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TO ALL:

ACCOUNTING OFFICERS

ACCOUNTING AUTHORITIES

CHIEF FINANCIAL OFFICERS

HEADS: SUPPLY CHAIN MANAGEMENT UNIT

CIRCULAR NO. 15 OF 2021/22

VALIDITY OF THE PREFERENTIAL PROCUREMENT REGULATIONS OF 2017

PURPOSE

1. The purpose of the Circular is to disseminate the National Treasury communications to all Organs of State on the matter of the Minister of Finance v Afribusiness NPC CCT279/20 pertaining to the validity of the Preferential Procurement Regulations (PPR/Procurement Regulations) of 2017 by the Supreme Court of Appeal (SCA).

BACKGROUND

2. On 2 November 2020, the SCA made a ruling that found the pre-qualification criteria contained in the PPR of 2017 invalid. The SCA suspended its ruling for a period of twelve (12) months which expired on 1 November 2021, in order to allow the Minister of Finance sufficient time to amend the PPR of 2017. The then Minister of Finance elected to challenge the SCA ruling in the Constitutional Court.



LEGISLATIVE FRAMEWORK

3. The Constitution of the Republic of South Africa, 1996, Section 217(1), requires that when an Organ of State in the national, provincial or local sphere of government, or any other institution identified in the national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
4. Section 217(2) stipulates that Sub-section (1) does not prevent an Organ of State from implementing procurement policy to provide for (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
5. Section 217(3) stipulates that national legislation must prescribe a framework within which the policy referred to in Sub-section (2) must be implemented.
6. The Preferential Procurement Policy Framework Act (PPPFA), 2000 (Act No. 5 of 2000) and its regulations were promulgated to give effect to Section 217(3) of the Constitution to prescribe the framework within which the policy referred to in Section 217(2) must be implemented, the latest edition of the regulations being the PPR of 2017.
7. Regulation 3.(b) of the PPR of 2017 stipulates that an organ of State must determine whether pre-qualification criteria will be applicable to a bid as envisaged in Regulation 4.
8. Regulation 4. of the PPR of 2017 stipulates that if an organ of State decides to apply pre-qualification criteria to advance certain designated groups, that organ of State must advertise the bid with a specific bidding condition that only one or more of the following bidders may respond:
 - A bidder having a stipulated minimum B-BBEE status level of contributor;
 - An EME or QSE; and
 - A bidder sub-contracting a minimum of 30% of the contract to one of the designated groups.

DISCUSSION

9. The Constitutional Court has now ruled on the matter. The appeal by the Minister of Finance against the judgment of the SCA has been dismissed. A copy of the judgment is attached for ease of reference.
10. The National Treasury has issued the attached communication dated 25 February 2022 to all Organs of State advising that:
 - 10.1 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 of Finance could permissibly regulate in terms of section 5 of the Procurement Act and section 217 of the Constitution;
 - 10.2 The majority judgment of the Constitutional Court dismissed the appeal against the SCA judgment, however, was silent on the question of remedy nor did the majority or minority judgements address itself to the specific issue of the status of the SCA's order of suspension;
 - 10.3 Neither the minority or majority judgments purports to set aside or replace the order of the SCA. The order of the Constitutional Court confines itself to the appeal and dismissing the appeal against the SCA's order. Thus, the legal position, 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, meaning that the suspensive period of invalidity has been re-engaged and the Procurement Regulations have been and continue to be of full force and effect;
 - 10.4 The Minister of Finance is to approach the Constitutional Court on an urgent basis seeking confirmation that the invalidity of the Procurement Regulations has been and continues to be suspended. That is, guidance is to be sought as to whether the Procurement Regulations remain valid until 15 March 2023, unless repealed sooner; and
 - 10.5 Organs of State are advised to act as follows whilst awaiting the outcome of the request for guidance from the Constitutional Court:
 - 10.5.1 bids advertised prior to 16 February 2022 are to be finalized in terms of the Procurement Regulations;
 - 10.5.2 bids advertised on or after 16 February 2022 are to be held in abeyance; and
 - 10.5.3 no new bids are to be advertised.

11. The National Treasury has issued a further communication dated 3 March 2022 to all Organs of State further advising that:
- 11.1 The advice on how to proceed with procurement contained in the communication of 25 February 2022 excludes procurement with a rand value of less than R 30 000 obtained through prices quotations and petty cash;
- 11.2 Organs of State are required to comply with the provisions of section 217(2) of the Constitution read with section 2 of the PPPFA when undertaking procurement. Such also requires the application of the 80/20 and the 90/10 preference points systems in terms of the thresholds prescribed in regulations in terms of sections 2(1)(b) and (c) of the PPPFA. With the declaration of invalidity of the PPR of 2017 in its entirety, the thresholds prescribed therein are no longer of any force or effect;
- 11.3 The National Treasury is in the process of drafting new regulations in terms of the PPPFA with the intention that such will be published for comment during the week of 7 March 2022. The objective of the draft regulations is to provide for the thresholds and formulae that must be prescribed by regulations in terms of sections 2(1)(b) and (c) of the PPPFA and any other matter that may be necessary or expedient to prescribe in order to achieve the objectives of the PPPFA;
- 11.4 Section 3(c) of the PPPFA makes provision for Organs of State to request for exemption from the provisions of the PPPFA for a specific procurement or category of procurement requirements. Organs of State may, until such time that the new regulations take effect or the Constitutional Court provides clarity on the suspension of the invalidity of the PPR of 2017, request exemptions provided that such are limited to procurement requirements that cannot await the promulgation of the new regulations or the Constitutional Court's clarification; and
- 11.5 The National Treasury is in the process of finalising the papers seeking the Constitutional Court's clarity and Organs of State will be advised once such have been filed and of further developments.
12. It must be reiterated that whilst the National Treasury communication makes reference to bids (tenders) only, the fact that the Procurement Regulations was declared invalid in its entirety, no procurement which is subject to the provisions of the Procurement Regulations may be undertaken. Thus, Organs of State are only permitted to procure requirements with a rand value of less than R 30 000 that would ordinarily have been obtained through prices quotations and petty cash.

13. Departments and Public Entities must ensure that the validity of those bids that were advertised on or after 16 February 2022 and are being held in abeyance are suitably and timeously extended until such time further directives are received from National Treasury in order to avoid re-advertising in the event that the Constitutional Court advises that the period of suspension of the invalidity of the PPR of 2017 is still applicable.
14. Departments and Public Entities are further advised to, in the interim, continue with the development of technical specifications/terms of references. This will assist in speedily finalising and advertising bids upon being permitted to do so.
15. In the event that there is an extended delay in promulgation of the new regulations of the Constitutional Court providing clarification, such may have an impact on existing contracts for goods and services which are of a repetitive nature and that are about to expire. Where necessary, such contracts may be extended on a month-to-month basis for such period of time as it takes to receive further directives from the National Treasury. These extension of contracts must be dealt with in terms of the provisions of Paragraph 9 of National Treasury SCM Instruction 3 of 2016/17 issued under cover of Circular No. 8 of 2016/17. Attention is also drawn to the Guidelines on Evaluation and approval of Variation Orders issued under cover of Circular No. 05 of 2019/20.

AUTHORITY

16. This Circular is issued in terms of Section 18 (2) of the PFMA.

APPLICABILITY

17. This Circular and the attached National Treasury communications to all Organs of State apply to all Provincial Departments and Public Entities.

EFFECTIVE DATE

18. The provisions of this Circular and the attached National Treasury communications to all Organs of State are effective from 16 February 2022.

DISSEMINATION OF INFORMATION

19. Kindly ensure that all relevant officials receive copies of this Circular and the attached National Treasury communications to all Organs of State.
20. Should there be any enquiries regarding the contents of this Circular and the enclosed National Treasury communications to all Organs of State, please contact:

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Ikhwezi Lomso greetings: *Serving with Honesty, Humility and Integrity.*



MR D. MAJEKE

HEAD OF DEPARTMENT

EASTERN CAPE PROVINCIAL TREASURY

03/03/2022

DATE