



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

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To all organs of state

Advisory note: Preferential Procurement Regulations, 2017 - Minister of Finance v Afribusiness NPC [2022] ZACC 4

1. I refer to my communication of 25 February 2022 informing organs of state that the Minister will, on an urgent basis, seek confirmation from the Constitutional Court that the invalidity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations), has been and continues to be suspended for a period of 12 months.
2. Please note that the communication of 25 February 2022 is an advisory note in response to the numerous requests for guidance regarding how to deal with the implications of the Constitutional Court judgment. Please further note that the advice referred to in that communication excludes procurement with a Rand value of less than R30 000 obtained through price quotations and petty cash.
3. According to section 217(2) of the Constitution, read with section 2 of the Preferential Procurement Policy Framework Act, 2000 (PPPFA), organs of state must determine a preferential procurement policy. This policy and procurement decisions must be made by an accounting officer/authority in line with the framework set out in section 2 of the PPPFA and other applicable legislation.
4. The PPPFA requires that the threshold amounts in which the 80/20 and 90/10 preference point systems must be utilised, together with the formula to be applied, must be prescribed by regulations, in terms of section 2(1)(b) and (c). Such regulations are necessary for organs of state to implement their preferential procurement policies.
5. National Treasury is preparing new draft regulations in terms of the Preferential Procurement Policy Framework Act, 2000 (Act), to be published for comment in the week of 7 March 2022. The draft regulations will provide for amounts and the formula that must be prescribed by regulation in terms of section 2(1)(b) and (c) of the Act and any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act.
6. Until the new regulations take effect or the Constitutional Court's clarity on the suspension of the invalidity of the 2017 Regulations is provided, whichever occurs first, an organ of state may, in terms of section 3(c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements. Such requests should be limited to

procurement requirements that cannot await the new regulations or the Constitutional Court's guidance.

7. The papers for seeking the Constitutional Court's clarity are being finalised and organs of state will be advised once these are filed, and of further developments.



DONDO MOGAJANE
DIRECTOR-GENERAL

Date: 3 March 2022