

ConCourt ruling creates further confusion regarding Preferential Procurement Regulations

By [Megan Adderley](#) and [Roxy Harrington](#)

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Regulatory uncertainty abounds in the procurement space after the recent Constitutional Court judgment upholding the Supreme Court of Appeal's decision to invalidate the 2017 Preferential Procurement Regulations.



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In 2018, the National Treasury estimated South Africa's annual spend on public procurement was approximately R938bn. Public Procurement is critical to service delivery, transformation, and job creation. It requires sound and prudent financial management to ensure that the state gets value for money.

On 16 February 2022, the Constitutional Court (CC) in *Minister of Finance v Afribusiness NPC* dismissed the appeal by the Minister of Finance (the Minister) against the Supreme Court of Appeal (SCA) judgment which had declared the Preferential Procurement Regulations 2017 (the 2017 Regulations) – which provide detailed instructions for the adjudication of procurement processes - invalid. In other words, the judgment confirmed that the 2017 Regulations are unlawful in their entirety. It also created great uncertainty in relation to the procurement regulatory regime and brought state procurements to a grinding halt.

Regulatory uncertainty

The SCA suspended the order that the 2017 Regulations are invalid for 12 months to provide legal certainty and allow the Minister of Finance time to rectify the errors in the 2017 Regulations. The CC's judgments (majority and minority) have created some confusion as to whether the suspension on the order of validity granted by the SCA continues to run or whether the suspension has lapsed, resulting in the immediate invalidity of the 2017 Regulations.



This has caused uncertainty for both tenderers and organs of state about the current legal regulatory regime. As a result, the Minister has subsequently filed an urgent application to the CC to seek clarification. Due to the regulatory turmoil that will ensue should the CC decide that the declaration of invalidity takes place immediately, it is likely that a suspension of some sort will be granted.

National Treasury, in an advisory note dated 25 February 2022, attempted to assist with navigating the uncertain regulatory regime during this interim period. It advised that, while tenderers and organs of state await an answer from the CC, tenders advertised before 16 February 2022 will be finalised in terms of the 2017 Regulations. Tenders advertised on or after 16 February 2022 will be held in abeyance. And no new tenders will be advertised.

On 3 March 2022, National Treasury issued a follow-up advisory note, further clarifying that organs of state have scope to determine their own preferential procurement policies. National Treasury said that these policies must be formulated by an accounting officer/authority, in line with the framework set out in section 2 of the Preferential Procurement Policy Framework Act (the Act) and other applicable legislation. Furthermore, it advised that organs of state may, in terms of section 3(c) of the Act, seek an exemption from the provisions of the Act for a specific procurement or category of procurement requirements.

Draft Preferential Procurement Regulations

In a helpful attempt to address the confusion and paralysis that currently plagues public procurement in South Africa, Draft Preferential Procurement Regulations (the 2022 Regulations) were hurriedly published for public comment on 10 March 2022. The deadline for comments is 11 April 2022.



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The 2022 Regulations are essentially a watered-down version of the 2017 Regulations. They prescribe the thresholds for using the 80/20 and 90/10 preference point systems, together with the formula to be applied. They also include other matters, such as: the criteria for breaking the deadlock in scoring; awarding contracts to tenderers that do not score the highest points; and what remedies organs of states should apply if false information is supplied by tenderers when submitting tenders for evaluation.

They omit regulations relating to pre-qualification criteria, sub-contracting, and local content, with which the SCA and

CC had found fault. Furthermore, the 2022 Regulations repeal all previous regulations under section 5 of the Act and therefore will replace the 2017 Regulations in their entirety, when promulgated.

Potential consequences

While we wait for the CC's guidance on the Minister's latest application and the promulgation of the 2022 Regulations, the preferential procurement regulatory regime remains uncertain, and the advertising of new tenders has halted.

Some commentators have read the CC judgment as permitting organs of state to formulate their own unique preferential procurement policies, which include aspects such as pre-qualification criteria, sub-contracting and other mechanisms aimed at advancing transformation. That means that different organs of state could include vastly different mechanisms aimed at advancing transformation in their procurement processes.

It remains to be seen whether organs of state will adopt this approach, and if they do so, what impact it will have on the uniform and consistent application of the procurement regime. The likely outcome is further litigation.

ABOUT THE AUTHOR

Megan Adderley, Consultant, and Roxy Harrington, Candidate Attorney from Webber Wentzel

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