

DISPUTE RESOLUTION ALERT

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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).



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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 will be introduced to



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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**

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann

Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tiffany Jegels

Director:
Dispute Resolution
T +27 (0)11 562 1388
E tiffany.jegels@cdhlegal.com

Tobie Jordaan

Sector Head:
Business Rescue, Restructuring & Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Mongezi Mpahlwa

Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng

Director:
Dispute Resolution
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Director:
Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Roxanne Webster

Director:
Dispute Resolution
T +27 (0)11 562 1867
E roxanne.webster@cdhlegal.com

Kylene Weyers

Director:
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com

Joe Whittle

Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Jonathan Witts-Hewinson

Executive Consultant:
Dispute Resolution
T +27 (0)11 562 1146
E witts@cdhlegal.com

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.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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