

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

NEW SERIES

PUBLIC LAW: KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 1

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PUBLIC LAW: GRACE MUGABE AND DIPLOMATIC IMMUNITY

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PUBLIC LAW: KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 1

NEW SERIES

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

The introduction of the requirement of a market-related bid means that the organ of state may not award a contract to a tenderer where the price offered by the tenderer is not market related.



The first three key changes occasioned by the 2017 Preferential Procurement Regulations (Revised Regulations) pertain to the preference point system, the requirement of a market-related bid price and the requirement of sub-contracting as a tender condition.

Preference point system

One of the criteria used in adjudicating a tender is the preference point system. This provides that tenders be evaluated out of a score of 100 points, with a maximum of 20 or 10 points being allocated to preference (more specifically, the B-BBEE level of an entity) and the remaining 80 or 90 points (as the case may be) being allocated to the most competitive price tendered.

The 2011 Preferential Procurement Regulations (2011 Regulations) stipulated that the 80/20 preference point system applied to tenders worth up to R1 million, while the 90/10 preference point system applied to tenders with a rand value above R1 million. The value includes all applicable taxes.

The Revised Regulations change this monetary threshold by providing that the 80/20 preference point system applies to tenders with a rand value equal to or above R30,000, with a maximum rand value of R50 million, while the 90/10 preference point system applies to tenders worth more than R50 million.

The impact of this change is that the 80/20 preference point system will now apply to tenders with a maximum value of R50 million, which is the majority of tenders. Prior to the Revised Regulations, businesses could neglect to focus on B-BBEE levels disregarding the loss of

the 10 points awarded therefor, instead relying on being awarded the complete 90 points for offering goods and services at the most affordable price. However, with greater weight being given to a tenderer's B-BBEE level when awarding the tender, this will compel businesses to transform meaningfully in order to remain competitive during the tender process.

Requirement of a market-related bid

The introduction of the requirement of a market-related bid means that the organ of state may not award a contract to a tenderer where the price offered by the tenderer is not market related. Where this is the case, the organ of state may negotiate a market-related price with the tenderer scoring the highest points (thereafter with the tenderer with the second highest points, and then third highest points) or it may elect to cancel the tender. If a market-related price is not agreed with the tenderer scoring the third highest points, the tender must be cancelled.

Notably, the Revised Regulations do not define what is meant by a "market-related" bid. However, the [Implementation Guide](#) published by National Treasury instructs officials to conduct an industry and commodity analysis to ascertain market-related prices and rely on their discretion to benchmark bids received.

PUBLIC LAW: KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 1

CONTINUED

Importantly, an organ of state must provide a list of all the registered suppliers who fall within the applicable designated groups.



This requirement of a market-related bid is directly linked to the constitutional injunction contained in s217(1) of the Constitution, in particular, that of cost effectiveness.

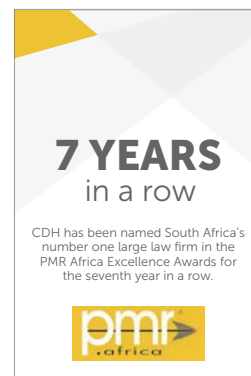
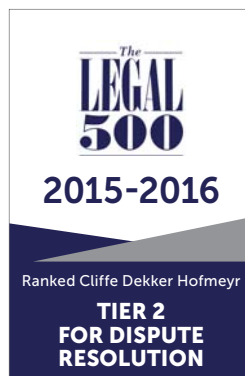
Sub-contracting as a tender condition

The Revised Regulations, unlike the 2011 Regulations, state in peremptory terms that where feasible, organs of state are mandated to require that tenderers sub-contract a minimum of 30% of the rand value of any contract worth more than R30 million. Regulation 9(2) provides that a tenderer must sub-contract to:

- “(a) an [exempted micro enterprise (EME)] or [qualifying small business enterprise (QSE)];
- (b) an EME or QSE which is at least 51% owned by black people;
- (c) an EME or QSE which is at least 51% owned by black people who are youth;

- (d) an EME or QSE which is at least 51% owned by black people who are women;
- (e) an EME or QSE which is at least 51% owned by black people with disabilities;
- (f) an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;
- (g) a cooperative which is at least 51% owned by black people;
- (h) an EME or QSE which is at least 51% owned by black people who are military veterans; or
- (i) more than one of the categories referred to in paragraphs (a) to (h).”

Importantly, an organ of state must provide a list of all the registered suppliers, with the approval of National Treasury, who fall within the applicable designated groups from which the tenderer must select.



PUBLIC LAW: KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 1

CONTINUED

In the next alert we will discuss the next three significant changes occasioned by the Revised Regulations.



The sub-contracting requirement acknowledges that most tenders with a rand value equal to or above R30 million are awarded to established companies. Therefore, the Revised Regulations require all businesses with the ability to deliver goods and services to sub-contract to designated groups.

In the next alert we will discuss the next three significant changes occasioned by the Revised Regulations.

Lionel Egypt, Malerato Motloun 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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PUBLIC LAW: GRACE MUGABE AND DIPLOMATIC IMMUNITY

When diplomatic issues arise, it is always tricky to cognitively disentangle them from international law, particularly given that they quite often overlap.

The ICC previously issued two warrants of arrest for President Omar al-Bashir on charges of crimes against humanity and genocide.



There have been a number of comparisons made between South Africa's failure to arrest President Omar al-Bashir and the decision to grant Zimbabwean First Lady Grace Mugabe diplomatic immunity in relation to the recent allegations of assault laid against her. This brief alert aims to set out the factual differences between these two situations without drawing any conclusions on the legal issues.

As a starting point, it is important to bear in mind that these two cases – while being strikingly similar at first glance – are playing out in different areas of law. The question of diplomatic immunity in relation to President al-Bashir falls within the bounds of international law, that is, the law regulating relations between states. The decision to grant Ms Mugabe immunity has not crossed the threshold into international law because it remains a domestic case in South Africa even though it has implications for international relations.

When diplomatic issues arise, it is always tricky to cognitively disentangle them from international law, particularly given that they quite often overlap. However, it is important to do this given that different implications arise in domestic legal issues which raise questions in relation to diplomacy and international legal issues. While domestic arrest warrants may, in some cases, operate internationally, this does not make them equivalent to International Criminal Court-issued (ICC) arrest warrants.

The ICC previously issued two warrants of arrest for President Omar al-Bashir on charges of crimes against humanity

and genocide. There was no diplomatic immunity to be granted to him because, according to the ICC, Sudan falls within the Rome Statute due to the referral of the situation in Darfur by the United Nations Security Council. Therefore, because Sudan and President al-Bashir could not validly claim diplomatic immunity, there was a legal duty on South Africa to arrest President al-Bashir (see our [previous alert](#) on the ICC's judgment on this issue).

In Ms Mugabe's case, she has been charged with assault with intent to do grievous bodily harm in South Africa and under South African law. Her status as President Robert Mugabe's wife raises international relations issues, but not necessarily international law issues per se. It is not immediately apparent that her alleged conduct falls within the bounds of the Rome Statute of the International Criminal Court.

It is easy to think that these charges are not as serious as those levelled against President al-Bashir, and that this may have something to do with the way we approach the two cases. However, at this point it is prudent to caution that in analysing the distinctions between President al-Bashir's situation

PUBLIC LAW: GRACE MUGABE AND DIPLOMATIC IMMUNITY

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Any form of alleged violence, particularly against women, is grave. Therefore, the two situations cannot be distinguished on this basis alone.



and Ms Mugabe's, the severity of the accusations against the latter must not be de-emphasised. Any form of alleged violence, particularly against women, is grave. Therefore, the two situations cannot be distinguished on this basis alone.

However, the importance in some kind of distinction may lie in the different originating points of the warrants. Once within the ICC's jurisdiction, diplomatic immunity may no longer be claimed. This is not necessarily the case in respect of an arrest warrant issued in South Africa under domestic law. This is, however, a legal

issue that may need to be determined by the South African courts in the pending challenges to the decision to grant immunity to Ms Mugabe launched last week.

In closing, it must be emphasised that the purpose of this alert was to assist with a foundational understanding on the current situation. At this stage, we make no comment on the merits of any pending or potential litigation in relation to these issues.

*Sarah McGibbon
(overseen by Lionel Egypt)*

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



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