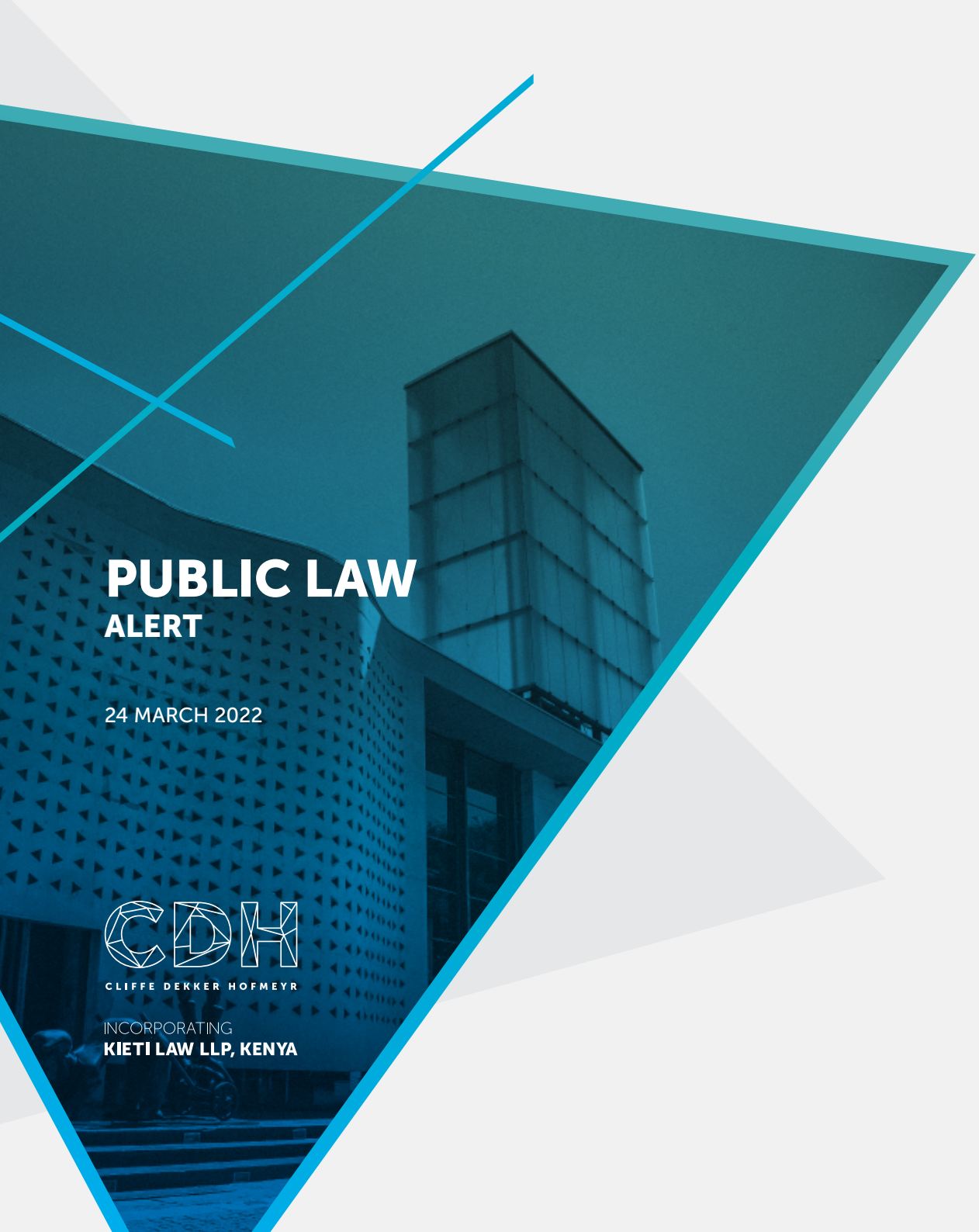

PUBLIC LAW
ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Shifting sands: A recent shakeup to the preferential procurement regime in South Africa

Procurement by organs of state is comprehensively regulated; section 217(1) of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness, and cost-effectiveness. Despite this, section 217(2) provides that the state may make use of procurement as a policy tool to protect or advance persons, or categories of persons disadvantaged by unfair discrimination. Section 217(3) stipulates that legislation must be enacted to provide a framework for the use of such policy. The enacted legislation is the Preferential Procurement Policy Framework Act, 2000 (PPPFA Act). It sets out the framework for the implementation of a preferential procurement policy.

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Procurement by organs of state is comprehensively regulated; section 217(1) of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness, and cost-effectiveness. Despite this, section 217(2) provides that the state may make use of procurement as a policy tool to protect or advance persons, or categories of persons disadvantaged by unfair discrimination. Section 217(3) stipulates that legislation must be enacted to provide a framework for the use of such policy. The enacted legislation is the Preferential Procurement Policy Framework Act, 2000 (PPPFA Act). It sets out the framework for the implementation of a preferential procurement policy.

Crucially, section 2(1) of the PPPFA Act states that *"an organ of state must determine its preferential procurement policy"* whereas section 5(1) stipulates that the Minister of Finance may make regulations regarding any matter that may be necessary or expedient to prescribe to achieve the objects of the PPPFA Act. The Minister has exercised this power thrice, first in 2001, next in 2011 and again in 2017 (2017 Regulations). The 2017 Regulations introduced pre-qualification criteria to be eligible to tender. These criteria were promulgated to:

- advance certain designated groups by making it a requirement that only certain tenderers may respond, including tenderers having a stipulated minimum Broad-Based Black Economic Empowerment status level. Put differently, to introduce a discretion for organs of state to include a mandatory pre-qualification criterion into their tenders, which would have the effect of excluding bidders who did not meet the criteria, irrespective of price;
- exempt micro enterprises or qualifying small enterprises, and tenderers subcontracting a minimum of 30% to EMEs and QSEs which are at least 51% black owned; and
- ensure subcontracting agreements (where the total tender award exceeded R30 million) were put in place to advance designated groups.

Noble causes, which, arguably are in line with constitutional policy directives.

Despite this, they were challenged. Afribusiness brought an application in the High Court, in which it sought to have the 2017 Regulations declared unlawful and set aside. The High Court dismissed the review application.

Aggrieved by the decision of the High Court, Afribusiness appealed to the Supreme Court of Appeal. The Supreme Court of Appeal held that in promulgating the 2017 Regulations, the Minister acted beyond the powers granted to him by the PPPFA Act, because the introduction of the pre-qualification criteria created an additional layer which, neither section 217 of the Constitution, nor section 2 of the PPPFA Act, authorises. As such, the Supreme Court of Appeal upheld the appeal, declared the 2017 Regulations inconsistent with the PPPFA Act and invalid, but that the declaration of invalidity be suspended for a period of 12 months. That 12-month period would have lapsed on 2 November 2021. The Minister however promptly appealed against the decision to the Constitutional Court. The appeal to the Constitutional Court had the effect of itself suspending the decision of the Supreme Court of Appeal in terms of section 18 of the Superior Courts Act, 2013 (although the minority judgment in the Constitutional Court appears to suggest otherwise).

Nevertheless, the primary basis of the Minister's appeal to the Constitutional Court was that section 5 of the PPPFA Act provided for a flexible regulatory scheme conferring wide regulatory powers on him to make any regulations with the

Shifting sands: A recent shakeup to the preferential procurement regime in South Africa

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only limitation being that they must advance the objects of the PPPFA Act. The minority of the Constitutional Court agreed with the Minister and would have found that the Minister acted within the powers conferred upon him by the PPPFA Act when the 2017 Regulations were promulgated.

The majority in sharp contradistinction dismissed the Minister's appeal. The majority found that although the terms *"necessary"* and *"expedient"* generally imply that the executive authority responsible for publishing regulations has a wide discretion to do so, it will never be unbounded. In general terms, the limitation on the power to promulgate regulations is one of legality. In assessing the lawfulness of any regulation promulgated under any Act the first question to ask is whether the functionary had the power to make the regulations in the first place. If he or she did not have the power, the assessment ends there because state functionaries (and by extension organs of state) may exercise no power and perform no function beyond that which is conferred upon them by law. This, as the majority found (and many judgments before it) *"is no small matter"* as *"conduct by an organ of state that has no foundation in some law breaches the principle of legality, which is a subset of the rule of law, a foundational value of the Constitution"*.

In the matter at hand, the Minister did not have the power to promulgate the 2017 Regulations because section 2(1) of the PPPFA Act stipulates that individual organs of state must determine their own preferential procurement policies and implement them within the framework provided for under section 2. The individualisation intended by the Legislature meant that the Minister could not arrogate to himself the power to promulgate regulations (the 2017 Regulations) that already provide for a preferential procurement policy. By doing so, he exercised a power that is not available to him, irrespective of whether his intentions were noble. As such his conduct could never have been *"necessary"* or *"expedient"*.

Curiously, in dismissing the Minister's appeal, the majority did not directly address the suspension of invalidity that formed part of the Supreme Court of Appeal's order. In fact, it did not interfere with the Supreme Court of Appeals order at all. It is arguable that the consequence of the dismissal of the appeal (contrary to what the minority appears to suggest at footnote 28 of its judgment – see above) is that the order of the Supreme Court of Appeal is no longer suspended in terms of section 18(1) of the Superior Courts Act, meaning that the period of suspension would continue to run for a period of 12 months. This is certainly the view adopted by National Treasury in its advisory note dated 25 February 2022. In the advisory note, National Treasury informed organs of state that the Minister will urgently seek clarity from the Constitutional Court on the status of the Supreme Court of Appeal's suspension of invalidity. National

Shifting sands: A recent shakeup to the preferential procurement regime in South Africa

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Treasury further advised organs of state that pending guidance from the Constitutional Court:

- tenders advertised before 16 February 2022 be finalised in terms of the 2017 Regulations;
- tenders advertised on or after 16 February 2022 be held in abeyance; and
- no new tenders be advertised.

The advisory note can be accessed here.

Further to the advisory note, on 3 March 2022, National Treasury issued a further advisory note. In it, National Treasury explained that the purpose of the advisory note, and then, heeding the findings of the majority judgment of the Constitutional Court advised organs of state of their obligations under section 2(1) of the PPPFA Act that they must develop a preferential procurement policy. The advisory note went on to say that the Minister would be promulgating draft regulations under the PPPFA Act for comment and would be filing papers with the Constitutional Court shortly. The further advisory note can be accessed here.

True to the advisory note, on 4 March 2022, the Minister filed an application to the Constitutional Court. That process is ongoing.

Then, on 10 March 2022, the Minister published the draft Preferential Procurement Regulations, 2022 for public comment. The most significant changes from the 2017 Regulations are the repeal of the regulations relating to the pre-qualification criteria, objective criteria, local production and content, subcontracting and cancellation of tenders. On the face of it, it would appear that the draft 2022 Regulations have regressed on many of the economic transformation tools that were found in the 2017 Regulations. However, it should be noted that section 2(1) of the Framework Act obliges organs of state to prepare their own preferential procurement policies as was confirmed by the majority in its judgment. Accordingly, organs of state ought to ensure that their individualized preferential procurement policies adhere to the constitutional policy directives.

The draft Preferential Procurement Regulations, 2022 are available on the National Treasury's website and public comments can be emailed to CommentDraftLegislation@treasury.gov.za by 11 April 2022.

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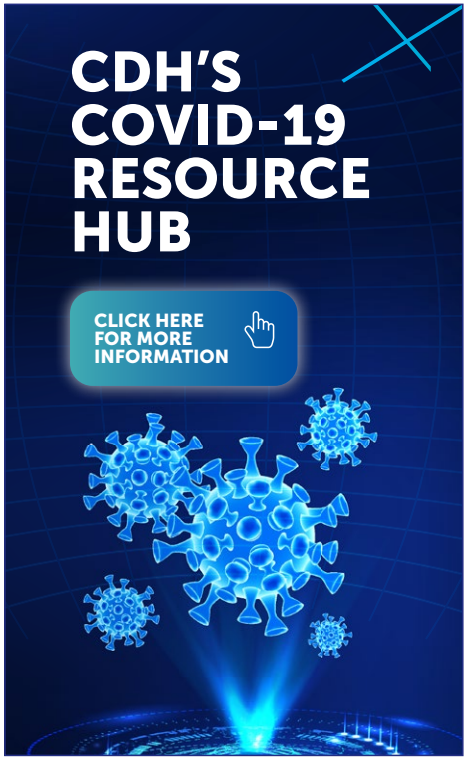

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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