



Construction, Engineering and Infrastructure Law Team

Circular
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PROCUREMENT LAW HEADING INTO 2023

INTRODUCTION

In 2020, the Preferential Procurement Regulations, 2017 (the **“2017 Regulations”**) gazetted in accordance with section 5 of the Preferential Procurement Policy Framework Act No. 5 of 2000 (the **“Act”**) came under scrutiny and were found to be unconstitutional by the Supreme Court of Appeal. That Court’s decision was taken on appeal to the Constitutional Court. Earlier this year, the Constitutional Court upheld the Supreme Court of Appeal’s decision, meaning that new Regulations had to be promulgated.

New Preferential Procurement Regulations (the **“2022 Regulations”**) were gazetted on 4 November 2022. The 2022 Regulations will come into effect on 16 January 2023. Any tender advertised before then is to be determined in terms of the 2017 Regulations.

A BRIEF SYNOPSIS OF THE 2022 REGULATIONS

Regulation 3(1) records that an organ of state must indicate in the tender:

- a) the applicable preference point system – i.e., whether the 80/20 or 90/10 system will apply; and
- b) any specific goal for which a point may be awarded; the number of points that will be awarded for each goal; and ‘proof of the claim for such goal’.

Much like the 2017 Regulations, the 80/20 system applies to a tender where the anticipated award will be for a Rand value of less than or equal to R50 million. The 90/10 system will apply to tenders estimated to be over R50 million.

The specific goals tie back to section 2(1) of the Act, which may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination based on race, gender and disability etc.

If it is unclear as to what the value of the bids received are likely to be, then the tender may record, in terms of Regulation 3(2) that:

- a) for income generating contracts – that the highest acceptable valued bid will determine whether the 80/20 or 90/10 system will apply; and
- b) for any other tender – that the lowest acceptable valued bid will determine whether the 80/20 or 90/10 system will apply.

Regulations 4 to 5 set out the formulae for the 80/20 and 90/10 systems in respect of tenders for goods and services. They remain unchanged from their 2017 predecessor.

Regulations 6 and 7 set out the formulae for the 80/20 and 90/10 systems in respect of income generating contracts, i.e., a contract which results in the production of revenue for an organ of state. This includes leasing and disposal of assets, and concession contracts – but excludes dispositions through auction.

Up to 10 or 20 points (depending on which system applies) may be awarded for the specific goal, or goals, recorded in the tender.

CHANGES TO THE 2017 REGULATIONS

The 2017 Regulations recorded that up to 10 or 20, points would be awarded based on a bidder's B-BBEE score. That has now been done away with, and each tender will have to specify its own specific goals for which points are to be awarded.

Income generating contracts are now set out separately and are provided their own formulae.

Regulation 4 of the 2017 Regulations, which made provision for pre-qualifying criteria to advance certain designated groups, has been omitted in its entirety.

Regulations 8 and 9 of the 2017 Regulations, which made provision for local production and content and subcontracting a minimum of 30% of the value of certain contracts have likewise been omitted in their entirety.

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