13 SEPTEMBER 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

NEW SERIES

PUBLIC LAW:
KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 3

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CLIFFE DEKKER HOFMEYR

PUBLIC LAW:
KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 3

NEW SERIES

This is the fourth alert in a series of five exploring the changes to South African procurement law occasioned by the publication of revised Preferential Procurement Regulations.

Remedial powers of organs of state are further restricted as they can no longer refer the matter for criminal prosecution but, rather, only penalise a tenderer who failed to disclose a sub-contracting arrangement for a maximum of 10% of the value of the contract.

The final three key changes occasioned by the 2017 Preferential Procurement Regulations (Revised Regulations) pertain to the remedial powers given to an organ of state; the replacement of the mechanism of cancelling and re-inviting tenders with the conditional preference point system; and the removal of good planning, tax clearance and declaratory provisions.

Remedial powers of organs of state

Previously, an organ of state was empowered to act directly against a fraudulent tenderer to, among other things, disqualify the tenderer or terminate the contract; claim damages; prevent the tenderer from obtaining business from any organ of state for a maximum period of 10 years; and refer the matter for criminal prosecution.

Now, in terms of the Revised Regulations, when an organ of state identifies a fraudulent tenderer they must first inform the tenderer accordingly; give the tenderer an opportunity to make representations within 14 days; and, finally, after considering the representations made, disqualify the tenderer or terminate the contract and, if applicable, claim damages.

These remedial powers of organs of state are further restricted as they can no longer refer the matter for criminal prosecution but, rather, only penalise a tenderer who failed to disclose a sub-contracting arrangement for a maximum of 10% of the value of the contract. An organ of state is obliged to inform National Treasury, in writing, of any action taken in this regard, whereafter National Treasury is empowered, after submissions have been made by both the fraudulent tenderer and relevant organ of state, to prevent a tenderer from doing business with any organ of state for a maximum period of 10 years and to add the tenderer to National Treasury's list of restricted suppliers.

Conditional preference point system

Previously, an organ of state had to cancel a tender invitation where the only bids received fell outside the stipulated preference point system (in terms of the price for the contract) and then re-invite tenders under the revised, correct preference point system. To illustrate, if a tender invitation applying the 80/20 preference point system only received tenders that in quoted price exceeded the estimated rand value of R1 million (now R50 million under the Revised Regulations), the tender had to be cancelled and tenderers had to be re-invited to tender under the 90/10 preference point system.

Now, according to the Revised Regulations, the initial tender invitation may stipulate that either the 80/20 or 90/10 preference point system will apply, and that the lowest acceptable tender will determine the applicable preference point system.

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In practice, should a tenderer wilfully misrepresent information in its bid, an organ of state will be able to exercise its remedial powers against fraudulent tenderers.

Removal of the proper planning, tax clearance and declaratory provisions

The Revised Regulations repealed the requirement for an organ of state, prior to making an invitation to tender, to properly plan for and, as far as possible, accurately estimate the costs of the tender. Significantly, even though this is no longer explicitly required, the Implementation Guide published by National Treasury still requires proper planning and accurate cost estimations. This is necessary to determine the appropriate preference point system to be utilised in the evaluation and adjudication of bids, and to ensure that the cost of the services, works and goods is market related. The removal of this provision seems rather curious, but organs of state would be well advised to follow the Implementation Guide.

Previously, tenderers were required to declare that the information provided in their bids is true and correct, the signatory is duly authorised and the tenderer will submit documentary proof when required to do so to the satisfaction of the organ of state. This is no longer required although, in practice, should a tenderer wilfully misrepresent information in its bid, an organ of state will be able to exercise its remedial powers against fraudulent tenderers (as mentioned above).

Finally, tenderers were also previously required to have their tax matters declared to be in order by the South African Revenue Service before being awarded a tender. This requirement has also been removed but is still required according to the Implementation Guide. In the case of *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform and Another; Asla Construction (Pty) Ltd v Head of the Department of Rural Development and Reform and Another* [2016] 3 All SA 686 (WCC), the High Court considered whether the applicants' tenders were fairly rejected as

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In the next and final alert in this series, we will highlight the most recent developments in preferential procurement in case law.

non-responsive for, among other things, failing to comply with the mandatory requirement relating to the furnishing of a tax clearance certificate. The court found that the requirement relating to tax clearance certificates, as provided in the tender documents, was mandatory and therefore, due to non-compliance therewith, the tenders were rendered invalid.

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Lionel Egypt, Malerato Motloung and Sabrina de Freitas

This schedule briefly outlines the focus of the coming instalments in this series as well as links to previous instalments.

Date of release	Topic
23 August 2017	Introduction: an overview of the Preferential Procurement Policy Framework Act, including its importance in the constitutional dispensation, and the Revised Regulations.
30 August 2017	Key changes to the Revised Regulations – Part 1: a summary of the first three changes to the Revised Regulations, namely the 80/20 and 90/10 Preference Point System; the requirement of a market-related bid price; and sub-contracting as a condition of a tender.
6 September 2017	Key changes to the Revised Regulations – Part 2: a summary of a further three changes to the Revised Regulations, namely the pre-qualification criteria based on B-BBEE levels of contribution; how functionality should be assessed; and the additional ground for the cancellation of a tender.
13 September 2017	**Key changes to the Revised Regulations – Part 3:** a summary of the final three changes to the Revised Regulations, namely the more circumscribed remedial powers given to an organ of state; the introduction of a conditional preference point system; and the removal of the good planning, tax clearance and declaratory provisions.
20 September 2017	**Latest Developments:** a discussion on the latest preferential procurement case.

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EDUCATION:
PARENTS BEHAVING BADLY

The parents of two primary school boys ran to court to challenge the termination of their contract by the school and the consequent expulsion of their boys.

The next time you are tempted to bring your own cricket coach to the U11A cricket trials or challenge your child's French teacher to a fist fight, think twice - if your child is at a private school you can get your child expelled.

But what about the right to a basic education? In the recent case of *AB and Another v Pridwin Preparatory School*, the High Court answered this question.

The parents of two primary school boys ran to court to challenge the termination of their contract by the school and the consequent expulsion of their boys, which they said was unconstitutional. After all, so they said, their children have a right to basic education and the school must act in the best interests of the children.

After a series of school sporting events where the children's father behaved improperly the school terminated both contracts in respect of both children. The school cited several examples of this behaviour, one was of the father approaching the umpire at his son's cricket match, swearing at him and saying that he would wait for the umpire after the game and kill him because he did not show respect - all this while apparently holding a cricket bat in his hand in a threatening manner. When the principal of the school approached the father about his behaviour the father said that where he came from if an umpire made a bad decision "they would take a cricket stump out of the ground and stab him". This at a primary school game!

At the heart of the dispute lies the conflict between the right to education, the rights of children and the contractual principle that parties should be bound to agreements freely concluded.

The relationship between the family and the school was governed by a contract, which included a clause allowing the school to cancel the contract for any reason. The cancellation of the contract meant that there was no longer a relationship between the family and the school, and the children were effectively expelled. The school said that the decision to terminate was due to the father's conduct and had nothing to do with the children who were model pupils.

And so the parents went to court brandishing the constitution. At the heart of the dispute lies the conflict between the right to education, the rights of children and the contractual principle that parties should be bound to agreements freely concluded.

Section 29 of the South African Constitution guarantees "the right ... to a basic education". Section 28(2) of the Constitution cautions that "a child's best interests are of paramount importance in every matter concerning the child".

Judge Hartford found that the duty to provide a basic education lies with the state. Accordingly that right does not include the right to be educated at an "independent" or private school. In regard

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.

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The right to a basic education does not apply if the school is not state funded, but private schools do have a constitutional duty to act in the best interests of all the children.

to the children's best interests she said that the school also had to take into account the rights of the many other children attending the school, who were adversely affected by the father's conduct. She found that the best interests of all the children had been properly considered before a decision was made to cancel the contract.

Interestingly, the court left open the question as to whether the same position would apply to "low fee" private schools, where pupils might come from lower income families and the private school is subsidised by the state. Those were not the facts in this matter.

What does this all mean? Can private schools ignore the constitution? Are the sins of the father visited upon the children? How far can a disruptive parent go?

The court's express message is that the right to a basic education does not apply if the school is not state funded, but private schools do have a constitutional duty to act in the best interests of all the children. The lesson for parents is that the best interests of your own children will not be served by loutish antisocial behaviour.

Threatening to kill the U9 umpire because he said your son was out LBW? What's next? News of some father running to court because his son wasn't made captain of the first cricket side? Oh yes, that already happened- and the Pietermaritzburg High Court sent him packing also.

Tim Fletcher and
Fiorella Noriega Del Valle

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Will the United States of America and the United Kingdom just ignore all the media hype and regulatory findings regarding alleged corruption in South Africa?

Will the United States of America and the United Kingdom just ignore all the media hype and regulatory findings regarding alleged corruption in South Africa? Will they allow corrupt trading involving their electronic and banking systems, especially by companies with US and UK connections? Most unlikely, given the recent developments in global anti-bribery and corruption (ABC) and anti-money laundering (AML). Chances are that South Africa might go through the same experience as Brazil.

Brazil topped the Country Count List of Corporate Investigations by the United States DOJ for purposes of enforcing the Foreign Corrupt Practices Act (FCPA) with 19 investigations.

In July 2017, Acting Assistant Attorney, General Kenneth A. Blanco, speaking at the Atlantic Council Inter-American Dialogue Event, confirmed that the US Department of Justice (DOJ) "will continue pushing forward hard against corruption, wherever it is" and he further confirmed that the Kleptocracy Asset Recovery Initiative is specifically designed to target and recover the proceeds of foreign official corruption that have been laundered "into or through the United States". Blanco stressed that in these kleptocracy cases, one of their goals is to return the assets to those harmed by criminal conduct.

In January this year Brazil topped the Country Count List of Corporate Investigations by the United States DOJ for purposes of enforcing the Foreign Corrupt Practices Act (FCPA) with 19 investigations. Only eight months later Brazil increased its global lead by slotting 38 FCPA Corporate Investigations. It has become a feeding frenzy with some of the biggest corruption-related fines in the 40-year history of the FCPA levied on global companies.

Brazil found itself the target of Odebrecht SA, a construction company that has constructed a 'graft machine' by creating fake companies, rigging contracts, using secret bank accounts to pay fake invoices submitted by fake customers, meddling in the affairs of sovereign nations, bankrolling political campaigns, using black market bankers and lawyers doing paperwork for shell companies, and drafting fake agreements to back up bribe money. It was described as a family empire built on bribery and corruption. In January 2014 Brazil enacted what became known as the 'Clean Company Act': the country's first anti-bribery statute providing for corporate liability, huge fines and disgorgement. Three years later the FCPA investigations count increased from 19 to 38. The wheels of justice turn slowly, but surely. Not a pretty picture but at least Brazil, as a country, has taken responsibility for its own future by maintaining the rule of law, removing corrupt state officials and politicians, and enacting transient anti-bribery and corruption legislation followed by active prosecution.

It is clear that the US is not going to tolerate any US company, or foreign entities utilising US systems, operating corruptly in Brazil. The US and Brazil enjoy significant political and economic relations, the US being the first country to recognise Brazil's independence in 1882.

South Africa has been going through a turbulent period. Every week, the media publishes reports of alleged corruption, often as front page news. Upon receipt of complaints of alleged

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Has the situation remained one of domestic relevance only, or is there evidence of global ABC transgressions calling for the extra-territorial reach of the FCPA and the UK Bribery Act?

improper and unethical conduct by state functionaries, and involving alleged improper relationships with a group of private individuals and corporate entities manifesting in alleged corrupt economic activity, the South African Public Protector conducted an investigation in terms of the Constitution and the Public Protector Act, No 23 of 1994. This investigation resulted in the publication of a report called "State of Capture".

Anti-corruption efforts by South Africa's crime combatting units have been severely criticised in the media despite the fact that the legislative framework meets international standards. This has led to the South African media taking the initiative. In an event, akin to the Panama papers exposure, a multitude of e-mails were exposed by the media placing in the public domain material allegedly illustrating grand corruption. These reports have also referred to global companies, dollar-based payments and overseas activities. Has the situation remained one of domestic relevance only, or is there evidence of global ABC transgressions calling for the extra-territorial reach of the FCPA and the UK Bribery Act?

The US has been the undisputed leading crusader against global corruption for 40 years. Countries like France, Canada, China and others have now also accepted the new paradigm and global anti-corruption standard. The UK especially has stepped up to the plate to be taken seriously. Its Bribery Act, introducing strict liability based on companies' "failure to prevent" corruption is an extremely powerful tool to combat global corruption and has struck fear in the boardrooms of global companies. The UK also clearly illustrated its commitment to anti-corruption when their courts approved the deferred prosecution agreement (DFA) entered into between the UK Serious Fraud Office (SFO) and Rolls Royce. This UK settlement is the highest-ever enforcement action against a company in the UK for corruption-related conduct to date including disgorgement of profit and a financial penalty totalling £497.25 million plus interest. It is significant that the UK has now followed the US's lead in opting for a settlement agreement as opposed to a full-blown trial. This will seriously speed up the UK's success and hit rate because most companies would prefer a settlement above a painful trial. The UK's SFO has furthermore increased its focus of enforcement against individuals, which will also play a huge role in the global anti-corruption efforts if CEOs are willing to risk the fine. The UK has recognised that it is at significant risk from illicit wealth laundered by corrupt individuals and it has taken a number of steps to help protect the UK from illicit wealth. One such step is the PSC Register: a public register of people with significant control over a UK company or its management. Transparency is a powerful tool in combating corruption. Ultimate beneficial ownership (UBO) is fast becoming a new standard in global ABC and AML.

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There has been a global move toward transparency and disclosure of beneficial ownership to limit corporate abuse for criminal purposes.

The DOJ follows a robust interpretation of the FCPA's extra territorial jurisdiction provisions and takes the view that US and foreign-based issuers and US citizens, nationals, residents and entities can be subject to territorial jurisdiction for any use of interstate commerce or for furtherance of a corrupt payment to a foreign official. This includes "placing a telephone call or sending an email, text message, or fax from, to or through the US" or "sending a wire transfer from, or to, a US bank or otherwise using the US banking systems". Even a fleeting contact with US territory may constitute sufficient US nexus to assert territorial jurisdiction over foreign entities and individuals for conduct that occurred outside the US. In this regard, wire transfers through correspondent bank accounts in the US in furtherance of a bribery scheme may be sufficient to satisfy territorial jurisdiction. Territorial jurisdiction could be based solely on the transmission or storage of e-mail on servers in the US.

The devastating effects of collateral litigation by innocent third parties must also not be overlooked. Once facts are uncovered in an investigation, those facts become available for further investigations and possible prosecution by other countries and other agencies, with "piggy-backing" becoming popular.

Global illicit financial flow is estimated at 2% to 5% of global GDP with less than 1% seized by authorities. There is also an extensive and hidden global financial system of offshore financial centres and developed country banks that facilitate illicit capital flight. It has been estimated that developed country banks, mainly in the US and UK, absorb between 56% and 76% of the illicit funds coming out of developing countries. The Global Financial Integrity Report (April 2017) shows that illicit financial flow in and out of the developing world has been estimated to at least 13.8% of total trade (or $2 trillion) in 2014. Countries like the US and UK have been criticised for their double-standard approach in dealing with this problem.

Speaking in Abuja in June 2017 at the Conference on Promoting International Co-operation in Combating Illicit Financial Flows, Nigeria's Acting President Yemi Osinbajo observed: "There is no way the transfer of this asset can happen without a handshake between the countries that they are transferred from and the international banking institutions in the countries in which they are transferred, there is no way it will happen without some form of connivance." The High Level Panel on Illicit Financial Flows from Africa, led by Thabo Mbeki, singled out Nigeria as the source of most of the illicit fund flow out of Africa. Osinbajo called for criminalising financial institutions - this call falls against the backdrop of a corporate transparency bill which was introduced in the US Congress a few months ago that will force disclosure of Nigerians and other nationals who run shell companies registered in the US. Apparently nearly two million companies are registered in the US every year. There has been a global move toward transparency and disclosure of beneficial ownership to limit corporate abuse for criminal purposes, especially with regards to anti-corruption.

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Global companies will not escape the extra territorial reach of countries such as the US and UK, and if they fail to self-report, the company and its officials will face the consequences of the new ABC paradigm.

The question is whether South Africa will end up in the same position as Brazil and face the invasive corporate investigations and concomitant plethora of collateral litigation which normally follow in the wake of corruption meltdown. The media has already exposed several global companies affected by the South African alleged grand corruption, some of which have stock trading on the New York Stock Exchange and others with definite connections to the UK. The media further exposed the use of US dollars in some of the transactions and flow of funds through bank accounts overseas such as in Dubai. The emails further clearly illustrate the use of US based email and service providers, and funds channelled through US based correspondent banks. The media has also exposed the involvement of German, Chinese and Swiss companies. The authenticity, factual correctness and legal consequences of the alleged corruption remains to be tested.

At present it is not quite clear what the future holds for the alleged corruption playing out in South Africa, but one thing seems predictable: anti-corruption is a global concern with a very high priority and countries like the US, UK, Germany, France and China are committed to uphold the anti-bribery standard on a global level.

The ABC score boards clearly illustrate global companies will not escape the extra territorial reach of countries such as the US and UK, and if they fail to self-report, the company and its officials will face the consequences of the new ABC paradigm.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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