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Will B-BBEE become irrelevant for government tenders?

In response to the Constitutional Court judgment on 16 February 2022, wherein it declared the 2017 Preferential Procurement Policy Framework Regulations as invalid, albeit the suspension of the invalidity now only expires in January 2023, National Treasury has issued a draft set of Regulations in March this year.

As part of the Court's ruling, it was ruled that the Regulations issued by the Minister of Finance in 2017, were "neither necessary nor expedient" and that clauses like "B-BBEE Pre-qualification", "Sub-contracting as a condition of tender", the "Functionality" evaluation criteria as well as "Local Production and Content" requirements, were not aspects, which were included in the ambit of the Preferential Procurement Policy Framework Act (PPPFA) of 2000.

National Treasury has responded to the instruction of the Court's judgement and it excluded these aspects from its draft 2022 Regulations, which will be promulgated either by the end of this year or shortly before the expiry of the suspension period of the invalid 2017 Regulations, in January 2023.

As it stands, the draft 2022 Regulations no longer allow for the allocation of Preference Points for a bidder's B-BBEE status since such an application was never part of the profile of "Specific Goals" as listed in the PPPFA.

Therefore, the question arises, as to whether compliance with B-BBEE will still be necessary for public sector tenders since an organ of state can only allocate such points to the categories of "Specific Goals" listed in the Act, which makes no mention of B-BBEE as a category for consideration.

Organs of state will now also be obliged to change their Preferential Procurement Policies for it to come in line with the Court's ruling as well as the new 2022 Regulations, to be issued by National Treasury.

These revised policies will have to stipulate that preference points may only be allocated to people who were previously disadvantaged based on race, gender, disability or promoting the programs of the Reconstruction and Development Program (RDP) respectively, and no points would be allowed to be allocated to a bidder's B-BBEE status.

The result is that bidders, which are not largely made up through ownership of the categories aforementioned, will not score points under the "Specific Goals" as stipulated in the PPPFA.

However, on the other hand, the B-BBEE Act of 2003 stipulates that the Minister of Trade & Industry and Competition, may issue Codes, regulating the "Qualification criteria for preferential purposes for procurement and other economic activities" and

that every organ of state must take in the account any relevant Codes, when “Developing and implementing a preferential procurement policy.”

According to Gerrit Davids, Lead Advisor at TaranisCo Advisory, tendering agency, “The 2022 Draft Regulations has a narrow focus on the “Specific Goals” prescribed in the PPPFA and excludes the B-BBEE status of a bidder for consideration as a “Specific Goal”, whereas the BEE Act clearly states that an organ of state must apply any relevant Codes when developing their respective preferential procurement policies.”

Davids says, “The challenge for organs of state, is to define as to how their preferential procurement policies could promote the objects of the BEE Act and still conform to the narrow focus of the “Specific Goals” as prescribed by the PPPFA.”

“Despite the perceived conflict between the two Acts, it looks like that the B-BBEE status of a bidder will not form part for points when the new Regulations will be promulgated and the question remains unanswered as to whether organs of state could use it as some form of “Pre-qualification” without making reference to the now declared unconstitutional 2017 Regulations”, said Davids.

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