

## **COURT OVERTURNS BBBEE PRE-QUALIFICATION**

It has become a usual requirement for tenders to have pre-qualification criteria, especially including its BBBEE compliance level.

The recent supreme court of appeal case, *Afribusiness NPC v The Minister of Finance* (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020) has invalidated this practice with far-reaching implications, especially for advertised but unawarded tenders.

### ***Facts***

The matter concerns the validity of the Preferential Procurement Regulations, 2017 (the "2017 Regulations") promulgated by the Minister of Finance (the "Minister") on 20 January 2017 under section 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (the "Framework Act" or "PPPFA").

Section 5 of the Framework Act empowers the Minister to make regulations and provides as follows:

*"(1) The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe to achieve the objects of this Act.*

*(2) Draft regulation must be published for public comment in the Government Gazette and every Provincial Gazette before promulgation."*

The issue for the court to determine focussed on regulations 3(b), 4, 9 and 10 of the 2017 Regulations. In terms of Regulation 4(2):

*"[a] tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender."*

### ***The approach by the High Court***

The High Court held that the 2017 Regulations are lawful and rational on the basis that 'they follow a preference point system, as required by section 2(1)(a) of the PPPFA.

## **The SCA**

The discretionary pre-qualification criteria in regulation 4 of the 2017 Regulations constitutes a deviation from the provision of section 217(1) of the Constitution. The Constitution which enjoins organs of state when contracting for goods or services, to do so following a system which is fair, equitable, transparent, competitive and cost-effective. Any pre-qualification requirement, which is sought to be imposed, must have as its objective advance the provisions of section 217(1) of the Constitution. The pre-qualification criteria stipulated in regulation 4 and other related regulations do not meet this requirement.

The procurement process must comply with five fundamental principles. It must be equitable, transparent, fair, competitive and cost-effective.

As Ponnann JA explained in *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others*:<sup>1</sup>

*"The general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The only exception to that general rule is that envisaged by ss 217(2) and (3). Section 217(2) allows organs of state to implement preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination.*

*Express provision to permit this needed to be included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in s 9 of the Constitution. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by s 217(3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation. It follows that the only escape for ACSA from the reach of s 217(1) is if it is able to bring itself within ss (2) and (3)."*

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<sup>1</sup> *Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others* (1306/18) [2020] ZASCA 02 (31 January 2020)

## **Conclusion**

The framework does not allow for the preliminary disqualification of tenderers, without any consideration of a tender as such. The Minister cannot through the medium of the impugned regulations create a framework which contradicts the mandated framework of the Framework Act. The Minister's decision is ultra vires the powers conferred upon him in terms of section 5 of the Framework Act.

This development and tenders already advertised, but unawarded may therefore require withdrawal and readvertising. Contact SchoemanLaw for all your public law and legal procurement needs.

