

CORPORATE & COMMERCIAL ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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Loadshedding continues to be a major source of concern for businesses across a variety of sectors, including agriculture, mining, manufacturing and hospitality, and the impact of an interrupted supply of electricity on these businesses has proven costly (and even fatal).



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Drawing lines in the sand: The promulgation of new Preferential Procurement Regulations and what it means for organs of state and the public

On 4 November 2022, the Minister of Finance promulgated the Preferential Procurement Regulations, 2022 (2022 Regulations) in terms of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA).

Almost immediately after the Regulations were gazetted, (some) mainstream media publications were abuzz with reports that the new 2022 Regulations do not contain stipulations regarding broad-based black economic empowerment (BBBEE) requirements under the Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended) (BBBEE Act) and local content requirements under the PPPFA, implying that organs of state would be free to procure goods and services without any regard to those concepts and criteria. In response to the media publications, on 8 November 2022, National Treasury published a media statement clarifying the situation (National Treasury media statement).


Specifically, National Treasury confirmed that the 2022 Regulations do not provide a mechanism for organs of state to ignore the BBBEE

Act when procuring goods and services. The National Treasury media statement also clarified that the purpose of the 2022 Regulations is to:

- comply with section 217 of the Constitution on procurement of goods and/or services by organs of state;
- comply with the PPPFA; and
- comply with the Constitutional Court judgment of February 2022, in respect of the 2017 Regulations.

Regarding the three points above, after reading this article, it would be useful to refer to our previous article on the topic, which can be accessed [here](#).

Importantly, the National Treasury media statement said the 2022 Regulations would act as a "placeholder" for organs of state pending the enactment of the Public Procurement Bill, which, according to the statement is being finalised and



The Legal 500 EMEA 2022 Results graphic features a dark blue background with a diagonal light blue and yellow streak. The text is white and yellow. It lists several individuals and their firms who were recognized in the 2022 results.

The Legal 500 EMEA 2022 RESULTS

The Legal 500 EMEA 2022 recommended our **Corporate & Commercial practice** in **Tier 1** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Willem Jacobs** and **David Pinnock** as a leading individuals for commercial, corporate/M&A.

The Legal 500 EMEA 2022 included **Ian Hayes** in the 'Hall of Fame' for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Peter Hesseling, Rachel Kelly, Vivien Chaplin, Roux van der Merwe, Roelof Bonnet, Brian Jennings** and **David Thompson** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Justine Krige** as a next generation lawyer for corporate, commercial/M&A.

Drawing lines in the sand: The promulgation of new Preferential Procurement Regulations and what it means for organs of state and the public

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will be introduced to Parliament in or before March 2023. For this article, it is important to note that (i) the Public Procurement Bill is meant to repeal the PPPFA, but (ii) is by no means guaranteed to see the light of day, given that it must still go through the complete legislative process, which includes a public participation process, and which is likely to be robust given the number of stakeholders involved in public procurement.

Of further importance is the fact that the 2022 Regulations would only be effective from 26 January 2023, which is the last day of the 12-month suspension of invalidity, according to the calculation of the Constitutional Court in its further judgment on the matter in May 2022. It may be recalled that pursuant to that “clarification” judgment, National Treasury published a media statement confirming, amongst other things, that the 2017 Regulations are still valid (until 26 January 2023) and that all new tenders must be published in accordance and compliance with

the 2017 Regulations and that all exemptions granted during the period of uncertainty (i.e. between the Constitutional Court’s February 2022 and May 2022 judgments) would lapse. A copy of that media statement can be accessed [here](#).

WHAT DO THE 2022 REGULATIONS ACTUALLY SAY?

So, with the media hoo-ha behind us, what do the 2022 Regulations actually say?

Firstly, the 2022 Regulations confirm that they apply to organs of state as defined in the PPPFA, which includes all public entities listed in Schedule 2 and 3 of the Public Finance Management Act 1 of 1999 (such as Eskom, the Industrial Development Corporation, Transnet, SAA) and municipal entities as defined in the Municipal Systems Act 32 of 2000.

Secondly, the 2022 Regulations stipulate that an organ of state must, in every tender document published, set the applicable preference point system that will be used in the evaluation of that procurement

process, i.e. whether 80/20 or 90/10. Like the 2017 Regulations, the 80 and 90 allotment is reserved for price formulae. However, unlike the 2017 Regulations, the /20 or /10 allotment in each scenario is reserved for “specific goals”, as opposed to BBBEE requirements, which were the focus of the 2017 Regulations.

DEFINING “SPECIFIC GOALS”

The term “specific goals” is defined in the 2022 Regulations as meaning:

“specific goals as contemplated in section 2(1)(d) of the [PPPFA] which may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender and disability including the implementation of programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994”.

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Interestingly, in terms of section 2(1)(d) of the PPPFA, the addressing of historically disadvantaged person/discrimination objectives (now enshrined as a BBBEE measurement) and the implementation of the Reconstruction and Development Programme (RDP) were referred to in two separate subsections. This is important because not all the programmes of the RDP relate to issues of historical discrimination – however, the wording of the 2022 Regulations seems to be trying to create a symbiotic link between these two concepts (i.e. BBBEE and the RDP Programme). The apparent linking of the two concepts is also important because, leaving aside the tragic fact that the legislature is still referring to a developmental policy which was formulated almost 30 years ago, the RDP is a policy document that contemplates a

vast swathe of macro-economic goals and programmes, all of which could be considered by an organ of state in the course of formulating its “*specific goals*”. That could be interpreted as the PPPFA and the 2022 Regulations granting organs of state a *carte blanche* in their determining of their procurement policies, so the apparent linking of the two concepts must have been intentional. This seems to be reinforced by the National Treasury media statement.

The upshot of this is that, in accordance with the Constitutional Court’s judgment and its interpretation of the PPPFA, each organ of state will be required to set its own “*transformation*” goals and those goals will be allotted to the /20 and /10 share of the points in respect of each tender published by the organ of state for the procurement of goods and services.

This is especially important because practically it could mean that organs of state could decide that their “*specific goals*” align with what was set out in the 2017 Regulations and allocate all the points to BBBEE in a manner similar to the 2017 Regulations (most likely). Or it could mean that the “*specific goals*” change with each tender issued and these goals could refer to transformational/BBBEE requirements combined with other RDP goals, such as meeting basic needs or increasing export capacity.

SETTING “TRANSFORMATIONAL” GOALS

The main implication for organs of state is that their procurement departments will be required to focus a lot more energy on and synergise with other internal departments (or their executive authority) as to what specific “*transformational*” goals need to be set and how and when to deploy them into specific tenders.

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This has the potential to be an opportunity for some of the state-owned companies which are currently in dire straits, to focus on transformation in conjunction with other developmental priorities referred to in the RDP. However, any such goals would need to be distilled into quantifiable and certain criteria, and aligned with other BBBEE legislation, in order ensure that the allocation of points for the specific goals is fairly done. This is where the challenge comes in as any departure from the 2017 Regulations would require very considered and well-crafted criteria to be developed by the relevant organ of state.

IMPLICATION FOR TENDER PARTICIPATION

On the other hand, the main implication for the public participating in such tenders will be to carefully read the tender documents to ensure that they identify the specific “*transformational*” goals that are required and, upon identifying

them, to determine whether they, as bidders, meet those requirements. If not, they would need to consider whether there are ways in which they can meet the goals through, for example, bidding as a consortium or through subcontracting (assuming the specific “*transformational*” goal is not a subcontracting requirement itself, for example to incentivise domestic manufacturing or increase exports).

It is also important to note that the 2022 Regulations do not contain regulations that stipulate when an organ of state is entitled to cancel a tender. As such, it will be important, going forward, to carefully consider what tender documents say regarding the cancellation of tenders and equally important to consider the specific organ of state’s supply chain management policy to see what it says regarding cancellations.

As a last note, with respect to local content, although the requirement does not feature in the 2022 Regulations, it does not necessarily mean that organs of state will not be required to comply with any existing designations because it would appear that those designations would remain in place after 26 January 2023 unless, between the date of publication of this alert and the coming into effect of the 2022 Regulations, National Treasury says otherwise.

So, while the promulgation of the 2022 Regulations may not result in a revolution of public procurement in South Africa (that is likely to occur if the Public Procurement Bill is enacted), they do imply that there is some opportunity for organs of state to incentivise other key development priorities in conjunction with BBBEE objectives, provided it is done in a manner which is clear and ascertainable and does not fall foul of other applicable legislation.

**JACKWELL FERIS, VIVIEN CHAPLIN
AND IMRAAN ABDULLAH**

Commercial and industrial power purchase agreements: Potentially a risky business?

Loadshedding continues to be a major source of concern for businesses across a variety of sectors, including agriculture, mining, manufacturing and hospitality, and the impact of an interrupted supply of electricity on these businesses has proven costly (and even fatal).

Many businesses have sought to mitigate the risk of blackouts through short-term solutions such as utilising diesel generators. The realisation that Eskom is nowhere near resolving its shortage of generation capacity, coupled with the rise in diesel costs, has led to many commercial and industrial businesses looking towards renewable energy developers for cost-effective and long-term solutions.

During his address on the national energy crisis on 25 July 2022, President Cyril Ramaphosa reported that the raising of the licensing threshold from 1 MW to 100 MW for new embedded generation projects which took place at the end of 2021 “unlocked a pipeline of more than 80 confirmed private sector projects with a combined capacity of over 6,000 MW”. In an effort to further increase private investment into electricity generation, the Presidency announced its intention to completely remove the licensing threshold for embedded generation,

and draft regulations to this effect have been published. These steps are encouraging for consumers needing a secure supply of energy and serve as evidence of Government’s ongoing efforts to remove or speed up the regulatory hoops that need to be jumped through when developing embedded generation projects.

The commercial arrangement between the generator of the power (seller) and the consumer of power (buyer) is typically structured as the purchase of power in terms of a power purchase agreement (PPA). PPAs are complex agreements as parties to them need to negotiate and fairly allocate the risks associated with the project amongst themselves.

We have highlighted just a few of the risks that buyers should be aware of when entering into commercial and industrial PPAs. We have specially looked at the instance where the seller will install a rooftop or ground mounted solar PV system (facility) at the buyer’s premises to generate electricity that it will sell to the buyer.

2022 RESULTS

CHAMBERS GLOBAL 2021 - 2022

ranked our Corporate & Commercial practice in Band 1: corporate M&A and in Band 2 capital markets: Debt and capital markets: equity.

Ian Hayes ranked by **CHAMBERS GLOBAL 2022** in Band 1: corporate M&A.

David Pinnock ranked by **CHAMBERS GLOBAL 2022** in Band 1: corporate M&A; private equity.

Peter Hesseling ranked by **CHAMBERS GLOBAL 2022** in Band 2: corporate M&A.

Willem Jacobs ranked by **CHAMBERS GLOBAL 2022** in Band 2: corporate/M&A and in Band 3: corporate/M&A; Private equity.

Sammy Ndolo ranked by **CHAMBERS GLOBAL 2022** in Band 4: corporate/M&A, Kenya.

David Thompson ranked by **CHAMBERS GLOBAL 2022** in Band 4: corporate/M&A.



Cliffe Dekker Hofmeyr

Commercial and industrial power purchase agreements: Potentially a risky business?

CONTINUED

TYPE OF RISK	WHAT TO LOOK OUT FOR!
<i>The duration of the PPA and the ability to terminate</i>	<p>PPAs are generally long-term contracts (often between 15 and 25 years), to allow the seller sufficient time to recoup its investment and make sufficient returns on the project. The buyer will generally not be able to terminate the PPA for no specific reason, without incurring some kind of penalty to compensate the seller. However, the buyer must ensure that the PPA does allow for it to terminate where, for example, the facility does not perform to the agreed standard, and the seller does not remedy the breach.</p>
<i>Take or pay for energy</i>	<p>Sellers often insist that buyers are obliged to “take or pay for energy”, which means that they are required to pay for a minimum amount of energy generated, whether the buyer consumes such energy or not. The purpose of this “take or pay” provision is to provide the seller with certainty that the revenue stream it will generate from the facility over the life of the project is secured.</p> <p>The risk presented to the buyer is that it will have to incur a baseline cost for energy, even if its demand changes or fluctuates and it does not require all of the power that it is obliged to pay for.</p> <p>Where the buyer is forced to accept a “take or pay” provision, it can mitigate this risk by forecasting its energy consumption as accurately as possible to ensure that it does not pay for any wasted energy. Furthermore, the PPA must make provision for exceptions to such take or pay obligations where, for example, the facility is unavailable or incapable of generating sufficient electricity as required by the buyer.</p>
<i>Availability of the power</i>	<p>The seller is normally tasked with the responsibility of procuring, installing, commissioning and testing the facility in terms of the PPA. If the seller fails to fulfil its obligation to install and be ready to commence operating the facility by an agreed commencement date, the buyer may negotiate for the payment of a penalty by the seller to negate or compensate for the adverse impact which the delay may have on the buyer.</p> <p>Naturally, the seller would try to achieve the converse and negotiate that, in addition to avoiding a penalty, it is afforded with the opportunity to extend the commercial operation date, and not be placed in default due to its failure to achieve an operating facility within the originally stipulated timeframe.</p>

Commercial and industrial power purchase agreements: Potentially a risky business?

CONTINUED

TYPE OF RISK	WHAT TO LOOK OUT FOR!
<p><i>What if the facility does not produce enough electricity?</i></p>	<p>The seller and buyer would agree to a minimum amount of energy that needs to be generated (minimum installed capacity) and an amount of energy that is contracted to be generated (contracted installed capacity).</p> <p>The two scenarios that may unfold are where the actual amount of energy generated is either lower than the contracted installed capacity or lower than the minimum installed capacity.</p> <p>In both instances, the buyer would want to ensure that it has the right to force the seller to commence with remedial work as soon as possible at its own cost, and if such remedial work is anticipated to take a long period, then the buyer be compensated through discounts and penalties. A measure of last resort would be for the buyer to terminate the PPA due to the seller's default in its obligations.</p>
<p><i>Force majeure</i></p>	<p>A PPA needs to set out what will happen where a natural or political extraordinary event (a <i>force majeure</i> event) directly prevents either party or both parties from performing their obligations.</p> <p>A buyer that is affected by the occurrence of a force majeure event may face the risk of having to continually make energy payments to the seller for the period of the <i>force majeure</i>.</p> <p>The primary mechanism through which buyers may seek relief is to suspend those contractual obligations which are affected by the <i>force majeure</i> during the force majeure period. buyers may further mitigate their risk by negotiating for an extension of the <i>force majeure</i> period (ranging between three and six months) during which it is prevented from carrying out its contractual obligations. During this period:</p> <ul style="list-style-type: none"> • the buyer's affected obligations are suspended; • the buyer cannot be held liable for non-performance of its obligations; and • the buyer has an extended period of time to remedy the force majeure (if possible).

Commercial and industrial power purchase agreements: Potentially a risky business?

CONTINUED

TYPE OF RISK	WHAT TO LOOK OUT FOR!
<i>Change of control</i>	<p>Before selecting a specific seller, buyers would often look into the financial strength of the seller and its controlling shareholder(s). A risk that is commonly experienced by buyers is that a seller may be sold and have a new, less established controlling shareholder, which may consequently leave the buyer exposed.</p> <p>To mitigate this risk, PPAs generally contain provisions which restrict a seller from undergoing a change of control without the buyer's consent, failing which the buyer is able to terminate the PPA.</p>

At the outset, it is important to bear in mind that PPAs are subject to negotiation and each party will always try to put forward mechanisms that would advance their interest and mitigate their risks. Parties therefore need to remain conscious that a PPA, at its core, has to be a balanced agreement which is achieved through engaging in careful negotiations and allocating the risk to parties who are able to efficiently manage them in the best possible way.

DEEPESH DESAI AND TESSA BREWIS

2021

WINNERS OF M&A DEAL FLOW 2021

DealMakers



2021

- 1st by M&A Deal Flow.
- 2nd by General Corporate Finance Deal Flow.
- 2nd by BEE Deal Value.
- 3rd by General Corporate Finance Deal Flow.
- 3rd by BEE Deal Flow.
- 4th by M&A Deal Value.

2020

- 1st by M&A Deal Flow.
- 1st by BEE Deal Flow.
- 1st by BEE Deal Value.
- 2nd by General Corporate Finance Deal Flow.
- 2nd by General Corporate Finance Deal Value.
- 3rd by M&A Deal Value.
- Catalyst Private Equity Deal of the Year.

2019

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.

- 1st by BEE M&A Deal Flow.
- 1st by General Corporate Finance Deal Flow.
- 2nd by M&A Deal Value.
- 2nd by M&A Deal Flow.

2018

- 1st by M&A Deal Flow.
- 1st by M&A Deal Value.
- 2nd by General Corporate Finance Deal Flow.
- 1st by BEE M&A Deal Value.
- 2nd by BEE M&A Deal Flow.
- Lead legal advisers on the Private Equity Deal of the Year.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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