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DISPUTE RESOLUTION ALERT

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KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 2

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INTERNATIONAL ARBITRATION:
THE ABC OF INTERNATIONAL INVESTMENT ARBITRATIONS

Do you understand the difference between an international commercial arbitration and an international investment arbitration?

CDH
CLIFFE DEKKER HOFMEYR

PUBLIC LAW: KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 2

NEW SERIES

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

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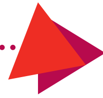


The 2017 Preferential Procurement Regulations (Revised Regulations) also alter the pre-qualification criteria, functionality and the grounds for cancellation of a tender.

Pre-qualification criteria

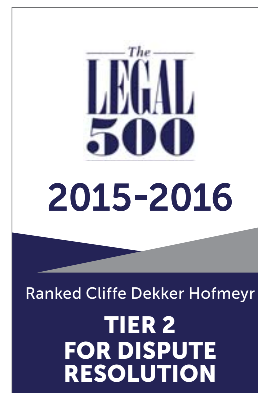
The Revised Regulations have introduced the option for organs of state to apply certain pre-qualification criteria that are based on B-BBEE levels as a means to support designated groups even further.

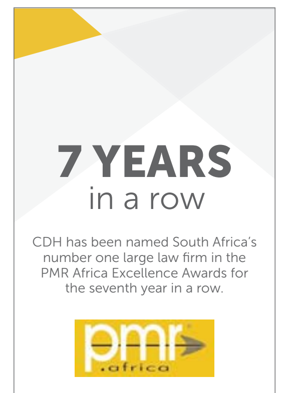
The pre-qualification criteria will stipulate minimum requirements that potential tenderers must meet, including that a tenderer must have a minimum B-BBEE level; be an exempted micro enterprise or qualifying small business enterprise; or be a tenderer subcontracting a minimum of 30% to designated groups. A tender that fails to meet the pre-qualification criteria stipulated in the tender documents is an unacceptable tender.

Functionality

The Revised Regulations elaborate on how functionality, being the ability of a tenderer to provide goods or services in accordance with the specifications set out in the tender documents, should be assessed. They provide that organs of state may not set a generic minimum score for functionality which is used to assess every tender, as was previously the case.

Instead, the minimum score for functionality must be determined separately for each tender. Moreover, the minimum score for functionality may not be so low that it may jeopardise the quality of the goods or services, or so high as to be unreasonably restrictive.





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PUBLIC LAW: KEY CHANGES TO PREFERENTIAL PROCUREMENT LAW: PART 2

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The Revised Regulations now also provide that a tender may be cancelled if there is a material irregularity in the tender process.

Additional ground for cancellation of a tender

The 2011 Preferential Procurement Regulations provided that a tender could be cancelled before it was awarded where – due to changed circumstances – there was no longer a need for the goods or services, funds were no longer available to cover the total envisaged expenditure or no acceptable tender was received. The Constitutional Court has settled that accounting authorities are constrained to these grounds for cancellation.

In addition to the previous grounds of cancellation, the Revised Regulations now also provide that a tender may be cancelled if there is a material irregularity in the tender process. The Implementation Guide published by National Treasury clarifies that where the whole process is rendered unfair by the material irregularity, then the tender may be cancelled and the process started afresh. Given the conflicting judicial interpretation of what constitutes 'material', the additional ground could result in a further proliferation of litigation.

The next alert in this series will deal with the final three significant changes under the Revised Regulations.

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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CLIFFE DEKKER HOFMEYR

PUBLIC LAW: CLARITY IN SIGHT: PAJA REVIEW OR LEGALITY REVIEW?

There are no express, legislated time periods in which the review must be launched nor any requirement that a formal application for condonation be brought if there is undue delay in launching a review.

Legal practitioners still have hard decisions to make when instituting a review in cases where PAJA applies.

One of the most crucial decisions that legal practitioners (and indeed their clients) have to make is whether, in instituting a judicial review, they rely directly on the provisions of the Promotion of Administrative Justice Act, 2000 (PAJA), the constitutional principle of legality or both. This choice is particularly important in circumstances where there may have been a delay in instituting review proceedings and legal practitioners are alive to the 180-day rule expounded in s7(1) of PAJA. A short survey of the body of case law suggests that most practitioners are likely to rely on both, in the alternative.

Unlike under the legality review, where an application for review must be initiated without undue delay, s7(1) of PAJA requires a judicial review to be instituted without unreasonable delay and not later than 180 days. In addition, the court may, on application, grant an extension of the 180-day period under s9(1)(b) of PAJA.

Under a legality review, the courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application in the face of an undue delay. However, there are no express, legislated time periods in which the review must be launched nor any requirement that a formal application for condonation be brought if there is undue delay in launching a review.

The logical question that follows is that, if PAJA applies, does a litigant have a choice to initiate a review under its provisions or bypass it, and formulate its cause of action as a legality challenge? The majority judgment of *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) held that where PAJA applies, litigants and the courts are not entitled to bypass its provisions and rely directly on the constitutional principle of legality. The majority was of the view that the proper place for the principle of legality in our law is to act as a safety net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an alternative path to review, when PAJA applies. This question was left open in *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC).

The appeal in the *Gijima* case was recently argued in the Constitutional Court, so it is hoped that the court will provide the much-needed clarity. In the interim, legal practitioners still have hard decisions to make when instituting a review in cases where PAJA applies.

Thabile Fuhrmann and Vincent Manko

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

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INTERNATIONAL ARBITRATION: THE ABC OF INTERNATIONAL INVESTMENT ARBITRATIONS

An investment arbitration only occurs as a result of a sovereign state's conduct (policy changes, regulatory changes and so on) which affects a foreign investor's investment.

Do you understand the difference between an international commercial arbitration and an international investment arbitration? Wait, is there any difference? The answer is yes. While both are alternative dispute resolution methods, that is where the similarities end.

An international investment arbitration in international law is akin to administrative law challenges found under domestic law.

Characteristics that distinguish international investment arbitrations from international commercial arbitration

- An investment arbitration only occurs as a result of a sovereign state's conduct (policy changes, regulatory changes and so on) which affects a foreign investor's investment.
- The parties to the investment arbitration are almost always sovereign states and foreign investors;
- An investment arbitration only flows from conduct by a sovereign state contemplated under:
  - a valid and enforceable international agreement between two or more sovereign states in compliance with each sovereign state's constitutional requirements;
  - a valid and enforceable investment agreement between a foreign investor and the sovereign state in compliance with the sovereign state's constitutional requirements;
  - customary international law; or
  - domestic legislation which provides for access to investment arbitration.
- the substantive basis for a foreign investor challenging the conduct of a sovereign state is generally based on a breach of:
  - a guarantee against expropriation of a qualifying investment; or
  - a guarantee of fair and equitable treatment of a foreign investor.

  In resolving these investment disputes, the substantive law is founded in international investment law and customary international law – not domestic law. In contrast, international commercial arbitration disputes are based on contracts with reference to a particular national law selected by the parties or resolved by conflict of law principles found under domestic law.
- In most instances, international investment agreements only permit foreign investors to initiate investment claims against a sovereign state – the state is not entitled or able to assert claims or counterclaims against the foreign investor. This is usually referred to as a "one-way" street arbitration.
- Investment arbitrations are often subject to a specialised legal regime under the International Centre for the Settlement of Investment Disputes (ICSID) that is more autonomous from national laws and courts than international commercial arbitration.

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CONTINUED

When all other remedies fail, investment arbitration against a sovereign state is usually the last hope most investors have of enforcing their rights.

This implies that the jurisdiction of national courts to review and set aside an ICSID arbitral award is removed and the ICSID annulment committee has exclusive jurisdiction to review and annul an ICSID arbitral award. There are, however, distinctions in respect of investment arbitrations under certain investment agreements where national courts will still retain jurisdiction to review and set aside arbitral awards.

- Most investment arbitrations awards are made public due to the involvement of the state as a party – transparency is a basic principle. This is in contrast with international commercial arbitrations where one of the deciding factors for parties is the private and confidential nature of the arbitration.

Investors' last recourse against host states

Tensions between a host state and foreign investors over policy and regulatory changes - such as expropriation of assets, additional royalties or taxes, onerous operating conditions - often act as catalysts for investment arbitrations. This is particularly common in sectors licenced by a host government (such as mining and energy, and telecommunications).

During the life-cycle of a project in licenced sectors, it is inevitable that the bargaining power will shift from the investor (capital and skills) to the host government after the investment costs are sunk. This risk, particularly for the resource sector, is increased by the fact that more accessible (good quality) mineral and hydrocarbon reserves continue to dwindle. The result: increasing exploitation of minerals and hydrocarbons in regions with regulatory and political uncertainty.

It is important for foreign investors to assess the regulatory and political risk associated with long-term projects, specifically whether recourse is available against a host state should its investment be materially impaired by the conduct of a state. When all other remedies fail, investment arbitration against a sovereign state is usually the last hope most investors have of enforcing their rights.

Jackwell Feris

CLICK HERE to find out more about our International Arbitration team.

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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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