IN THE CONSTITUTIONAL COURT

OF SOUTH AFRICA

CCT Case no: 62/22

In the variation application between:

MINISTER OF FINANCE	**Applicant**
and	
SAKELIGA NPC (PREVIOUSLY KNOWN AS AFRIBUSINESS NPC)	**First Respondent**
RULE OF LAW PROJECT	**Second Respondent**
ECONOMIC FREEDOM FIGHTERS	**Third Respondent**

In re the matter CCT 279/20 between:

THE MINISTER OF FINANCE	*Applicant*
and	
AFRIBUSINESS NPC	*Respondent*
and	
RULE OF LAW PROJECT	*First Amicus Curiae*
ECONOMIC FREEDOM FIGHTERS	*Second Amicus Curiae*
and	
FIDELITY SERVICES GROUP (PTY) LTD	*First Intervening Party*
THE SOUTH AFRICAN NATIONAL SECURITY EMPLOYERS ASSOCIATION	*Second Intervening Party*

FILING NOTICE

DOCUMENTS TO BE FILED:

- **FIRST RESPONDENT'S ANSWERING AFFIDAVIT**

SIGNED at PRETORIA on 16 MARCH 2022.

KRIEK WASSENAAR & VENTER INC
ATTORNEYS FOR THE FIRST RESPONENT
Ref: P Wassenaar/es/QB0946
Tel: 012 756 7566 / Fax: 086 596 8516
E-mail: peter@kriekprok.co.za /
rohann@kriekprok.co.za
C/O: NEL DU TOIT INCORPORATED
14 TOKTOKKIE AVENUE
WELTEVREDENPARK
ROODEPOORT
Tel: 065 828 1891
E-mail: lewellannel@ndtinc.co.za

TO: **THE REGISTRAR**
THE CONSTITUTIONAL COURT OF SOUTH AFRICA
via email: generaloffice@concourt.org.za

AND TO: **THE STATE ATTORNEY**
ATTORNEYS FOR THE APPLICANT
SALU BUILDING
255 THABO SEHUME STREET
CNR FRANCIS BAARD STREET
PRIVATE BAG X91, PRETORIA 0001
DOCEX: 298, PTA

Tel: (012 309 1575
Fax: (012) 309 1649
E-mail: ZZenani@justice.gov.za
Zingisa.Zenani@treasury.gov.za
C/O STATE ATTORNEY – JOHANNESBURG
10TH FLOOR ALBERTINA SISULA STR, CNR KRUIS STREET
Ref: V.DUHLAM
Tel: 011 330 7600
E-mail: VDuhlam@justice.gov.za

AND TO: **IAN LEVITT ATTORNEYS**
ATTORNEYS FOR THE THIRD RESPONDENT
The Leonardo
Office Level 12
75 Maude Street
Sandton
Tel: 011 784 3310
E-Mail: angelike@ianlevitt.co.za

IN THE CONSTITUTIONAL COURT

OF THE REPUBLIC OF SOUTH AFRICA

CCT Case No: 62/2022

In the variation application between:

MINISTER OF FINANCE	**Applicant**
and	
SAKELIGA NPC (PREVIOUSLY KNOWN AS AFRIBUSINESS NPC)	**First Respondent**
RULE OF LAW PROJECT	**Second Respondent**
ECONOMIC FREEDOM FIGHTERS	**Third Respondent**

In re the matter CCT 279/20 between:

THE MINISTER OF FINANCE	*Applicant*
and	
AFRIBUSINESS NPC	*Respondent*
and	
RULE OF LAW PROJECT	*First Amicus Curiae*
ECONOMIC FREEDOM FIGHTERS	*Second Amicus Curiae*
and	
FIDELITY SERVICES GROUP (PTY) LTD	*First Intervening Party*
THE SOUTH AFRICAN NATIONAL SECURITY EMPLOYERS ASSOCIATION	*Second Intervening Party*

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

Contents

Introduction 3
First Respondent's opposition to the relief sought 4
The orders 6
Urgency 7
Uniform rule 42(1)(c) and the Declaratory Orders 9
The jurisdictional facts for the variation of the CC order are not present 11
Conclusion: 13

I, the undersigned,

PIETER JACOBUS LE ROUX

hereby state under oath as follows:

1 I am an adult male and the duly authorised chief executive officer of the First Respondent, Sakeliga NPC, previously known as Afribusiness NPC, a non-profit company with its business address at Building A, 5th Floor, Loftus Park, 402 Kirkness Street, Arcadia, Pretoria, Gauteng. The First Respondent is duly incorporated in terms of the company laws of South Africa, with registration number 2005/042861/08.

2 The facts and allegations contained herein fall within my personal knowledge, unless the contrary appears from the context, and is true and correct.

3 Insofar as I refer to legal submissions and arguments, I am advised by the First Respondent's legal representatives, which advice I accept as correct.

Introduction

4 In this answering affidavit, the First Respondent refers to the Supreme Court of Appeal as " the SCA", the Constitutional Court as "the CC" or the "Court", and to the Applicant's founding affidavit as "the FA". Reference to "rules" will refer to the Constitutional Court Rules, and to the Superior Court Rules as "the Uniform rules", (unless specifically stated otherwise).

5 The First Respondent in the current application was the Applicant in the initial application under case number 34523/2017, in the Gauteng Division of the High Court, Pretoria,("the court a quo") thereafter the Appellant in the SCA and still thereafter the Respondent in the CC. The Applicant in turn was the Respondent in the court a quo and the SCA, and now the Appellant in the CC.

6 The First Respondent it is therefore an "affected party" in the current application lodged by the Applicant in terms of Uniform rule 42(1)(b) read with rule 29.

First Respondent's opposition to the relief sought

7 The First Respondent submits that Applicant's application is unnecessary, ill-conceived, and serves no purpose but to waste the CC valuable time and resources.

8 In an attempt to bring the aforesaid under the Applicant's attention and prevent the First Respondent from entering the fray, the First Respondent on 14 March 2022 addressed a letter to the Applicant requesting it to withdraw their application, which is annexed hereto marked **Annexure "A"**.

9 However, the Applicant refused to do so, as indicated in an email of 15 March 2022, which I attach hereto marked **Annexure "B"**. The First Respondent, as a party affected by the application and acting in the public interest, is required to oppose the application in order to ensure that the issues are properly ventilated before this CC.

10 The primary basis of the opposition, as it also appears from Annexure "A" is very simple:

10.1 The matter is not urgent, and urgency is self-created;

10.2 Although it is conceded that direct access to the CC may be required in respect of a Uniform Rule 42 application, that principle does not apply to the declaratory orders sought in paragraphs 3.1 and 3.2 of the Applicant's Notice of Motion, which deals with the calculation of periods of suspension and processes to be conducted by organs of state *ex post facto* the order. The Minister has not shown that irreparable harm will follow if direct access on the issue is not granted.

10.3 Insofar as the application is brought in terms of Uniform Rule 42, the jurisdictional facts of Uniform Rule 42 are not present, as there are no ambiguities, errors or omissions in the CC's order.

10.4 Whatever the period for suspension of the declaration of invalidity of the Preferential Procurement Regulations 2017 is, the Applicant has sufficient time to correct the regulations before the period of 12 months contemplated in the order will lapse, and in fact already started with such process. The whole issue will become moot, if not already at the time of hearing this application.

10.5 The Applicants application is unfounded and unnecessary, wasting valuable time and resources. It is a proverbial storm in a teacup and should be dismissed with costs.

10.6 Should the CC, despite the arguments set out above, decide to vary its own order, the First Respondent will argue that the order of the suspension of the invalidity of the Preferential Procurement Regulations 2017 be varied, by the deletion thereof, as the consequence would otherwise be that the *ultra vires* regulations are allowed to stand for a period of 12 months, contrary to the principles of legality and the rule of law.

The orders

11 The relevant portion of the SCA order reads as follows:

"The order of the court a quo is set aside and is replaced with the following order:

(a) The application succeeds with costs;

(b) It is declared that the Preferential Procurement Regulations, 2017, are inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and are invalid;

(c) *The declaration of invalidity referred to in para (b) above is suspended for a period of 12 months from the date of this order."*

12 The relevant portion of the CC's majority judgement reads as follows:

"4. The appeal is dismissed with costs, including the costs of two counsel."

13 The Applicant's application has primarily been brought because various conflicting interpretations were placed by the Applicant on the court orders following the CC judgment on 16 February 2022.

Urgency

14 The Applicant caused uncertainty amongst organs of state when the Applicant addressed a circular/letter dated 25 February 2022, annexed to the Applicant's application as Annexure DM 4, directing organs of state as follows:

14.1 That all tenders advertised before 16 February 2020 be finalised in terms of the Preferential Procurement Regulations 2017 (which were declared invalid);

14.2 That all tenders advertised after 16 February 2020 be held in abeyance; and

14.3 That no further tenders to be advertised.

15 Thereafter the Applicant addressed a further circular/letter to the organs of state, qualifying its earlier circular/letter as being "an advisory note", which circular/letter is annexed to the Applicant's application as Annexure "DM5".

16 The Applicant's contradicting circulars/letters is the cause of confusion amongst organs of state.

17 Instead of advising organs of state on what the Applicant holds to be a correct interpretation of the judgment and order of the CC, the Applicant elected to provide advice that no further tenders should be processed after 16 February 2022, which gave rise to confusion and furthermore resulting in the interruption of service delivery by organs of state.

18 At best the Applicant's urgency as pleaded is subjective or assumed urgency.

19 Furthermore, the CC judgement was delivered on 16 February 2022, and the Applicant already acted with knowledge of the order on 25 February 2022. However, the application was only issued on 4 March 2022, after the Applicant created its own urgency.

Uniform rule 42(1)(c) and the Declaratory Orders

20 The Applicant seeks to vary the CC order. The CC order is clear and there is no ambiguity, patent error or omission. It is capable of interpretation in terms of the ordinary rules of interpretation.

21 Although the Applicant does not seek the variation of the SCA's order in the current application, there's also no ambiguity or patent error or omission in regard to same.

22 It instead appears that the Applicant wants the vary the CC order in order to deal with fresh issues, being:

22.1 a declaratory order regarding the calculation of the periods of suspension, which should apply according to the Applicant to the suspension of the invalidity of the Preferential Procurement Regulations 2017;

22.2 a declaratory order that the tender processes conducted by organs of state under the Preferential Procurement Regulations 2017 (*ex post facto* the CC order) are not affected until the expiration of the suspended period.

23 These are all issues that were not before the CC (or even the SCA) during the hearing of the case and were not considered in the CC's

judgment and order of 16 February 2022. These are new issues that have *ex post facto* presented themselves because of the Applicant's conflicting interpretations of the judgment and order, and not because of any ambiguity or mistake on the part of the CC.

24 It is trite that a court is not there to give legal advice or opinions, and that declaratory orders could not be sought if there is not a genuine factual dispute between the parties relating to an issue.

25 For the same reasons advanced above, the Applicant is not entitled to the further declaratory relief sought, as set out in paragraphs 4, 5 and 6 of its Notice of Motion, relating to the import of the CC's judgement and/or seeking new declaratory orders that the declaration of invalidity shall operate prospectively from the date of the CC's judgement.

26 It appears that the highwater mark of the Applicant's case is its own perceived confusion regarding footnote 28 in the minority judgement of Mhlantla J. This footnote is of no moment, as it forms part of the minority judgment and can be regarded as an *obiter* remark that does not have the status of any judgment pronounced on that issue. It does not affect the interpretation of the majority judgement, which is binding on the parties.

The jurisdictional facts for the variation of the CC order are not present

27 There is simply no ambiguity, patent error or omission in the CC order, and even if there was such, the relief claimed is not to the extent of such ambiguity, error, or omission.

28 The Applicant has sufficient time to correct the Preferential Procurement Regulations 2017, and the whole issue is academic and/or will become moot.

29 On 10 March 2022, the Applicant already published new regulations in terms of section 5(2) of the Preferential Procurement Policy Act 5 of 2000. A copy of the draft regulations is attached as **Annexure "C".** From the wording of the notice one can glean:

29.1 That the public has until 11 April 2022 to submit comments on the draft regulations; and

29.2 That the regulations on their adoption will repeal all previous regulations, i.e. the Preferential Procurement Regulations 2017.

30 The Minister has effectively brought an urgent application for an interpretation order under circumstances where new regulations can

and have been drafted. The Minister clearly has already implemented the Court's judgment on an administrative level, and this application to vary the Court's order is an exercise in futility. Why should the parties and Court deal with an issue that the Minster can clearly resolve itself and which the Minister is already in the process of attending to?

Reconsideration of the CC order of suspension of the invalidity:

31 Should the CC despite the First Respondent's arguments to the contrary, decide to vary its own order, the First Respondent will argue that the order of the suspension of the invalidity of the Preferential Procurement Regulations 2017 be varied, by the deletion thereof, as the consequence would otherwise be that the *ultra vires* regulations are allowed to stand for a period of 12 months, contrary to the principles of legality and the rule of law.

32 The First Respondent proposes that in the interim period pending the pronouncement of the new regulations, organs of state should be governed in line with the draft regulations attached as Annexure "B".

Conclusion:

33 In the view of the aforesaid and the legal submissions that the First Respondent will submit, I am advised that it is not necessary to deal *ad seriatim* with the content of the Applicant's FA. Insofar as such content conflicts with the facts and legal submissions advanced by the First Respondent in this affidavit and oral submissions before the CC, it should be regarded as disputed.

34 The First Respondent seeks that Applicant's application be dismissed with costs. In as far as the Court might decide to vary the order, the First Respondent submits that costs should also be awarded to the First Respondent, seeing that the matter will be a continuance of the debatement of the original order to which the First Respondent was a party and had been awarded costs.

35 In respect of costs it must be considered that the First Respondent is acting in the public interest by placing the aforesaid facts and arguments before the CC.

PIETER JACOBUS LE ROUX

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED:

(a) he knows and understands the contents of this affidavit;

(b) he has no objection to taking an oath;

(c) he considers the oath to be binding on his conscience.

THUS signed and sworn before me, at **PRETORIA** on this the **16th** day **MARCH 2022**, the Regulations contained in Government Notice No. R1648 of 19 August 1977 (as amended) having been fully complied with.

_____

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

DESIGNATION:

AREA / OFFICE:

JOHANNES JACOBUS VAN DER MERWE
Commissioner of Oaths
HB Forum
13 Stamvrug Street
Val De Grace
Ex Officio Practising Attorney
Republic of South Africa

KRIEK WASSENAAR & VENTER ING
PROKUREURS - ATTORNEYS

A

Our Ref: PJ Wassenaar/es/QB0946
Your ref: 3793/17/Z32

14 March 2022

THE STATE ATTORNEY
SALU BUILDING
316 THABO SEHUME STREET
PRETORIA CENTRAL
PRETORIA

URGENT

By e-mail: Zingisa.Zenani@treasury.gov.za
ZZenani@justice.gov.za
VDuhlam@justice.gov.za

Sir/Madam

SAKELIGA NPC (PREVIOUSLY KNOWN AS AFRIBUSINESS NPC) / THE MINISTER OF FINANCE & OTHERS // URGENT APPLICATION CCT 62/2022

1. We refer to the above urgent application brought by your client, the Minister of Finance.

2. Our client has consulted with counsel. It is our client's position that your client's urgent application should be withdrawn to avoid wasting the Constitutional Court's limited time and to also prevent the wastage of unnecessary costs. The application should be withdrawn for the following reasons:

   2.1 The matter is not urgent, and urgency was self-created by your client;

   2.2 Although it is conceded that direct access to the Constitutional Court may be required in respect of a rule 42 application under certain circumstances, that principle does not apply to the declaratory orders sought in paragraphs 3.1 and 3.2 of the notice of motion, which deals with the periods of suspension and processes conducted by organs of state *ex post facto* the order;

2.3 Insofar the application is brought in terms of rule 42, the jurisdictional facts of rule 42 are not present, as there are no ambiguities, errors or omissions in the Constitutional Court order which requires variation;

2.4 Furthermore, with reference to rule 42, such an application can only be brought if there is notice to all the parties that 'may be affected' by the variation of the order. Our client and the other respondents are not the only parties directly affected by this order;

2.5 Your client has already published draft amended regulations that intend to replace the 2017 regulations. Your client's application will most likely become moot, if not already, by the time of the hearing of the application;

2.6 The application is furthermore unfounded and unnecessary, wasting valuable time and resources – especially seeing that the Minister has already indicated that he will be issuing new regulations.

3. In order to avoid unnecessary litigation, our client requests that your client consider withdrawing their urgent application. However, if your client fails to do so by 14h00 on 15 March 2022, our client will have no choice but to continue our opposition of the matter in the public interest and to file an answering affidavit by 16 March 2022.

4. We await your urgent response.

Yours faithfully,

KRIEK WASSENAAR & VENTER ING
PÉTER WASSENAAR – DIREKTEUR / DIRECTOR
(f) 086 596 8516
(e) peter@kriekprok.co.za

Elektronies geteken
Electronically signed

B

Elbie Swanepoel

From: Zenani Zingisa <ZZenani@justice.gov.za>
Sent: 15 March 2022 17:56
To: Elbie Swanepoel; Zingisa Zenani; Dhulam Vijay
Subject: Re: SAKELIGA NPC (PREVIOUSLY KNOWN AS AFRIBUSINESS NPC) / THE MINISTER OF FINANCE & OTHERS

Sensitivity: Private

Dear Sirs,

We refer to your letter dated 14 March 2022.

Be advised that our client has no intentions of withdrawal its application.

Regards

Sent from my Huawei Mobile

-------- Original Message --------
Subject: SAKELIGA NPC (PREVIOUSLY KNOWN AS AFRIBUSINESS NPC) / THE MINISTER OF FINANCE & OTHERS
From: Elbie Swanepoel
To: Zingisa Zenani ,Zenani Zingisa ,Dhulam Vijay
CC:

Good day,

We refer to the above and attach hereto a letter for your attention.

Regards,

ELBIE SWANEPOEL

Kriek Wassenaar & Venter Inc

Regsekretaresse / Legal Secretary

• *(t) (+27) 12 803 4719* • *(f) (+27) 86 596 8516*
• (a) 3de Vloer / 3rd Floor, HB Forum Gebou / Buidling, Stamvrugstraat 13 Stamvrug Street, Val de Grace, Pretoria, 0184
• *(p) Postnet Suite # A7, Privaatsak / Private Bag X592, Silverton, 0127* • *BTW Reg: 4020260685* • *Reg: 2012/030418/21*

Disclaimer

Privileged/Confidential information may be contained in this message. If you are not the addressee indicated in this message (or responsible for delivery of the message to such person) you may not copy or deliver this message to anyone. In such case, you should destroy this message and kindly notify the sender by reply E-Mail. Please advise immediately if you or your employer do not consent to e-mail messages of this kind. Opinions, conclusions and other information in this message that do not relate to the official business of the Department of Justice and Constitutional Development shall be understood as neither given nor endorsed by it. All views expressed herein are the views of the author and do not reflect the views of the Department of Justice unless specifically stated otherwise.

NATIONAL TREASURY

NO. R. 1851

10 March 2022

PUBLICATION OF DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2022 FOR PUBLIC COMMENT

In accordance with section 5(2) of the Preferential Procurement Policy Framework Act, 2000 (the Act), the draft Preferential Procurement Regulations, 2022 (the draft Regulations), in the Schedule are published for public comment. These Regulations are intended to be made by the Minister of Finance in terms of section 5(1), read with section 2(1)(b) and (c) and the definition of "prescribed" in section 1, of the Act.

The draft Regulations propose to prescribe—

- the threshold amounts in which the 80/20 and 90/10 preference point systems must be used, together with the formula to be applied; and
- other matters necessary or expedient in order to achieve the objects of the Act.

Written comments on the draft Regulations submitted by **11 April 2022** to CommentDraftLegislation@treasury.gov.za will be considered. By making a submission, the commentor agrees that the name of the commentator and the submission may be made public by the National Treasury and the submission will be disclosed if requested in terms of the Promotion of Access to Information Act, 2000.

SCHEDULE

PREFERENTIAL PROCUREMENT REGULATIONS, 2022

Contents

1. Definitions
2. Application
3. Identification of preference point system
4. 80/20 preference point system for acquisition of goods or services with Rand value equal to or above R30 000 and up to R50 million
5. 90/10 preference point system for acquisition of goods or services with Rand value above R50 million
6. 80/20 preference points system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R30 000 and up to Rand value of R50 million
7. 90/10 preference point system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R50 million
8. Criteria for breaking deadlock in scoring
9. Award of contracts to tenderers not scoring highest points
10. Remedies
11. Repeal of regulations
12. Short title and commencement

Definitions

1. In these Regulations, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in the Act must bear the meaning so assigned—
"National Treasury" has the meaning assigned to it in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);
"price" includes all applicable taxes less all unconditional discounts;
"Rand value" means the total estimated value of a contract in Rand, calculated at the time of the tender invitation; and
"the Act" means the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000).

Application

2. These Regulations apply to organs of state as defined in section 1[1] of the Act.

Identification of preference point system

3.(1) An organ of state must, in the tender documents, stipulate—
(a) the preference point system applicable to the tender as envisaged in regulations 4, 5, 6 or 7; and
(b) any specific goal as envisaged in section 2(1)(d) and (e) of the Act.
(2) If it is unclear whether the 80/20 or 90/10 preference point system applies—
(a) in the case of a tender to generate income or to dispose of or lease assets, the highest acceptable tender; or
(b) in the case of any other tender, the lowest acceptable tender,
must be used to determine the applicable preference point system.

80/20 preference point system for acquisition of goods or services with Rand value equal to or above R30 000 and up to R50 million

4.(1) The following formula must be used to calculate the points out of 80 for price in respect of a tender with a Rand value equal to or above R30 000 and up to a Rand value of R50 million, inclusive of all applicable taxes:

$$Ps = 80\left(1 - \frac{Pt - P\min}{P\min}\right)$$

[1] Paragraph (f) of the definition of organ of state in section 1 of the Act includes any other institution or category of institutions included in the definition of "organ of state" in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which the Act applies. Government Notices—
(a) R. 501 of 8 June 2011 recognises, with effect from 7 December 2011, all public entities listed in Schedules 2 and 3 to the Public Finance Management Act, 1999; and
(b) R. 571 of 15 June 2017 recognises, with effect from 17 June 2017, national and provincial government components listed in Schedule 3 to the Public Service Act, 1994 and municipal entity as defined in section 1 of the Local Government: Municipal Systems Act, 2000, as institutions to which the Act applies.
Note should be taken of notices issued from time to time in terms of paragraph (f) of this definition. The application of these Regulations is also subject to applicable exemptions approved in terms of section 3 of the Act.

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmin = Price of lowest acceptable tender.

(2) A maximum of 20 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest two decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

90/10 preference point system for acquisition of goods or services with Rand value above R50 million

5.(1) The following formula must be used to calculate the points out 90 for price in respect of a tender with a Rand value above R50 million, inclusive of all applicable taxes:

$$Ps = 90\left(1 - \frac{Pt - Pmin}{Pmin}\right)$$

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmin = Price of lowest acceptable tender.

(2) A maximum of 10 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

80/20 preference points system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R30 000 and up to Rand value of R50 million

6.(1) The following formula must be used to calculate the points for price in respect of a tender to generate income or to dispose of or lease assets, with a Rand value equal to, or above R 30 000 and up to a Rand value of R50 million, inclusive of all applicable taxes:

$$Ps = 80\left(1 + \frac{Pt - Pmax}{Pmax}\right)$$

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmax = Price of highest acceptable tender.

(2) A maximum of 20 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

90/10 preference point system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R50 million

7.(1) The following formula must be used to calculate the points for price in respect of a tender to generate income or to dispose of or lease assets, with a Rand value above R50 million, inclusive of all applicable taxes:

$$Ps = 90\left(1 + \frac{Pt - Pmax}{Pmax}\right)$$

Where-

Ps = Points scored for price of tender under consideration;

Pt = Price of tender under consideration; and

Pmax = Price of highest acceptable tender.

(2) A maximum of 10 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.

(3) The points scored must be rounded off to the nearest 2 decimal places.

(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.

Criteria for breaking deadlock in scoring

8.(1) If two or more tenderers score an equal total number of points, the contract must be awarded to the tenderer that scored the highest points for specific goals.

(2) If two or more tenderers score equal total points in all respects, the award must be decided by the drawing of lots.

Award of contracts to tenderers not scoring highest points

9. A contract may be awarded to a tenderer that did not score the highest points only in accordance with section 2(1)(f) of the Act.

Remedies

10.(1) Upon detecting that a tenderer submitted false information regarding specific goals or any other matter required in terms of these Regulations which will affect or has affected the evaluation of a tender, the organ of state must—

(a) inform the tenderer accordingly; and

(b) give the tenderer an opportunity to make representations within 14 days as to why—

(i) the tender submitted may not be disqualified or, if the tender has already been awarded to the tenderer, the contract should not be terminated in whole or in part; and

(ii) the organ of state should not restrict the tenderer from conducting any business for a period not exceeding 10 years with any organ of state.

(2) After considering the representations referred to in subregulation (1)(b), the organ of state may—

(a) if it concludes that such false information was submitted by the tenderer—

(i) disqualify the tenderer or terminate the contract in whole or in part; and

(ii) if applicable, claim damages from the tenderer;

(b) if it concludes that the tenderer must be restricted, restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years.

(3) An organ of state must, within five working days—

(a) inform the National Treasury, in writing, of any action taken in terms of subregulation (2); and

(b) if it decides to restrict a tenderer, request the National Treasury to publish the name of the tenderer in its list of restricted suppliers.

(4) The National Treasury must, within three working days after receiving a request in terms of subregulation (3)(b), publish the name of the tenderer in its list of restricted suppliers.

Repeal of regulations

11. Any regulations made under section 5 of the Act are repealed.

Short title and commencement

12. These Regulations are called the Preferential Procurement Regulations, 2022 and take effect on the date of promulgation of these Regulations.