was defined as the *"ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents"*. Functionality has long been the threshold that one has to overcome for a bid to be scored using the 80/20 or 90/10 preference points system.

Functionality effectively "weeded out" the bidders that did not have the necessary experience or capacity to perform the work.

Whilst the functionality evaluation process has long been abused by government officials and has been a source of a number of tender reviews and challenges, it is widely accepted as a 'necessary evil' because it ought to ensure that the bidders that are able to perform the work, advance through to the final round and are scored on B-BBEE and price.

Further good news is the fact that the old Regulation 8, pertaining to local production and content and the old Regulation 9, pertaining to subcontracting as a condition of tender have also been removed. These were both incredibly contentious regulations. In practice, compelling a bidder to subcontract 30% of the value of the tender was never feasible.

Public procurement can only benefit from these suggested improvements.

We strongly suggest that all interested parties deliver comments on the Draft Regulations attached to National Treasury by 11 April 2022.

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FURTHER ADVICE

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