

TRANSNET TEMPORARILY EXEMPTED FROM PPPFA PROVISIONS

[Johannesburg, 22 March 2022] – It has come to Transnet’s attention that an internal document still to be discussed by Transnet’s Executive Committee has unfortunately found its way onto social media, creating unintended confusion.

For context, in terms of the Constitution of the Republic of South Africa, the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and its Regulations were enacted to give effect to the requirement to have national legislation that prescribes the framework for preferential procurement policies for all organs of state.

On 16 February 2022, in the case of *The Minister of Finance v Afribusines NPC*, the Constitutional Court confirmed the ruling of the Supreme Court of Appeal (SCA) that the 2017 Preferential Procurement Regulations (PPR 2017) issued by the Minister in terms of section 5 of the PPPFA were invalid. However, the SCA also ordered the effectiveness of its ruling to be suspended for 12 months from 2 November 2020. This was to allow the Minister time to introduce new regulations.

Regrettably, the Constitutional Court judgment is silent on the issue of the timing effect of the invalidity of the Regulations. This has created legal uncertainty in the public procurement environment and the Minister of Finance has since approached the Constitutional Court on an urgent basis to seek clarity on this aspect of the judgment.

It is important to note that the PPPFA itself remains valid as an Act of Parliament. It is only the Regulations that have been declared invalid. However, the continued implementation of the Act is dependent on valid Regulations being in place.

The PPPFA requires that the threshold amounts to which the 80/20 and 90/10 preference points systems applied together with the price formula must be prescribed by regulations. Such regulations are necessary for the organs of state to implement their preferential policy. Without the thresholds and formula lawfully determined by the Minister, it becomes impossible to implement the preference scoring as envisaged in the Act.

The Minister of Finance on 10 March 2022 published for public comment new draft regulations. As soon as the Regulations 2022 are promulgated, Transnet will ensure full compliance.

As an interim arrangement to ensure compliant business continuity at Transnet, National Treasury advised that organs of state could apply for an exemption from the PPPFA. Such requests should be limited to procurement requirements that cannot await the new regulations or the Constitutional Court clarification. Transnet requested and was granted an exemption from the application of the provisions of the PPPFA, effective 11 March 2022 until:

- New Preferential Procurement Regulations (PPR) take effect; or

- The Constitutional Court confirms the effective date of the judgment, whichever comes first.

Waiting for either of these decisions in order to proceed with procurement events at Transnet would have huge ramifications for the business, and its ability to service its customers.

Transnet is not able to use preference during this period of exemption including the 80/20 and 90/10 preference points system. Furthermore, Transnet is not able to issue tenders with preferential procurement prequalification criteria (e.g. minimum B-BBEE level, EMEs/QSE set-asides and minimum 30% sub-contracting requirements). This would not be in compliance with Section 217(3) of the Constitution.

This situation is anticipated to be short-term pending either the new regulations or clarification of the Constitutional Court judgment. Transnet would ideally have preferred to apply preference during this period, however it is left with no other options in order to meet immediate operational requirements and economic objectives.

Transnet remains fully committed to transformation and the full participation of historically disadvantaged individuals in the economy and the operations of Transnet and other State-Owned Companies (SOCs), as well as encouraging the localisation of production. This ruling and the absence of a new and better mechanism for ensuring the participation of black or transformed businesses is regrettable. As is common cause, Transnet and the South African economy cannot afford to stop all procurement whilst waiting for the new regulations or an alternative ruling by the Constitutional Court in order to avoid our procurement being interdicted. A better system for empowerment is needed going forward, as the current 80/20 and 90/10 preference point systems have in practice benefited very few black-owned companies. The B-BBEE Act could be better utilised to drive transformation, not just within SOCs, but the whole economy.

Transnet's view remains that least cost procurement militates against transformation and re-industrialisation, and the company will aggressively pursue all available mechanisms to effect transformation, empowerment and localisation as the legislative landscape shifts.

Issued on behalf of Transnet SOC Ltd

By: Ayanda Shezi, Spokesperson
Ayanda.Shezi@transnet.net

For media queries contact,

Khululwa.Magazi@transnet.net / MediaDesk@transnet.net
063 684 5293