THE THIRD WAVE OF PREFERENTIAL PROCUREMENT REGULATIONS IN SOUTH AFRICA

1 *Introduction*

The use of public procurement to promote wealth redistribution in South Africa as part of the overall constitutional objective of addressing the continuing disadvantage created by unfair discrimination in the past is a distinct feature of South African public procurement law. What has generally become known as the practice of preferential procurement is rooted in section 217(2) of the Constitution of the Republic of South Africa, 1996. The basic constitutional authorisation for preferential procurement is given some content in the Preferential Procurement Policy Framework Act 5 of 2000 (the act), but the real meat of the regulatory regime governing preferential procurement is found in the regulations under the act.

The first set of regulations was promulgated in 2001 (Preferential Procurement Regulations, 2001, GN R725 of 2001 in *GG* 22549 (10-08-2001)) (the 2001 regulations), which was replaced by a second set in 2011 (Preferential Procurement Regulations, 2011, GN R502 of 2011 in *GG* 34350 (08-06-2011)) (the 2011 regulations). A third set, the Preferential Procurement Regulations, 2017, came into effect on 1 April 2017 (GN R32 in *GG* 40553 (20-01-2017)). This third set of regulations (the 2017 regulations) represents the third wave of legal rules governing preferential procurement in South Africa. It introduces a number of important changes to the previous regime and it raises a number of questions. This note analyses these changes and the questions that they bring.

 [ISSN 0257 – 7747]

2 *An expanded repertoire of preferential procurement mechanisms*

One of the most important changes introduced by the 2017 regulations is the significant expansion of the distinct mechanisms available to pursue preferential procurement This may also be one of the most problematic areas of the new regulations.

The act in essence involves a system of price preference at the award stage of adjudication of public tenders. Section 2 of the act prescribes a preferential procurement framework in terms of which a fixed percentage of the adjudication criteria must relate to the preferential dimension of procurement. The fixed percentage will either be 10% or 20%, depending on the value of the contract. For higher value contracts the percentage will be 10% and for lower value contracts 20%, although the exact values must be determined by regulation. The remaining 90% or 80% of the adjudication criteria relate specifically to price. Bidders can thus score a 10% or 20% preference over the price offered by competitors based on preferential criteria. It is, however, at the same time clear that the act contemplates price to be the single biggest factor in awarding tenders. The act prescribes a point system to implement this framework that involves adjudicating all bids against a total of 100 points split between price (90 or 80 points) and preference (10 or 20 points). The bidder scoring the highest number of points should be awarded the tender "unless objective criteria … justify the award to another tenderer" (s 2(1)(*f*)).

The 2017 regulations provide further details on the price preference mechanism, as did the two prior sets of regulations. However, the 2017 regulations also introduce two further mechanisms in pursuit of preferential procurement. The first is called "pre-qualification criteria" and effectively amounts to set-asides. The second new mechanism is subcontracting conditions. With the addition of these two new mechanisms, the preferential procurement regulatory regime in South African now simultaneously incorporates the three main vehicles for the pursuit of policy in procurement, namely 1) qualification criteria (including set-asides), 2) award criteria and 3) contract conditions All three mechanisms will be discussed individually in more detail below.

2.1 Price preference

The price preference mechanism prescribed in the act and given content in the 2001 and 2011 sets of preferential procurement regulations is largely maintained in the 2017 regulations. The contract value threshold for using either the 90/10 or 80/20 point split is, however, drastically increased. Whereas the 80/20 split was used for all contracts below R1 million and the 90/10 split for all contracts above R1 million under the 2011 regulations, the 2017 regulations increased the threshold to R50 million. Thus, all tenders for contracts with an estimated rand value at the time of tender invitation between R30 000 and R50 million, including all taxes, must be adjudicated in terms of the 80/20 split and those above R50 million must be adjudicated in terms of the 90/10 split under the 2017 regulations. This means that for a large category of public contracts, those with a rand value between R1 million and R50 million, the percentage price preference has doubled. This is a clear indication of the increased emphasis placed on preferential procurement under the 2017 regulations, even though the threshold is exactly half of what was proposed in the draft regulations that were published for public comment, which put the threshold at R100 million (719 in *GG* 40067 (14-06-2016)).

2.1.1 Choice of points split

The choice between the two-point splits at the time of inviting bids is made significantly easier and less risky under the 2017 regulations than before. When inviting bids, a contracting authority must estimate the value of the contract in order to determine which of the two-point splits will apply to the tender. That is, the authority must determine whether the contract will be above or below the stated threshold. At times this estimation may create difficulties, especially when the estimated value of the contract is close to the threshold. Under the previous set of regulations, a contracting authority was obliged to indicate which points split will apply to the tender and had to cancel the tender process if all bids received were outside of the price threshold of the stated point split (reg 8(1) of the 2011 regulations). For example, if the contracting authority advertised the tender as subject to the 80/20 points split, but all bids received tendered a price above R1 million, the authority had to cancel the tender. This amounted to a significant waste of resources in that the authority was subsequently obliged to restart the process, simply to state that the applicable points system will be the 90/10 system and all bidders would have had to resubmit their bids (and potentially revise them to take account of price fluctuations).

The 2017 regulations introduce much more sensible flexibility in this regard. While still requiring the contracting authority to indicate in the invitation to tender which points split will be applied, the 2017 regulations allow the authority to state that either the 90/10 or 80/20 split will be used and that the lowest acceptable bid will determine which one of the two systems will apply (reg 3(a)(ii)). The 2017 regulations have accordingly also done away with the requirement to cancel the tender process on the basis that the wrong points split was indicated in the invitation to tender.

2.1.2 Calculation methodology

The same formula as used in the 2001 regulations and 2011 regulations to calculate the number of points that a particular bidder scored for its price remains under the 2017 regulations. The formula is the same for the 80/20 and 90/10 points split, with only the number of points awarded for price differing in the prescribed formula, which for the 80/20 split looks as follows (reg 6(1)):

Where –

Ps	=	Points scored for price of tender under consideration;
Pt	=	Price of tender under consideration; and
Pmin	=	Price of lowest acceptable tender.

The same methodology also remains in respect of calculating the 10 or 20 preference points. Two simple matrixes are set out in the regulations that prescribe the number of points (either out of 10 or 20) that a bidder must receive. This is based on the bidder's broad-based black economic empowerment status level (b-bbee status level) as determined in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003. The only difference between the 2017 regulations and the 2011 regulations is a slight change in the number of preference points scored

against one of the b-bbee status levels in each of the two matrixes as indicated in the following tables. In both instances a more pronounced distinction is made between b-bbee status levels 2 and 3, which is most prominent in the 90/10 points split where the distinction between these two levels now translates to 3 points, whereas under the 2011 regulations the equivalent points differentiation was between b-bbee status levels 3 and 4. This change again illustrates the aim of emphasising the importance of the preferential dimension of public procurement under the 2017 regulations by encouraging bidders to pursue higher b-bbee status levels.

80/20 Points Split:

B-BBEE Status Level of Contributor	2011 Regulations preference points	2017 Regulations preference points
1	20	20
2	18	18
3	16	14
4	12	12
5	8	8
6	6	6
7	4	4
8	2	2
Non-compliant contributor	0	0

90/10 Points Split:

B-BBEE Status Level of Contributor	2011 Regulations preference points	2017 Regulations preference points
1	10	10
2	9	9
3	8	6
4	5	5
5	4	4
6	3	3
7	2	2
8	1	1
Non-compliant contributor	0	0

2.1.3 Proof of b-bbee status

The 2017 regulations still require bidders to submit proof of their b-bbee status level (reg 6(3) and 7(3)), which proof is defined as:

"(*a*) the B-BBEE status level certificate issued by an authorised body or person;
(*b*) a sworn affidavit as prescribed by the B-BBEE Codes of Good Practice; or
(*c*) any other requirement prescribed in terms of the Broad-Based Black Economic Empowerment Act;" (reg 1).

This requirement must, however, be read in conjunction with supply chain management instruction no. 4A of 2016/2017 regarding the central supplier database issued by the National Treasury in terms of the Public Finance Management Act 1 of 1999. The supply chain management instruction binds all national and provincial departments, constitutional institutions and public entities listed in schedules 2 and 3 of the Public Finance Management Act. In terms of this instruction, the covered entities must rely on the information of bidders contained in the central supplier database, including the b-bbee status level, and must not require bidders to submit hard copies of verification documents, which would include proof of b-bbee status level. The requirement in the 2017 regulations that bidders must submit proof of their b-bbee status level must thus be read as referring to the submission of such proof when registering on the central supplier database as opposed to when submitting a bid. However, this reading would apply only to entities covered by the Public Finance Management Act and pertinently not to local authorities, given that supply chain management instruction no 4A of 2016/2017 does not apply to local government. The result is a somewhat strained interpretation of regulations 6(3) and 7(3) of the 2017 regulations to mean something different when applied at different levels of government. The alternative interpretation of the 2017 regulations is that they simply override the supply chain management instruction, given that the regulations were issued after the instruction and that the regulations are higher in terms of the hierarchy of subordinate legislation than the instruction. This would mean that submission of actual certificates or affidavits as proof of b-bbee status level is a requirement in every tender across all levels of government regardless of what is contained in the central supplier database.

Another difficulty that is resolved in the 2017 regulations is the question whether submission of proof of b-bbee status is an absolute requirement pertaining to all bidders regardless of whether the bidder has a b-bbee status or not. The 2011 regulations required that "[t]enderers other than Exempted Micro-Enterprises (exempted micro enterprises) must submit their original and valid B-BBEE status level verification certificate or a certified copy thereof, substantiating their B-BBEE rating" (reg 10(2)). National Treasury, in its "Implementation guide: preferential procurement regulations, 2011", advised procurement officials that bidders that do not submit certificates should score zero points for preference, but should not be disqualified as non-compliant simply because they did not submit such certificate. This approach was judicially endorsed in *Rodpaul Construction CC v Ethekwini Municipality* (2014 JDR 1122 (KZD)), where the court held that a failure to submit a b-bbee certificate resulted in no preference points being awarded, but did not result in the bidder being excluded. However, in *Superintendent-General: North West Department of Education v African Paper Products (Pty) Ltd* (2014 ZANWHC 29), the court came to a different conclusion, holding that it was indeed obligatory for all bidders to submit b-bbee certificates in order for their bids to be considered responsive. This, in the court's view, applied even when the bidder was a non-compliant b-bbee contributor. The result of this judgment was that submission of b-bbee certificates ostensibly became an absolute qualification criterion for all bidders in addition to being an award criterion. This position is clearly in conflict with the position adopted in the *Rodpaul Construction* case and in National

Treasury's "Implementation guide". The 2017 regulations resolve this conflict by explicitly stating that bidders may not be disqualified simply for failing to submit b-bbee certificates (reg 6(4), 7(4)). The result of a failure to submit a certificate will only be that the bidder scores zero for preference in the adjudication.

2.1.4 Market price

An important new condition to the award of bids following the application of the price and preference criteria is found in regulations 6(9) (in respect of the 80/20 formula) and 7(9) (in respect of the 90/10 formula) of the 2017 regulations. These regulations provide that the bid may not be awarded to the bidder scoring the highest number of points if that bidder's price is not market-related. In such a scenario the contracting authority may negotiate with the highest scoring bidder in an attempt to reduce the price to a market-related price or may cancel the contract. If the organ of state decides to negotiate, but fails to reach agreement with the highest scoring bidder on price, the organ of state may negotiate with the second highest scoring bidder to achieve a market-related price and if such negotiations also fail, the organ of state may negotiate with the third highest scoring bidder. At each step the organ of state may also decide to rather cancel the tender. When negotiations with the third highest scoring bidder fail, the organ of state must cancel.

This is an interesting new mechanism, which is clearly aimed at forcing government suppliers to offer market-related prices and to deal with abnormally low and high prices. However, a few questions emerge. Firstly, it is not clear exactly what the meaning of "market-related price" is and who will determine it. Does this refer to the price for the required goods and services as offered in the open market, also to private buyers? Or does it refer to the price offered in the public procurement market? The difference may be significant, since the risk factors between these markets may be markedly different. For example, the supplier in the procurement market runs the risk of the contract being invalidated due to some administrative irregularity, with severely limited recourse for any damages it may suffer as a result (see Quinot "Worse than losing a government tender: winning it" 2008 *Stell LR* 101), which is not the case when supplying to private buyers and which is clearly a risk for the supplier. One would expect such differences in risk to impact on price. If "market-related price" refers only to the price in the public-procurement market, the further question emerges as to how this price will be determined. Can the average price offered by all qualifying bidders in the particular procurement be used as an indication of what suppliers are willing to accept in the market for the type of goods or services required on the terms required under the procurement? If so, this requirement will have very little impact, since the adjudication formula already results in price playing the biggest role in identifying the top-scoring bidder. By definition under this approach, that bidder will thus be offering a market-related price. Perhaps the new e-tender portal, where information on all public bids must be published (National Treasury Instruction no 1 of 2015/2016 "Advertisement of bids and the publication of awards on the E-tender publication portal"), will be a useful tool to determine market-related prices in the broader public-procurement market.

A second question is whether this requirement constitutes a possible ground of review in the hands of a disappointed bidder. That is, can a losing bidder approach a court on review and argue that the contract should not have been awarded to the winning bidder, because it did not offer a market-related price (*eg* using s 6(2)(*b*) or s 6(2)(*e*)(iii) of the Promotion of Administrative Justice Act 3 of 2000 as basis)? If

this is the case, it will certainly open up a potentially significant further basis for judicial challenges to procurement decisions.

Thirdly, it is not exactly clear whether this requirement is in line with section 2(1)(*f*) of the act, which explicitly requires the contract to be awarded to the highest scoring bidder unless further objective criteria militate against such award. It is clear that the 2017 regulations do not consider this market-price mechanism as such a further objective criterion under section 2(1)(*f*), since these are dealt with separately in regulation 11. This of course raises questions about the lawfulness of the market-price requirement in the regulations, as it seems to further restrict the obligation under section 2(1)(*f*) of the act.

2.2 "Pre-qualifications"

The first of the two completely new preferencing mechanisms introduced by the 2017 regulations is the so-called "pre-qualification" mechanism. It is termed "pre-qualification" because it serves as a filter right at the outset of a procurement process to determine which bidders are allowed to compete for the tender. It is the first true set-aside mechanism in South African procurement law.

In terms of regulation 4 of the 2017 regulations, an organ of state is granted the discretion to decide whether it wants to restrict the procurement to certain categories of bidders, which must be stated as such in the invitation to bid. When an organ of state exercises this option, the procurement will be set aside for bids by the identified categories of bidders exclusively. The regulation provides for three broad categories that an organ of state may use. The choice between the categories and any combination of the listed categories is left to the discretion of the organ of state. The three broad categories are:

(i) bidders with a stated minimum b-bbee status level of contributor;
(ii) exempted micro enterprises or qualifying small business enterprises as defined in the Broad-Based Black Economic Empowerment Act; and
(iii) bidders subcontracting at least 30% of the contract to one or more of a list of eight categories of bidders, basically exempted micro enterprises or qualifying small business enterprises with majority shareholdings by listed categories of people.

Once the pre-qualification has been applied in a given procurement, the bids that meet these pre-qualification criteria will be adjudicated in terms of the normal rules of adjudication, *ie* functionality assessment followed by price and preference point comparison. A bidder not meeting the pre-qualification criteria is thus excluded from competition.

This reservation system will obviously raise equality questions similar to those raised in the employment equity context in relation to affirmative action schemes. Viewed from this perspective, the pre-qualification scheme should be judged against the requirements of section 9(2) of the constitution in terms of the approach adopted in cases such as *Minister of Finance v Van Heerden* (2004 6 SA 121 (CC)) and *South African Police Service v Solidarity obo Barnard* (2014 6 SA 123 (CC)). A full analysis of this aspect of the preferential procurement scheme falls beyond the ambit of this note, but some remarks are immediately apposite. Under the three-pronged test adopted by the courts in testing a measure against section 9(2), which would save it from a finding of unfair discrimination, the second category of pre-qualification above, namely set-aside for exempted micro enterprises and qualifying small business enterprises, may raise difficulties. The first leg of the test requires

showing that "the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination" (*Minister of Finance v Van Heerden* par 37). In the present context, this would require showing that exempted micro enterprises and qualifying small business enterprises have been disadvantaged by unfair discrimination in the past. It is not immediately apparent that this is indeed the case, at least not in all instances of public procurement. It may be possible to argue that the majority of exempted micro enterprises and qualifying small business enterprises that stand to benefit from this scheme are black-owned, which may satisfy the first leg of the test on the basis that the "overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion" (*Minister of Finance v Van Heerden* par 40). However, the exclusion of black-owned businesses that do not qualify as exempted micro enterprises or qualifying small business enterprises may again create difficulties, as the pre-qualification set-aside may be argued to amount to a naked preference against such businesses. This may undermine the envisaged outcome of promoting suppliers previously denied access to the procurement market and accordingly fail the second leg of the section 9(2)-test, namely "whether the measure is 'designed to protect or advance' those disadvantaged by unfair discrimination" or even the third leg of the test, namely "that the measure 'promotes the achievement of equality'" (*Minister of Finance v Van Heerden* par 41 44).

2.3 Subcontracting terms

The second new mechanism introduced by the 2017 regulations is subcontracting conditions in contracts. Regulation 9 makes it mandatory to include a subcontracting condition in a tender contract if two conditions are met. Firstly, the estimated value of the contract at the time of invitation to bid must be more than R30 million. Secondly, subcontracting must be "feasible" under the relevant contract. The regulations do not provide any more detail on what feasibility in this context entails. It is, however, an objective standard, *ie* it must be objectively possible to subcontract under the contract.

The regulations provide a closed list of qualifying categories of entities that the main contractor must subcontract with. This list is identical to the subcontracting list under the pre-qualification mechanism in regulation 4. The organ of state must decide which of the categories to list in the relevant subcontracting condition, which may be one or any combination of the listed categories. The specific subcontracting condition, including the qualifying categories of subcontractors, must be stated in the invitation to tender and must require subcontracting of at least 30% of the contract.

This subcontracting condition does not form part of the adjudication of bids. That is, bidders are not compared or scored based on their proposed subcontracting arrangements under this mechanism. Under this mechanism, subcontracting becomes a condition of the contract and thus an obligation on the winning bidder.

An important question is what exactly subcontracting means in this context. Does subcontracting refer only to contractual arrangements between the main contractor and another contractor in terms of which part of the performance by the main contractor is transferred to another contractor? In other words, the subcontracting involves the subcontractor delivering part of the service or some of the goods amounting to at least 30% of the tender contract value. Alternatively, subcontracting can be a broader concept, which refers to the main contractor engaging another contractor for any purpose in order for the main contractor to perform under the

main contract. The difference between these two understandings of subcontracting can be illustrated using the example of a tender contract involving a school feeding programme in terms of which the contractor will supply meals to children at identified schools at a set price per meal. The first, narrower, understanding of subcontracting would require the contractor to bring subcontractors on board to deliver meals to at least the value of 30% of the contract, *ie* the subcontractor(s) will deliver at least 30% of the meals. On the second, broader, understanding of subcontracting, the main contractor may subcontract packaging of the meals or delivery of the meals to subcontractors, as long as the relevant value of such services amounts to at least 30% of the tender. On a yet broader interpretation of subcontracting, the main contractor may itself procure the raw materials to produce the meals from a qualifying supplier, which can be viewed as the subcontractor, again, as long as such transactions are at least to the value of 30% of the tender contract. The 2017 regulations provide no clarity on which of these interpretations should be adopted.

It is noteworthy that in the procurement sector that is perhaps most familiar with subcontracting arrangements, namely construction procurement, a set of guidelines have had to be developed to give content to subcontracting requirements. The Construction Industry Development Board (CIDB) thus issued a best practice guideline on subcontracting arrangements ("CIDB best practice guideline D1 (1012), "Subcontracting arrangements") setting out acceptable and unacceptable forms of subcontracting. It has also explicitly set out arrangements for how to deal with subcontracting where the procuring entity wishes to prescribe subcontracting, in its "Standard for uniformity in construction procurement" (CIDB Board Notice 86 of 2010, *GG* 33239 (28-05-2010)). Annex I to the standard provides the mechanism for the selection of subcontractors and requires the parties to list the scope of the works to be subcontracted. The CIDB regime provides some indication of the additional regulations that may be required to make subcontracting work and that are currently absent under the 2017 regulations.

It is important to note that the 2017 regulations contemplate that the procuring entity will have some control over who the subcontractors are. Regulation 12(1) requires the winning bidder to obtain approval from the procuring organ of state before it may enter into a subcontracting arrangement. It is not clear on what basis the organ of state may withhold approval. Such approval would at least include a determination that the subcontracting arrangement is in line with the mandatory subcontracting condition in the contract. National Treasury's "Implementation guide" on the 2017 regulations, however, goes further than this and prescribes in paragraph 14.18 that the organ of state must draw a list of qualifying subcontractors from the central supplier database from which the winning bidder must select a subcontractor. It thus seems that the subcontractor must also be registered on the central supplier database, something that is ordinarily only required of the tenderer. This approach brings the 2017 regulations close to that in the CIDB standard's annex I, where the procuring entity and the main tenderer jointly appoint the subcontractors.

A final point of interest in relation to subcontracting terms is another statement in National Treasury's "Implementation guide", to the effect that tenderers are "discouraged from subcontracting with their subsidiary companies" (par 14.14). The operative word here is "discouraged", as it indicates that such practice would, at least in National Treasury's view, not fall foul of the subcontracting condition. In other words, a tenderer may comply with the mandatory subcontracting term in its contract when subcontracting with its own subsidiary, although this is "discouraged". Given that the subcontracting condition is not an award criterion,

a bidder could thus not be penalised during adjudication if it submits a bid that includes subcontracting arrangements with its subsidiary.

3 *The scope of the preferential procurement regime*

The 2017 regulations differ markedly from the 2011 regulations in their application provisions. The latter regulations had a much more extensive coverage provision compared to the act. The act, by virtue of its definition of "organ of state" in section 1, applies to all national and provincial government departments, all municipalities, all constitutional institutions defined in schedule 1 to the Public Finance Management Act and all legislatures. The act further provides that the minister of finance may extend the act's coverage to any other organ of state by notice in the government gazette.

The 2011 regulations had a more extended coverage than the act, given that they also applied to entities listed in schedules 2 and 3 to the Public Finance Management Act and all municipal entities. This was an all-encompassing extension of coverage, given that schedule 2 to the Public Finance Management Act includes all major public entities, essentially all major state-owned companies such as ESKOM, Transnet and SAA, and schedule 3 includes the vast majority of other organs of state at national and provincial levels.

The coverage provision of the 2017 regulations (reg 2), however, states that it applies only to organs of state as defined in the act. At first blush it would thus seem that the coverage of the preferential procurement regime was again significantly narrowed down following the introduction of the 2017 regulations.

This is, however, not the case. While the coverage provision of the 2011 regulations explicitly listed a wider number of entities compared to the act, the extension of the preferential procurement regime's coverage was in fact done under the act itself by virtue of a notice published by the minister simultaneously with, but separate from, the 2011 regulations and which added all entities listed in schedules 2 and 3 of the Public Finance Management Act to the coverage of the act (GN R501 in *GG* 34350 (08-06-2011)). The repeal of the 2011 regulations by the 2017 regulations accordingly did not affect the extension of coverage of the act by means of this separate notice and remains in place. It follows that the 2017 regulations continue to cover almost all public entities, importantly including state-owned companies.

A further extension of coverage of the act and regulations was effected by notice in the *Government Gazette* in 2017 (GN 571 in *GG* 40919 (15-06-2017)). This notice added to the preferential procurement regime's coverage national government components and provincial government components listed in schedule 3 to the Public Service Act 1994 as well as municipal entities as defined in the Local Government: Municipal Systems Act 32 of 2000.

The coverage of the current preferential procurement regime under the act and 2017 regulations is thus all-encompassing and there should be no public entities not subject to its provision. That is, all public entities in South Africa should be obliged to adhere to the prescripts of the act and regulations when procuring.

4 *Cancellation of tenders*

The cancellation of public tenders prior to award has been a matter of contention for some time under the previous sets of regulations. Despite the constitutional court's ruling on the conditions under which public tenders may be cancelled prior to award

in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* (2015 5 SA 245 (CC)), the supreme court of appeal has cast doubt on the legal position in the two judgments of *Tshwane City v Nambiti Technologies (Pty) Ltd* (2016 2 SA 494 (SCA)) and *SAAB Grintek Defence (Pty) Ltd v South African Police Service* (2016 3 All SA 669 (SCA)). The position has been somewhat clarified in the subsequent supreme court of appeal judgment in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC* (2017 JDR 0586 (SCA)), which confirmed that public tenders may be cancelled prior to award only if one of the conditions set out in the 2011 regulations is present and that a court may review the cancellation decision upon a judicial review application. It follows that a procuring entity does not have a free-floating power to cancel tenders outside of the relevant provisions of the regulations.

The 2017 regulations, in regulation 13(1)(*a*)-(*c*), retain the provisions on cancellation found in the 2011 regulations so that the judgments in the *Trencon Construction* case and the *Valozone* case continue to govern the position. However, the 2017 regulations add an important additional ground for cancelling a tender prior to award. Regulation 13(1)(*d*) allows a procuring entity to cancel the tender if there is a material irregularity in the tender process. This is an important addition, since it allows the organ of state to terminate the tender process without the need to approach a court for the review and setting aside of its tender process prior to award where it discovers material irregularities.

This further ground for cancellation also means that a decision-maker (either the bid adjudication committee or accounting authority, depending on the prevailing delegations) will have to knowingly satisfy itself that the tender process was regular before taking the award decision.

It would have been preferable for the 2017 regulations to bring statutory clarity to the uncertainty created by the conflicting higher court judgments noted above on the question of whether an organ of state may cancel for reasons other than those stated in the regulation. It could have simply achieved this by adding the word "only" between the words "invitation" and "if" in regulation 13(1) to read: "An organ of state may, before the award of a tender, cancel a tender invitation *only* if". However, the additional requirement in regulation 13(3), which had no equivalent in the 2011 regulations, that prior treasury approval must be obtained if an organ of state wishes to cancel a tender for the second time confirms that organs of state may cancel tenders prior to award only in terms of regulation 13 and do not have a free discretion, outside of the regulation, to cancel.

5 *Abuse of the preferential procurement regime*

The final meaningful change introduced by the 2017 regulations relates to the abuse of the preferential procurement regime. The two previous sets of regulations granted organs of state an extremely general mandate to sanction suppliers for failures to meet "any of the conditions of the contract" (reg 13(1)(*b*) of the 2011 regulations) or "any specified goals … in the performance of the contract" (reg 15(1) of the 2001 regulations). In contrast, the 2017 regulations significantly narrowed down the basis upon which suppliers may be sanctioned to only cases where the bidder has submitted false information in adjudication under the regulations or failed to disclose subcontracting arrangements (reg 14(1)). Additionally, for the first category of transgressions, that is where the bidder submitted false information with regard to the adjudication of the bids, the 2017 regulations add a materiality requirement before sanctions may be imposed. The regulations require that such false information

"will affect or has affected the evaluation of a tender" before the bidder may be sanctioned.

The 2017 regulations maintain the remedies that may be imposed by an organ of state found in the previous regulations, but add a sanction of a penalty of up to 10% of the value of the contract in cases where subcontracting was not disclosed (reg 14(1)(*c*)(ii)).

The 2017 regulations also introduce a new approach to debarment of suppliers. Whereas it was the procuring entity itself that took the debarment decision under the 2011 regulations (reg 13(2)(*d*)), such decisions are now taken by National Treasury (reg 14(3)). Under the 2017 regulations the procuring entity only recommends debarment to National Treasury, but the actual decision is taken by the latter. This is a significant change, since it means that challenges to debarment decisions will now have to be brought against the National Treasury in all instances and not against the procuring entity.

In stark contrast to the two previous sets of regulations, the 2017 regulations do not contain any provisions relating to tax compliance by bidders. This is a sensible change, since the previous regulations were in all likelihood unlawful in this respect given that the act itself does not provide any mandate to regulate tax matters under the preferential procurement regime.

6 *Conclusion*

The third set of regulations governing preferential public procurement in South Africa, which came into effect in 2017, represent the latest refinement of a public procurement system that is unequivocally committed to utilising public procurement for social policy purposes. The 2017 regulations are a further development of the system rather than any drastic change and continue along the same policy route as the previous sets of regulations. This is not surprising given that the broad framework set out in the act remains unaltered.

There are, however, important signals within the refinement introduced by this third wave of preferential regulations pointing to shifts in the policy approach. It is clear that the system is moving towards greater emphasis on the preferential dimension of public procurement and the social policy dimension is playing a larger role in the award of bids. Not only are the thresholds determining the weight to be attached to preferential award criteria drastically increased under the new regulations, but two completely new preferential mechanisms are introduced, namely set-asides and contract conditions. Both of these new mechanisms are significantly more categorical than the approach adopted in the first two waves of preferential regulations.

Particular aspects of the regulatory regime have been refined in response to lessons learned under the previous regimes, notably in respect of the requirement to submit proof of b-bbee status level, cancellation of tenders and abuse of the system. However, the new regulations raise a number of new questions, such as how the market-price requirement is to be implemented and what exactly subcontracting means. The 2017 regulations thus remain work in progress.

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[ISSN 0257 – 7747]