

**AGENDA of the
Portfolio Committee : Finance & Tourism
30 May 2022
(Also the agenda for the Mayoral Committee Meeting : 30 May 2022)**

**4.
PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000 AND THE
APPLICATION OF INTERIM MEASURES DUE TO THE CONSTITUTIONAL COURT
RULING OF 16 FEBRUARY 2022**

8/2/2

C Le Roux

11 May 2022

Deputy Director: Finance & SCM

(028) 313 8107

1. Executive Summary

The purpose of this report is to inform Council of the implications of the Constitutional Court ruling handed down on 16 February 2022 and to adopt interim measures to be applied by the municipality.

2. Service Delivery and Budget Implementation Plan - IGNITE

Directorate: Finance
Department: Supply Chain Management

3. Compliance with Strategic Priorities

Provision of democratic, accountable and ethical governance
Provision and maintenance of municipal services

4. Delegated Authority

None

5. Legal Requirements

Local Government: Municipal Finance Management Act 2003, (Act 56 of 2003)
Local Government: Municipal Systems Act 2000, (Act 32 of 2000)
Overstrand Municipality Supply Chain Management Policy dated 25 June 2008,
as amended.

6. Background/Discussion/Evaluation/Conclusion

Background

On Wednesday, 06th February 2022, the Constitutional Court handed down judgement in the application for leave to appeal against the judgement and order of the Supreme Court of Appeal (SCA). This application was brought by the National Minister of Finance (“the Minister”) against Afribusines NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 (“Procurement Regulations” as referred to in the judgement) promulgated by the

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Minister on 20 January 2017, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 ("Procurement Act" as referred to in the judgement).

The SCA held that the Minister's promulgation of regulation 3(b) (determining whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4), regulation 4 (pre-qualifying criteria for preferential procurement) and regulation 9 (subcontracting as a condition of tender) of the Procurement Regulations was unlawful.

Due to the interconnectedness of the regulations, the SCA declared the entire Procurement Regulations invalid on the basis that the content of the regulations exceeded the Minister's power on what could permissibly be regulated on in terms of section 5 of the Procurement Act and section 217 of the constitution. The declaration of invalidity was suspended for 12 months that ended 02 November 2021.

The matter was then heard by the Constitutional Court where the majority judgement dismissed the appeal against the SCA judgement. The majority judgement was silent on the question of remedy and did not address the specific issue of the status of the SCA's order of suspension. The minority judgement addresses the issue at footnote 28, where it asserts that "the period of suspension expired on 02 November 2021". The Constitutional Court hence in both its majority and minority judgements technically did not address the issue of suspension in the body of their orders.

In response the National Treasury has indicated that the Minister has on an urgent basis on 04 March 2022, sought confirmation from the Constitutional Court whether or not the invalidity of the Procurement Regulations has been and continues to be suspended.

Confirmation is sought by way of declaration, variation and/or clarification. In other words, guidance is required as to whether the Procurement Regulations remain valid until 15 February 2023, unless repealed sooner. The Constitutional Court has subsequently issued a directive that the last date for parties to file papers in this matter is 25 March 2022.

Discussion

The National Treasury has in the interim issued a letter on 25 February 2022 (**Annexure B**) indicating that whilst awaiting the outcome of guidance from the Constitutional Court, organs of state are advised that:

- a) Tenders advertised before 16 February 2022 be finalised in terms of the Procurement Regulations;
- b) Tenders advertised on or after 16 February 2022 be held in abeyance; and
- c) No new tenders be advertised.

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The National Treasury subsequently on 03 March 2022 (**Annexure C**) issued a further letter indicating in summary that:

- a) The advice provided on 25 February 2022 excluded procurement with a Rand value less than R30 000 obtained through price quotations;
- b) Regulations will be issued providing for the thresholds for the points system. Note that draft regulations in this respect were subsequently issued on 10 March 2022 with the comment period closing on 11 April 2022;
- c) Until the new regulations take effect that organs of state may in terms of section 3(c) of the Act, request exemption from the provisions of the Act for a specific procurement or category of procurement requirements limiting this to procurement that cannot await the new regulations or the Constitutional Court's guidance.

It must be noted that the above letters do not have any binding effect in law, given that the format and content of the letters are advisory in nature and is not issued under any authority contained in the Municipal Finance Management Act (No.56 of 2003) or otherwise.

However, the letters have now been issued to all organs of state and hence there is an obligation to assess the impact of the requirements to determine whether and to what extent the letter should be applicable to procuring institutions given that the Auditor-General of South Africa may audit all subsequent procurement based on this advice.

The judgement has now left a gap as it relates to value thresholds and the evidence burden to claim preference points. These matters can only be prescribed via regulations by the Minister and the entire regulations have now been declared invalid. This also removes the threshold evidence burden to claim points via the preference points system, despite this not being in dispute.

Risks for the Municipality

The primary risks for the municipality due to the *lacuna* created by the court ruling include the following:

- a) Increase in irregular expenditure;
- b) Delivery of critical municipal services delayed;
- c) Delays in procurement processes;
- d) Audit risks, non-compliance and interpretation challenges;
- e) NT not responding or approving exemption timeously or at all;
- f) Impact on future budgetary allocations for the 2022/23 financial year;
- g) Legal implications for the municipality
- h) Some tenders for the period will be dealt with in terms of preference and the exempted ones not; and

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- i) Possibility of supplier litigation risks from aggrieved suppliers who will have grounds for the municipality applying regulations that have been declared unconstitutional with higher chances of success.

The issuance of both the National Treasury advisory letters creates significant risks for the municipality should procurement not proceed as intended. This will impact directly on service delivery and the ability to spend on budgets as planned for in terms of procurement planning and budget planning initiatives. This will be to the detriment of communities and the residents within the municipality as it will result in the non-delivery of goods, services and infrastructure.

The municipality's restricted ability to spend the budget will result in significant under expenditure that may have future budgetary implications, albeit not within the control of the Municipal Manager.

That is exacerbated further by the uncertainty on whether or not the court will extend the suspension of invalidity, and when this clarification will be made. If indeed it does provide clarity that the suspension of invalidity has not been extended, then the gap persists up until such time that the Minister issues replacement Procurement Regulations.

Interim arrangements for the municipality up until the new regulations comes into effect

The minister is obligated to issue regulations in terms of section 2(1) of the Procurement Act, to prescribe the value of thresholds that apply to the preference point system, section 2(1) states that:

- a) "A preference point system must be followed:
- b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 for price;
- (ii) for contract with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 for price".

The Provincial Treasury (PT) issued the following advice:

After an extensive consultation process with key stakeholders including the Provincial Cabinet, Legal Services in the Province and other stakeholders to determine an interim way forward that would mitigate the risks; municipalities and municipal entities should consider adopting the following interim measures to manage their own delivery risks. Such interim arrangements must be approved by the Council of each municipality:

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- a) Municipalities and municipal entities should maintain the status quo and apply the Procurement Regulations up until such time as the Constitutional Court clarifies the applicable date of the invalidity of said regulations, or new Procurement Regulations come into effect;
- b) Use the pre-existing points system with thresholds and associated formulas as per the Procurement Regulations i.e., 80/20 preference point system for procurement with a rand value equal to or above R30 000 up to R50 million and the 90/10 preference point system for procurement above R50 million (all applicable taxes included);
- c) Use the pre-existing mechanism to address the evidence requirements as it relates to the allocation of points for preference i.e., B-BBEE certificates and affidavits given that these matters were not in dispute and will be covered by the new National Treasury regulations;
- d) Sub-contracting requirements as contemplated in the 2017 Procurement Regulations have been declared as invalid. However, the cidb prescripts / regulations in terms of empowerment impact assessment may still be concluded and sub-contracting as per the cidb prescripts / regulations in terms of the different contracting models for construction-related bids; and
- e) The status quo in terms of advertisement and evaluation and awarding of quotations below R30 000 to be maintained.

In respect of NT's letter issued on 28 February 2022, it is thus proposed that municipalities, subject to Council approval, adopt the following approach:

- a) Tenders advertised before 16 February 2022 must be finalised in terms of the Procurement Regulations;
- b) Tenders advertised on or after 16 February 2022 must be evaluated as intended given the municipality's interim arrangements to maintain the status quo in terms of the Procurement Regulations, and
- c) In order to mitigate the risks for municipalities and municipal entities as articulated above, Accounting Officers may proceed with the advertisement of new bids (including quotations) as intended and apply the interim arrangements as it relates to the evaluation of bids as articulated above.

According to the PT the most viable and least disruptive approach to the procurement system would be to maintain the status quo and that is to continue to apply the Procurement Regulations up until such time as the Constitutional Court clarifies the applicable date of the invalidity of said regulations, or new Procurement Regulations come into effect.

Accounting Officers of municipalities and municipal entities may, at their own discretion, apply these interim measures and revise their current policies to be tabled before Council for approval and implementation.

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Accounting Officers also need to take cognisance of where SCM policies were approved by Council with the pre-qualification and local production and content requirements; it should be retracted and amended accordingly before final approval by Council.

It should be noted that municipalities and municipal entities may apply for an exemption from the Procurement Act by application to the Minister and apply it up until such time as the Constitutional Court clarifies the applicable date of the invalidity of the Procurement Regulations, or new regulations come into effect. A decision to apply for an exemption should be considered in the context of the risk that the suspension of the invalidity of the regulations would not be granted by the court up until the new regulations are issued and come into effect.

Interim Measures proposed for Overstrand Municipality

Overstrand municipality has two options to consider in order to proceed with the procurement of goods and services. The municipality can apply for exemption from the Procurement Act and follow the advice from the National Treasury, thereby enabling the municipality to finalise the tenders and formal quotations that are currently in the SCM system and to advertise new tenders and formal quotations until such time as the Constitutional Court clarifies the applicable date of the invalidity of the Procurement Regulations, or new regulations come into effect.

It must be noted that with this option no preference can be applied by the municipality in its tenders and formal quotations as there is no framework that exists that has been prescribed through national legislation as required in terms of section 217(3) of the Constitution. Previously, this framework was prescribed in the Procurement Regulations however, this has now been declared invalid. This implies that tenders will be awarded purely on price as the municipality will be exempted from applying the preference points system.

Alternatively, the municipality can implement the advice offered by Provincial Treasury and maintain the status quo and apply the Procurement Regulations up until such time as the Constitutional Court clarifies the applicable date of the invalidity of the regulations, or new Procurement Regulations come into effect. This will require an amendment to the Preference Policy as there are regulations that have been declared as unconstitutional by the SCA and subsequently confirmed by the Constitutional Court and therefore cannot be implemented.

Tenders and formal quotations will be evaluated will be evaluated in terms of the 80/20 or 90/10 preference points systems and where 80 or 90 points are allocated for price and 20 or 10 points are allocated for preference

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respectively and allocated in accordance with the B-BBEE scorecard of the procuring entity.

It must be noted that should the Constitutional Court clarify that the period of suspension expired prior to 16 February 2022, then all expenditure incurred on contracts subject to that date could be regarded as irregular.

The municipality has decided to heed the advice of the National Treasury and has suspended all procurement of tenders and formal quotations from 16 February 2022 up to date. All procurement processes advertised prior to 16 February 2022 are being finalised in terms of the Procurement Regulations. The municipality has applied for exemption from the Procurement Act and the Minister has granted exemption from the Procurement Act and its regulations (**Annexure D**).

There are 9 tenders or formal quotations that were advertised before 16 February 2022 and will be finalised in terms of the Procurement Regulations (**Annexure E**).

There are 6 tenders or formal quotations that were advertised after 16 February 2022, before receiving any advice from Treasury (**Annexure F**). these will have to be cancelled as they were advertised in accordance with the Procurement Regulations.

There are 47 tenders or formal quotations that have not been advertised and that will be advertised without preference in accordance with the exemption received (**Annexure G**) in these instances where budgetary provision was made in 2022/23 for these items.

All other tenders and quotations as planned for the 2022/23 financial year will be advertised in accordance with the exemption received until such time as the Constitutional Court clarifies the applicable date of the invalidity of the regulations, or new Procurement Regulations come into effect.

7. Financial Implications

None

8. Staff Implications

None

9. Comments from other Departments, Divisions and Administrations

None

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10. Annexures

- Annexure A: Treasury Circular Mun No. 06/2022
- Annexure B: National Treasury Advisory Note dated 25 February 2022
- Annexure C: National Treasury Advisory Note dated 03 March 2022
- Annexure D: Approval of Exemption Application
- Annexure E: Tenders and Formal Quotations to be Finalised in Terms of the Procurement Regulations
- Annexure F: Tenders and Formal Quotations to be Cancelled
- Annexure G: Tenders and Formal Quotations to be Advertised
- Annexure H: Draft Preferential Procurement Regulations, 2022

RECOMMENDATION TO THE COUNCIL:

1. that the report on the implementation of interim measures due to the Constitutional Court ruling of 16 February 2022, **be noted**;
2. that the implementation of National Treasury's advisory notes, until such time as the Constitutional Court clarifies the applicable date of the invalidity of the regulations, or new Procurement Regulations come into effect, **be approved**; and
3. that the Overstrand Preferential Procurement Policy be withdrawn until such time as the Constitutional Court clarifies the applicable date of the invalidity of the regulations, or new Procurement Regulations come into effect, based on the exemption letter received, dated 07 May 2022 advising that the Minister has approved the request.

RESPONSIBLE OFFICIAL :

C LE ROUX

TARGET DATE FOR IMPLEMENTATION :

01 JUNE 2022

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REMARK

Please note that the following recommendation contained in this agenda is subject to confirmation or amendment by the Executive Mayor in view of the fact that the **compilation of the MAYORAL COMMITTEE agenda** was done before the FINANCE & TOURISM PORTFOLIO COMMITTEE of 30 May 2022 had formally sat.

**4.
PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000 AND THE
APPLICATION OF INTERIM MEASURES DUE TO THE CONSTITUTIONAL
COURT RULING OF 16 FEBRUARY 2022**

8/2/2

**C Le Roux
11 May 2022**

Deputy Director: Finance & SCM

(028) 313 8107

**THIS MATTER SERVED BEFORE THE FINANCE & TOURISM PORTFOLIO
COMMITTEE ON 30 MAY 2022, WHICH COMMITTEE RECOMMENDED AS
FOLLOWS:**

RECOMMENDATION TO THE COUNCIL:

1. that the report on the implementation of interim measures due to the Constitutional Court ruling of 16 February 2022, **be noted**;
2. that the implementation of National Treasury's advisory notes, until such time as the Constitutional Court clarifies the applicable date of the invalidity of the regulations, or new Procurement Regulations come into effect, **be approved**; and
3. that the Overstrand Preferential Procurement Policy be withdrawn until such time as the Constitutional Court clarifies the applicable date of the invalidity of the regulations, or new Procurement Regulations come into effect, based on the exemption letter received, dated 07 May 2022 advising that the Minister has approved the request.

RESPONSIBLE OFFICIAL :

C LE ROUX

TARGET DATE FOR IMPLEMENTATION :

01 JUNE 2022

Reference number: RCS/C.5

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MASTER RECORDS OFFICIAL: BUSINESS INFORMATION AND DATA MANAGEMENT

THE HEAD OF DEPARTMENT: LOCAL GOVERNMENT

THE CHIEF DIRECTOR: LOCAL GOVERNMENT BUDGET ANALYSIS – NATIONAL TREASURY (MR J HATTINGH)

THE CHIEF DIRECTOR: MFMA IMPLEMENTATION – NATIONAL TREASURY (MR TV PILLAY)

INTERIM ARRANGEMENTS FOR THE MUNICIPALITIES AND MUNICIPAL ENTITIES AS IT RELATES TO PREFERENTIAL PROCUREMENT FOLLOWING THE CONSTITUTIONAL COURT JUDGMENT DECLARING THE PREFERENTIAL PROCUREMENT REGULATIONS, 2017 INVALID

1. PURPOSE

- 1.1 The purpose of this circular is to share with accounting officers of municipalities and municipal entities the interim strategy put in place post the recent Constitutional Court judgment concerning the

validity of the Preferential Procurement Regulations, 2017, for the Western Cape Government (WCG) as endorsed by Provincial Cabinet on 09 March 2022. A copy of the Provincial Interim arrangements PT Circular 07/2022 is attached herewith marked **Annexure A**.

- 1.2 To provide guidance and recommendations in respect of the interim arrangements for municipalities and municipal entities, as it relates to Preferential Procurement in terms of the Preferential Procurement Policy Framework Act (Act No. 5 of 2000) given the recent Constitutional Court judgment declaring the Preferential Procurement Regulations, 2017 invalid.

2. BACKGROUND

- 2.1 On Wednesday, 16 February 2022, the Constitutional Court handed down judgment in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA). This application was brought by the National Minister of Finance ("the Minister") against Afribusiness NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 ("Procurement Regulations" as referred to in the judgment) promulgated by the Minister on 20 January 2017, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 ("Procurement Act" as referred to in the judgment).
- 2.2 The SCA held that the Minister's promulgation of regulation 3(b) (determining whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4), regulation 4 (pre-qualification criteria for preferential procurement) and regulation 9 (subcontracting as a condition of tender) of the Procurement Regulations was unlawful.
- 2.3 Due to the interconnectedness of the regulations, the SCA declared the entire Procurement Regulations invalid on the basis that the content of the Regulations exceeded the Minister's power on what could permissibly be regulated on in terms of section 5 of the Procurement Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months which ended 02 November 2021.
- 2.4 The declaration of invalidity was suspended for 12 months which accordingly ended 2 November 2021. The matter was then heard by the Constitutional Court where the majority judgment dismissed the appeal against the SCA judgment. The majority judgment was silent on the question of remedy and did not address the specific issue of the status of the SCA's order of suspension. The minority judgment addresses the issue at footnote 28, where it asserts that "the period of suspension expired on 02 November 2021". The Constitutional Court hence in both its majority and minority judgments technically did not address the issue of suspension in the body of their orders.
- 2.5 In response, the National Treasury has indicated that the national Minister has on an urgent basis on 4 March 2022, sought confirmation from the Constitutional Court whether or not the invalidity of the Procurement Regulations has been and continues to be suspended. Confirmation is sought by way of declaration, variation and/or clarification. In other words, guidance is required as to whether the Procurement Regulations remain valid until 15 February 2023, unless repealed sooner. The Constitutional Court has subsequently issued a directive that the last date for parties to file papers in this matter is 25 March 2022.
- 2.6 The National Treasury has in the interim (whilst seeking guidance from the Court on the date of invalidity of the regulations), issued a letter on 25 February 2022 (attached hereto marked **Annexure B**) indicating that whilst awaiting the outcome of guidance from the Constitutional Court, organs of state are advised that:
- a) tenders advertised before 16 February 2022 be finalised in terms of the PPPFR, 2017;
 - b) tenders advertised on or after 16 February 2022 be held in abeyance; and

- c) no new tenders be advertised.
- 2.7 The National Treasury subsequently on 03 March 2022 (attached hereto marked **Annexure C**) issued a further letter indicating in summary that:
- a) the advice provided on 25 February 2022 excluded procurement with a Rand value less than R30 000 obtained through price quotations;
 - b) regulations will be issued providing for the thresholds for the points system. Note that draft regulations in this respect were subsequently issued on 10 March 2022, with the comment period closing on 11 April 2022;
 - c) until the new regulations take effect that organs of state may in terms of section 3 (c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements limiting this to procurement that cannot await the new regulations or Constitutional Court's guidance.
- 2.8 It must be noted that the above letters do not have any binding effect in law, given that the format and content of the letter is advisory in nature and is not issued under any authority contained in the Municipal Finance Management Act (No. 56 of 2003) or otherwise. However, the letter has now been issued to all organs of state and hence there is an obligation to assess the impact of the requirements to determine whether and to what extent the letter should be applicable to procuring institutions given that the Auditor-General of South Africa may audit all subsequent procurement based on this advice.
- 2.9 It must be noted that whilst the judgment has been welcomed and supported by the WCG it has left a *lacuna* as it relates to value thresholds and the evidence burden to claim preference points. These matters can only be prescribed via regulations by the National Minister and the entire regulations have now been declared invalid. This also removes the thresholds and evidence burden to claim points via the preference points system, despite this not being in dispute.

3. RISKS FOR THE MUNICIPALITIES AND MUNICIPAL ENTITIES

- 3.1 The primary risks for municipalities due to the *lacuna* created by the court ruling include the following:
- Increase in Irregular expenditure;
 - Delivery of critical municipal service;
 - Delays in procurement processes;
 - Audit risks, non-compliance, and interpretation challenges;
 - NT not responding or approving exemption timeously or at all;
 - Impact on future budgetary allocations for the 2022/23 financial year;
 - Legal implications for municipalities
 - Some tenders for the period will be dealt with in terms of preference and the exempted ones not; and
 - Possibility of supplier litigation risks from aggrieved suppliers who will have grounds for the municipalities applying regulations that have been declared unconstitutional with higher chances of success.
- 3.2 The issuance of both the National Treasury advisory letters creates significant risks for municipalities should procurement not proceed as intended. This will impact directly on service delivery and the ability to spend on both the current and forthcoming financial year's budget as planned for in terms of procurement planning and budget planning initiatives. This will be to the detriment of the communities within the local sphere of government, as it will result in the non-delivery of goods, services and infrastructure and potentially also derogate their Constitutional rights.
- 3.3 Municipalities and municipal entities inability to spend their budgets will result in significant under expenditure, that may have future budgetary implications, albeit not within the control of the municipal manager.

- 3.4 It must also be noted that procurement has already been impacted by COVID-19 where municipalities and municipal entities could not procure the goods or services as originally planned for and hence certain procurement processes were delayed or put on hold for a later date.
- 3.5 This is exacerbated further by the uncertainty on whether or not the court will extend the suspension of invalidity, and when this clarification will be made. If indeed it does provide clarity that the suspension of invalidity has not been extended, then the *lacuna* persists up until such time that the national Minister issues replacement Procurement Regulations.
- 3.6 It is therefore critical that municipalities and municipal entities puts in place their own interim arrangements to mitigate the risk of non-delivery, underspending and the impact on citizens that any moratorium on procurement will create, even if only for a short period. These interim arrangements will also provide risk mitigation coverage for municipal managers, will enable synergy in decision-making and ensure that there is consistent application across the board when accounting officers are exercising their obligations.

4. INTERIM ARRANGEMENTS FOR THE MUNICIPALITIES UP UNTIL THE NEW REGULATIONS COMES INTO EFFECT

- 4.1 The national Minister is obligated to issue regulations in terms of section 2(1) of the Preferential Procurement Policy Framework Act, to prescribes the value thresholds that apply to the preference point system. Section 2 (1) states that:

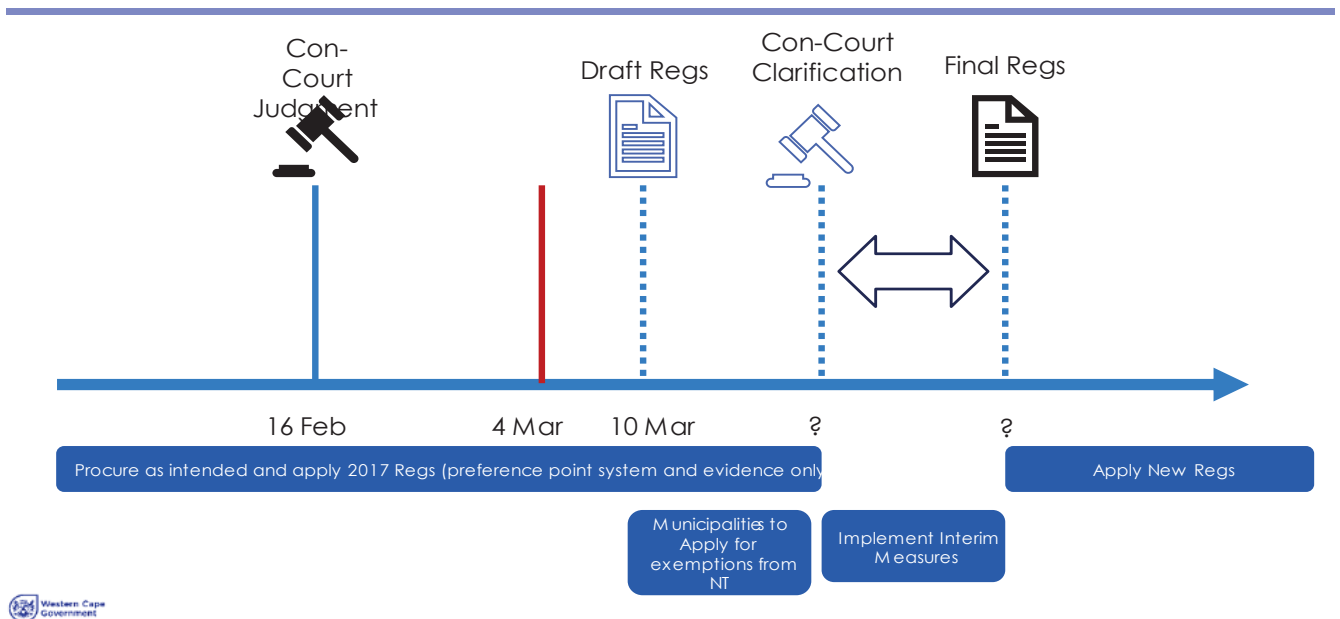
“(a) A Preference point system must be followed;

(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goods as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goods as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price”

- 4.2 The National Treasury published draft regulations for public comment on 10 March 2022, with the comment period closing on 11 April 2022 (**attached as Annexure D**). It must however be noted that these draft regulations are not at present applicable and will only be formally gazetted after the period for public comment has closed. Hence in the absence of the Regulations the interim arrangements articulated hereunder may be considered for adoption by municipalities to manage their procurement needs up until the new Regulations are formally issued or clarity is provided by the Constitutional Court.
- 4.3 After an extensive consultations process with key stakeholders including the Provincial Cabinet, Legal Services in the Province and other stakeholders to determine an interim way forward that would mitigate the risks, municipalities and municipal entities should consider adopting the following interim measures to manage their own delivery risks. Such interim arrangements must be approved by Council of each municipality:
- a) Municipalities and municipal entities should maintain the status quo and apply the Preferential Procurement Policy Framework Regulations, 2017(PPPFR) up until such time as the Constitutional Court clarifies the applicable date of the invalidity of said Regulations, or new Procurement Regulations come into effect.
 - b) use the pre-existing points system with thresholds and associated formulas as per the PPPFR, 2017 i.e., 80/20 preference point system for procurement with a rand value equal to or above R30 000 up to R50million and the 90/10 preference point system for procurement above R50million (all applicable taxes included);

- c) use the pre-existing mechanism to address the evidence requirements as it relates to the allocation of points for preference i.e., B-BBEE certificates and affidavits given that these matters were not in dispute and will be covered by the new National Treasury regulations;
 - d) sub-contracting requirements as contemplated in the 2017 Procurement Regulations have also been declared as invalid. However, the cidb prescripts/ regulations in terms of empowerment impact assessments may still be concluded and sub-contracting as per the cidb prescripts/ regulations in terms of the different cidb contracts may still be used in terms of the different contracting models for construction-related bids; and
 - e) the status quo in terms of the advertisement and evaluation and awarding of quotations below R30 000 to be maintained.
- 4.4 In respect of NT's letter issued on 25 February 2022, it is thus proposed that municipalities, subject to Council approval, adopt the following approach:
- a) tenders advertised **before 16 February 2022** must be finalised in terms of the Procurement Regulations;
 - b) tenders advertised **on or after 16 February 2022** must be evaluated as intended given the municipality's interim arrangements to maintain the status quo in terms of the PPPFR, 2017; and
 - c) in order to mitigate the risks for municipalities and municipal entities as articulated above, accounting officers may proceed with the advertisement of new bids (including quotations) as intended and apply the interim arrangements as it relates to the evaluation of bids as articulated above.
- 4.5 The most viable and least disruptive approach in the procurement system would be to maintain the status quo and that is to continue applying the 2017 Preferential Procurement Regulations, 2017, up until such time as the Constitutional Court has clarified the date at which the regulations are invalid.
- 4.6 Accounting Officer of municipalities and municipal entities may, at their own discretion, apply these interim measures and revise their current policies to be tabled before Council for approval and implementation.
- 4.7 Accounting Officers also need to take cognisance of where SCM policies were approved by Council with the pre-qualification and local production and content requirements, it should be retracted and amended accordingly before final approval by Council.
- 4.8 It should be noted that municipalities and municipal entities may apply for an exemption from the national Minister of Finance from section 2 (1)(b) – (g) and subsection 2 of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) up until National Treasury issues new regulations to the Act, and to the extent that they meet the exemption requirements in terms of section 3 of the PPPFA. A decision to apply for exemptions should be considered in the context of the risk that the suspension of the invalidity of the regulations will not be granted by the court up until the new regulations are issued and come into effect.
- 4.9 The abovementioned interim arrangements are depicted diagrammatically hereunder in Illustration 1 for ease of reference of the requirements:

Illustration 1:

4.10 Municipalities and municipal entities may approach the National Treasury and the Auditor-General (AG) for approvals and concurrence, where necessary with their approach. This must be understood in the context of the PPPFA providing for organs of state to determine their own Preferential Procurement Policies and for the National Treasury to determine the threshold values and the calculations associated with the application of preferences.

5. SUPPORT TO MUNICIPALITIES TO SPEED UP THE RESPONSE TIME DURING THE PROCUREMENT PROCESSES

- 5.1 The Provincial Treasury will provide the following support to municipalities and municipal entities:
- Procurement assistance and guidance via its helpdesk;
 - Partnerships with municipalities in liaising with the Office of the Chief Procurement Officer and the Auditor-General of South Africa as and when required;
 - Regular engagements via the municipal CFO and SCM Fora; and
 - Provide support in respect of SCM Communication of audit findings (Comaf) as and when required.
- 5.2 In order to be more responsive and to provide timeously response to municipalities enquiries, kindly direct all enquiries to the PT Supply Chain Management HDMFMA Helpdesk function via the following email address: SupplyChainManagement.HDMFMA@westerncape.gov.za.
- 5.3 The Provincial Treasury will re-assess the situation and the direction provided in this Circular once the Constitutional Court direction has been received via the National Treasury/ or the new Regulations are formally issued and take effect.
- 5.4 Further guidance will be issued by the Provincial Treasury should any supervening communication or action be taken by the National Treasury or by way of Court direction require that the interim arrangements be reviewed.

6. REQUEST

- 6.1 Municipalities and municipal entities may be guided by the policy stance taken by the Province to mitigate their service delivery risks;
- 6.2 A risk assessment of the approach utilised by the Province should be undertaken by each municipality and municipal entity to assess the viability to implement similar measures as the Province
- 6.3 Municipalities and municipal entities should record all risks, impacts on service delivery and budgetary implications as part of their record of decision and keep this as evidence for audit purposes.
- 6.4. Municipalities and municipal entities must note that any interim measures taken must be adopted by their Council.

**David Savage**

2022.03.11 18:16:54

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DAVID SAVAGE**HEAD OFFICIAL: PROVINCIAL TREASURY**



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National Treasury
REPUBLIC OF SOUTH AFRICA

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To all organs of state

Preferential Procurement Regulations, 2017 - Minister of Finance v Afribusiness NPC [2022] ZACC 4

On Wednesday, 16 February 2022, the Constitutional Court handed down judgment in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal. This application was brought by the Minister of Finance (Minister) against Afribusiness NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 (Procurement Regulations) promulgated by the Minister on 20 January 2017, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Procurement Act).

The Supreme Court of Appeal (SCA) held that the Minister's promulgation of regulations 3(b), 4 and 9 of the Procurement Regulations was unlawful. Due to what the SCA held to be the interconnectedness of the regulations, the entirety of the Procurement Regulations was declared invalid on the basis that the content of the Regulations exceeded what the Minister could permissibly regulate in terms of section 5 of the Procurement Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months. In terms of section 18(1) of the Superior Courts Act, the SCA's judgment and orders were suspended when the Minister launched the application for leave to appeal.

The majority judgment of the Constitutional Court dismissed the appeal against the SCA judgment. The majority judgment was silent on the question of remedy. It did not address itself to the specific issue of the status of the SCA's order of suspension. The minority judgment addresses the issue at footnote 28, where it asserts that "the period of suspension expired on 2 November 2021". This assertion is in conflict with section 18(1) of the Superior Courts Act, on its face, and neither of the judgments address the issue of suspension in the body of their orders.

Neither judgment purports to set aside or replace the order of the SCA. The order of the Constitutional Court confines itself to granting leave to the Minister to appeal, and dismissing the appeal against the SCA's order. The legal position, accordingly – although not what the Constitutional Court seemed to intend – is that the SCA's order is no longer suspended in terms of section 18(1) of the Superior Courts Act, the suspensive period of invalidity has been re-engaged, and the Procurement Regulations have been and continue to be of full force and effect.

The Minister will, on an urgent basis, be seeking confirmation from the Constitutional Court that the invalidity of the Procurement Regulations has been and continues to be suspended. Confirmation will be sought by way of declaration, variation and/or clarification. In other words, guidance is

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required as to whether the Procurement Regulations remain valid until 15 March 2023, unless repealed sooner.

While awaiting the outcome of the above guidance from the Constitutional Court, organs of state are advised that—

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

DONDO MOGAJANE
DIRECTOR-GENERAL

Date: 25 February 2022



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To all organs of state

Advisory note: Preferential Procurement Regulations, 2017 - Minister of Finance v Afribusiness NPC [2022] ZACC 4

1. I refer to my communication of 25 February 2022 informing organs of state that the Minister will, on an urgent basis, seek confirmation from the Constitutional Court that the invalidity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations), has been and continues to be suspended for a period of 12 months.
2. Please note that the communication of 25 February 2022 is an advisory note in response to the numerous requests for guidance regarding how to deal with the implications of the Constitutional Court judgment. Please further note that the advice referred to in that communication excludes procurement with a Rand value of less than R30 000 obtained through price quotations and petty cash.
3. According to section 217(2) of the Constitution, read with section 2 of the Preferential Procurement Policy Framework Act, 2000 (PPPFA), organs of state must determine a preferential procurement policy. This policy and procurement decisions must be made by an accounting officer/authority in line with the framework set out in section 2 of the PPPFA and other applicable legislation.
4. The PPPFA requires that the threshold amounts in which the 80/20 and 90/10 preference point systems must be utilised, together with the formula to be applied, must be prescribed by regulations, in terms of section 2(1)(b) and (c). Such regulations are necessary for organs of state to implement their preferential procurement policies.
5. National Treasury is preparing new draft regulations in terms of the Preferential Procurement Policy Framework Act, 2000 (Act), to be published for comment in the week of 7 March 2022. The draft regulations will provide for amounts and the formula that must be prescribed by regulation in terms of section 2(1)(b) and (c) of the Act and any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act.
6. Until the new regulations take effect or the Constitutional Court's clarity on the suspension of the invalidity of the 2017 Regulations is provided, whichever occurs first, an organ of state may, in terms of section 3(c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements. Such requests should be limited to



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procurement requirements that cannot await the new regulations or the Constitutional Court's guidance.

7. The papers for seeking the Constitutional Court's clarity are being finalised and organs of state will be advised once these are filed, and of further developments.

DONDO MOGAJANE
DIRECTOR-GENERAL

Date: 3 March 2022



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FROM: Molefe-Isaac Fani, Tel: 012 395 6749, Email: PPR2017CC@treasury.gov.za / OCPO.SCMPolicy@treasury.gov.za

Mr Dean O'Neill
Municipal Manager
Overstrand Local Municipality
P. O. Box 20
Hermanus
7200

Dear Mr O'Neill

REQUEST FOR EXEMPTION FROM PROVISIONS OF PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT

1. I refer to your letter, dated 07 April 2022, requesting an exemption from the application of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000 - PPPFA) in order to continue with procurement processes so as to ensure that service delivery requirements are not negatively impacted and that your institution is able to fulfill its obligations in terms of its mandate.
2. Please be informed that the Minister has, in terms of section 3(c) of the PPPFA granted the request for an exemption from the provisions of the PPPFA and regulations made thereunder. The exemption is effective from **6 May 2022** until:-
 - (a) new Preferential Procurement Regulations take effect; or
 - (b) the Constitutional Court confirms the suspension of the order of invalidity of the Preferential Procurement Regulations, 2017, for a period of 12 months, whichever occurs first.
3. The exemption is limited to the specific categories of goods and services and values as stipulated in your application.
4. You are reminded that whilst the exemption is in effect, procurement must still comply with section 217 of the Constitution and other legislation applicable to your organ of state. You must ensure that the SCM system is not abused during the period of the exemption.

Kind regards,

Signed by: Molefe Isaac Fani
Signed at: 2022-05-07 07:58:06 +02:00
Reason: Witnessing Molefe Isaac Fani

MOLEFE-ISAAC FANI
ACTING CHIEF PROCUREMENT OFFICER
DATE: 7-May-2022

Items to be finalised in terms of the Procurement Regulations

	Tender #	Process Type	Description	Directorate	Date Advert	Date Advert close	Number of Tenders received
1	SC2245/2021	Tender	Pruning and Felling of Trees in Hermanus, Kleinmond and Stanford Areas for a contract period ending 30 June 2025	Community Services	08 Nov 21	10 Dec 21	16
2	SC2246/2021	Tender	Provision of Garden Maintenance Services in the Hermanus Area for a contract period ending 30 June 2025	Community Services	08 Oct 21	12 Nov 21	16
3	SC2251/2021	Tender	New Ablution Facilities at Kleinmond Municipal Yard	Community Services	08 Oct 21	12 Nov 21	8
4	SC2259/2021	Tender	The Compilation and Maintenance of the General- and Supplementary Valuation Rolls for the Financial Years 1 July 2022 to 30 June 2025	Finance	08 Nov 21	10 Dec 21	7
5	SC2265/2021	Quotation	Upgrade of Hangklip Beach Ablution Facilities	Community Services	19 Nov 21	10 Dec 21	7
6	SC2269/2021	Tender	Repair, Maintenance and Design of Irrigation Systems in the Overstrand Municipal Area for a contract period ending 30 June 2025	Community Services	04 Nov 21	10 Dec 21	6
7	SC2282/2021	Tender	Term Tender for Drilling and Testing of Boreholes in the Primary and Secondary Aquifers in the Overstrand Municipal Area.	Infrastructure & Planning	14 Jan 21	18 Feb 22	8
8	SC2283/2021	Tender	Lease, Management, Maintenance & sub-lease of a portion of Erf 9515 Zweihle.	Infrastructure & Planning	14 Jan 21	18 Feb 22	3
9	SC2291/2022	Quotation	Provision of Interpreting and Translation Services for a 12 Month Contract Period	Management Services	02 Feb 22	18 Feb 22	4

Items to be cancelled

	Tender #	Process Type	Description	Directorate	Date Advert	Date Advert close	Number of Tenders received	Minimum Validity Period (Days)
1	SC2287/2022	Tender	Lifeguard Services for the Overstrand Area for a Contract Period Ending 30 June 2025	Community Services	17 Feb 22	25 Mar 22	7	90
2	SC2292/2022	Quotation	Appointment of Attorneys for Conveyancing Services	Infrastructure & Planning	24 Feb 22	11 Mar 22	8	90
3	SC2298/2022	Quotation	Supply and Deliver Concrete Septic Tanks to Overstrand Municipality.	Community Services	25 Feb 22	11 Mar 22	4	90
4	SC2299/2022	Quotation	Manufacture, Supply and Deliver Mobile Pavilions to Mount Pleasant Sportsgrounds in Hermanus.	Community Services	24 Feb 22	11 Mar 22	2	90
5	SC2300/2022	Quotation	Purchasing of Winch and Winch Brackets for Law Enforcement Vehicles as Safety Measure.	Protection Services	24 Feb 22	11 Mar 22	1	90
6	SC2301/2022	Quotation	Supply and Deliver four Fibreglass Extension Ladders.	Infrastructure & Planning	24 Feb 22	11 Mar 22	11	90

Tenders and formal quotations to be advertised

	Tender #	Process Type	Description	Directorate
1	SC2232/2021	Tender	New Ablution Facilities Onrus Beach	Community Services
2	SC2252/2021	Tender	Renovations at Onrus Caravan Park Ablution Facilities	Community Services
3	SC2258/2021	Tender	Upgrade of Hawston Swimming Pool	Community Services
4	SC2264/2021	Quotation	Electronic Notice Board/s at Entrances to Kleinmond	Community Services
5	SC2270/2021	Quotation	Supply of Sanitaryware and Accessories and Additional Renovations to Davies Pool Toilets	Community Services
6	SC2290/2022	Tender	Placement of Recruitment advertisement in Different Newspapers	Management Services
7	SC2293/2022	Tender	Appointment of Panel of Attorneys for the Rendering of Conveyancing and Notary Services for a Period Ending 30 June 2025,	Infrastructure & Planning
8	SC2294/2022	Tender	Replacement of Water Meters in the Overstrand Area, Phase 5 for a Period Ending 30 June 2025,	Community Services
9	SC2295/2022	Tender	Provision of Cleaning Services for The Greater Hermanus Area	Community Services
10	SC2296/2022	Tender	Appointment of Consultant for Various Engineering and Groundwater Projects for a Contract Period Ending 30 June 2025.	Infrastructure & Planning
11	SC2297/2022	Tender	Lease, Management and Maintenance of Erf 1179 Hawston (Situating on the corner of Woodlands Road and Mill Street, Hawston) as a Community Facility For a Contract Period of 9 (NINE) Years and 11 (ELEVEN) Months	Infrastructure & Planning
12	SC2302/2022	Tender	Service Provided for Tow-in Services in the Overstrand Area	Protection Services
13	SC2303/2022	Tender	Education Awareness - Puppet Shows and Live Theatre for Scholars to Create Awareness for Water Conservation, Waste Recycling and, Environmental Conservation.	Infrastructure & Planning
14	SC2304/2022	Quotation	Supply and Delivery of Refuse Skip Bins	Community Services
15	SC2305/2022	Tender	Sale of Erf 1886 Franskraalstrand (1,5447 Hectares in Extent) for Development of Town Housing.	Infrastructure & Planning
16	SC2306/2022	Tender	Online Subscription for Access to Legal Information for a 3 Year Contract Period Starting 7 May 2022,	Management Services
17	SC2307/2022	Quotation	Supply and Delivery of LED Post Top Luminaire Designed for General Area Lighting for Minimal and Modern Looking Surroundings.	Infrastructure & Planning
18	SC2308/2022	Tender	De Mond Development	Infrastructure & Planning
19	SC2309/2022	Tender	Purchase and Delivery of a Generator for the Overstrand Traffic Department in Hermanus	Protection Services
20	SC2310/2022	Quotation	Purchasing of Dashcams for Traffic and Law Enforcement Vehicles as a Safety Measure.	Protection Services
21	SC2311/2022	Tender	Provision of Cleaning Services for the Kleinmond Area for a Contract Period Ending 30 June 2025,	Community Services
22	SC2312/2022	Quotation	Minor Remedial Works to the Hawston Industrial Hub	Infrastructure & Planning
23	SC2313/2022	Tender	Accommodate Dogs and Cats Impounded by Law Enforcement Officials as Empowered by the Overstrand Municipality By-Law Relating to the Keeping of Dogs and Cats.	Protection Services
24	SC2314/2022	Quotation	Supply and Delivery of Golf Shirts for Marketing Purposes	Management Services

	Tender #	Process Type	Description	Directorate
25	SC2315/2022	Quotation	Manufacture, Supply and Deliver Trailer for Overstrand Municipality in Hermanus	Community Services
26	SC2316/2022	Tender	Repair of Synthetic Turf Surface in Gansbaai and the Maintencane and Deep Cleaning of Synthetic Turf Surfaces in the Overstrand Municipal Area on a As and When Basis for a Contract Period Ending 30 June 2024	Community Services
27	SC2317/2022	Quotation	Purchasing of Highly/Fully Trained Patrol/Explosive Detection Dog	Protection Services
28	SC2318/2022	Tender	Upgrading of the Kleinmond Wastewater Treatment Works	Infrastructure & Planning
29	To be allocated	Tender	Repair of small plant (lawnmowers, weed eater, etc.)	Community Services
30	To be allocated	Tender	Supply, installation, monitoring and maintenance of a vehicle active tracking system on a lease basis	Community Services
31	To be allocated	Tender	Upgrade, maintenance of digital mobile network and supply of equipment	Management Services
32	To be allocated	Tender	Microsoft office 365: migrate, design, install, maintain and train	Management Services
33	To be allocated	Tender	Fernkloof nature reserve facilities	Infrastructure & Planning
34	To be allocated	Tender	Ablution facilities onrus swimming beach phase 2 (f1/2)	Community Services
35	To be allocated	Tender	Ablution facilities onrus swimming beach(f2/2)	Community Services
36	To be allocated	Tender	Electrification of low cost housing areas (inep)	Infrastructure & Planning
37	To be allocated	Tender	Power cable to kleinmond slipway facilities	Infrastructure & Planning
38	To be allocated	Tender	Electrification of low cost housing areas	Infrastructure & Planning
39	To be allocated	Tender	Street lights	Infrastructure & Planning
40	To be allocated	Tender	Zwelihle community hall: repairs and maintenance	Community Services
41	To be allocated	Tender	Maintenance of Hawston abalone hall	Community Services
42	To be allocated	Tender	Masakhane housing project bus route	Infrastructure & Planning
43	To be allocated	Tender	Replacement of Overstrand water pipes(f1/2)	Infrastructure & Planning
44	To be allocated	Tender	Cleaning of Stormwater	Community Services
45	To be allocated	Tender	Upgrade water lines & new booster pumpstation valves	Infrastructure & Planning



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PROVINCE OF THE WESTERN CAPE

PROVINSIE WES-KAAP

Provincial Gazette Extraordinary

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Thursday, 10 March 2022

Donderdag, 10 Maart 2022

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PROVINCIAL NOTICE

The following Provincial Notice is published for comment.

DR H.C. MALILA,
DIRECTOR-GENERAL

Provincial Building,
Wale Street,
Cape Town.

PROVINSIALE KENNISGEWING

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P.N. 28/2022

10 March 2022

GOVERNMENT NOTICE**NATIONAL TREASURY****PUBLICATION OF DRAFT PREFERENTIAL PROCUREMENT REGULATIONS,
2022 FOR PUBLIC COMMENT**

In accordance with section 5(2) of the Preferential Procurement Policy Framework Act, 2000 (the Act), the draft Preferential Procurement Regulations, 2022 (the draft Regulations), in the Schedule are published for public comment. These Regulations are intended to be made by the Minister of Finance in terms of section 5(1), read with section 2(1)(b) and (c) and the definition of “prescribed” in section 1, of the Act.

The draft Regulations propose to prescribe—

- the threshold amounts in which the 80/20 and 90/10 preference point systems must be used, together with the formula to be applied; and
- other matters necessary or expedient in order to achieve the objects of the Act.

Written comments on the draft Regulations submitted by **11 April 2022** to CommentDraft Legislation@treasury.gov.za will be considered. By making a submission, the commentator agrees that the name of the commentator and the submission may be made public by the National Treasury and the submission will be disclosed if requested in terms of the Promotion of Access to Information Act, 2000.

SCHEDULE

PREFERENTIAL PROCUREMENT REGULATIONS, 2022

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Definitions

1. In these Regulations, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in the Act must bear the meaning so assigned—

“**National Treasury**” has the meaning assigned to it in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

“**price**” includes all applicable taxes less all unconditional discounts;

“**Rand value**” means the total estimated value of a contract in Rand, calculated at the time of the tender invitation; and

“**the Act**” means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000).

Application

2. These Regulations apply to organs of state as defined in section 1¹ of the Act.

Identification of preference point system

3.(1) An organ of state must, in the tender documents, stipulate—

(a) the preference point system applicable to the tender as envisaged in regulations 4, 5, 6 or 7; and

(b) any specific goal as envisaged in section 2(1)(d) and (e) of the Act.

(2) If it is unclear whether the 80/20 or 90/10 preference point system applies—

(a) in the case of a tender to generate income or to dispose of or lease assets, the highest acceptable tender; or

(b) in the case of any other tender, the lowest acceptable tender, must be used to determine the applicable preference point system.

80/20 preference point system for acquisition of goods or services with Rand value equal to or above R30 000 and up to R50 million

4.(1) The following formula must be used to calculate the points out of 80 for price in respect of a tender with a Rand value equal to or above R30 000 and up to a Rand value of R50 million, inclusive of all applicable taxes:

$$P_s = 80 \left(1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where-

P_s = Points scored for price of tender under consideration;

P_t = Price of tender under consideration; and

P_{\min} = Price of lowest acceptable tender.

¹ Paragraph (f) of the definition of organ of state in section 1 of the Act includes any other institution or category of institutions included in the definition of “organ of state” in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which the Act applies. Government Notices—

(a) R. 501 of 8 June 2011 recognises, with effect from 7 December 2011, all public entities listed in Schedules 2 and 3 to the Public Finance Management Act, 1999; and

(b) R. 571 of 15 June 2017 recognises, with effect from 17 June 2017, national and provincial government components listed in Schedule 3 to the Public Service Act, 1994 and municipal entity as defined in section 1 of the Local Government: Municipal Systems Act, 2000, as institutions to which the Act applies.

Note should be taken of notices issued from time to time in terms of paragraph (f) of this definition. The application of these Regulations is also subject to applicable exemptions approved in terms of section 3 of the Act.

(2) A maximum of 20 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest two decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

90/10 preference point system for acquisition of goods or services with Rand value above R50 million

5.(1) The following formula must be used to calculate the points out 90 for price in respect of a tender with a Rand value above R50 million, inclusive of all applicable taxes:

$$P_s = 90 \left(1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

Where-

P_s = Points scored for price of tender under consideration;

P_t = Price of tender under consideration; and

P_{\min} = Price of lowest acceptable tender.

(2) A maximum of 10 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

80/20 preference points system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R30 000 and up to Rand value of R50 million

6.(1) The following formula must be used to calculate the points for price in respect of a tender to generate income or to dispose of or lease assets, with a Rand value equal to, or above R 30 000 and up to a Rand value of R50 million, inclusive of all applicable taxes:

$$P_s = 80 \left(1 + \frac{P_t - P_{\max}}{P_{\max}} \right)$$

Where-

P_s = Points scored for price of tender under consideration;

P_t = Price of tender under consideration; and

P_{\max} = Price of highest acceptable tender.

(2) A maximum of 20 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

90/10 preference point system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R50 million

7.(1) The following formula must be used to calculate the points for price in respect of a tender to generate income or to dispose of or lease assets, with a Rand value above R50 million, inclusive of all applicable taxes:

$$Ps = 90 \left(1 + \frac{Pt - Pmax}{Pmax} \right)$$

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmax = Price of highest acceptable tender.

(2) A maximum of 10 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

Criteria for breaking deadlock in scoring

8.(1) If two or more tenderers score an equal total number of points, the contract must be awarded to the tenderer that scored the highest points for specific goals.

(2) If two or more tenderers score equal total points in all respects, the award must be decided by the drawing of lots.

Award of contracts to tenderers not scoring highest points

9. A contract may be awarded to a tenderer that did not score the highest points only in accordance with section 2(1)(f) of the Act.

Remedies

10.(1) Upon detecting that a tenderer submitted false information regarding specific goals or any other matter required in terms of these Regulations which will affect or has affected the evaluation of a tender, the organ of state must—

(a) inform the tenderer accordingly; and

- (b) give the tenderer an opportunity to make representations within 14 days as to why—
 - (i) the tender submitted may not be disqualified or, if the tender has already been awarded to the tenderer, the contract should not be terminated in whole or in part; and
 - (ii) the organ of state should not restrict the tenderer from conducting any business for a period not exceeding 10 years with any organ of state.
- (2) After considering the representations referred to in subregulation (1)(b), the organ of state may—
 - (a) if it concludes that such false information was submitted by the tenderer—
 - (i) disqualify the tenderer or terminate the contract in whole or in part; and
 - (ii) if applicable, claim damages from the tenderer;
 - (b) if it concludes that the tenderer must be restricted, restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years.
- (3) An organ of state must, within five working days—
 - (a) inform the National Treasury, in writing, of any action taken in terms of subregulation (2); and
 - (b) if it decides to restrict a tenderer, request the National Treasury to publish the name of the tenderer in its list of restricted suppliers.
- (4) The National Treasury must, within three working days after receiving a request in terms of subregulation (3)(b), publish the name of the tenderer in its list of restricted suppliers.

Repeal of regulations

- 11. Any regulations made under section 5 of the Act are repealed.

Short title and commencement

- 12. These Regulations are called the Preferential Procurement Regulations, 2022 and take effect on the date of promulgation of these Regulations.