

Pre-qualification criteria in terms of the Broad Based Black Economic Empowerment Act No. 53 of 2003

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In brief

In the recent case of *Imperial Group Limited v Airports Company South Africa SOC Limited and others [2018] 3 All SA 751 (GJ)*, the High Court ruled that organs of state active in areas regulated by the B-BBEE Codes do not have the power to impose pre-qualification criteria in respect of tenders unless empowered to do so by the B-BBEE Codes.

In detail

Legislative framework in relation to pre-qualification criteria

Section 217 (2) of the Constitution of South Africa makes provision for organs of state to implement procurement policies that prefer categories of persons disadvantaged by unfair discrimination. This constitutional provision has been implemented in national law through the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) (“the PPPF Act”) and the regulations promulgated thereunder (“the PPPF Regulations”), as well as the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) (“the B-BBEE Act”) and the regulations promulgated thereunder (the B-BBEE Codes”).

The effect of this legislation has been to restrict competition for tenders in certain areas to selected categories of persons, thereby excluding many large, well-established businesses unless they subcontract to these selected categories of persons.

The revised PPPF Regulations, which came into effect in 2017, introduced the concept of pre-qualification criteria, which seeks to advance the promotion of tenders that comply with one or more specific requirements, including that a tenderer must have (i) a minimum B-BBEE level; and/or (ii) be an exempted micro enterprise or a qualifying small enterprise; and/or (iii) be a tenderer subcontracting a minimum of 30 per cent to designated

groups. If a tenderer fails to meet one or more of the pre-qualification criteria, it will be considered an unacceptable tender. The PPPF Regulations now permit a procurement authority to set aside contracts for tenderers that meet one or more of the prescribed pre-qualification criteria.

The PPPF Regulations may be subject to legal challenge at some stage, on the basis that it is arguable that, in respect of pre-qualification criteria, they go beyond what is permitted in terms of the PPPF and the Constitution regarding preferential treatment in relation to tenders.

Section 9 (1) of the B-BBEE Act grants the Minister of Trade and Industry the power

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to issue B-BBEE Codes that may include pre-qualification criteria for preferential purposes for procurement and other economic activities. Section 10(1) of that Act mandates organs of state to apply any relevant B-BBEE Code *inter alia* in the determination of pre-qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law. In certain instances, section 10(2)(a) of the B-BBEE Act empowers the Minister, after consultation with an organ of state or public entity, to grant an exemption or permit a deviation from section 10(1) if there are objectively verifiable facts or circumstances justifying such an exemption or deviation.

If any conflict arises between any B-BBEE Code and the PPPF Act in relation to the application of pre-qualification criteria, the relevant B-BBEE Code applies.

Case: Imperial Group Limited v Airports Company South Africa SOC Limited and Others 3 All SA 751 (GJ)

Imperial Group Limited (“Imperial”) operates a car-rental business from, amongst other places, airports controlled by the Airports Company of South Africa (“ACSA”). In September 2017, ACSA issued a request for bids (“RFB”) in respect of car-rental opportunities at its airports.

Imperial challenged ACSA's decision to publish the RFB and the actual RFB itself, on the ground, among others, that the pre-qualification criteria imposed by ACSA contravened the B-BBEE Act and the Tourism Sector Code (“Tourism Code”).

The RFB set prescribed pre-qualification criteria in respect of B-BBEE. Tenderers were required to meet minimum ownership, enterprise, supplier development and management control requirements. If a tenderer failed to meet any of those requirements, its tender would be disqualified and as a result it would be excluded from the first stage of the evaluation process.

The Court held that, for the lawful inclusion of pre-qualification criteria in the RFB, the relevant legislation had to expressly (and not impliedly) provide for this. The B-BBEE Act expressly empowers the Minister to, *inter alia*, include pre-qualification criteria for preferential purposes and for procurement in the B-BBEE Codes. If so included, the criteria must be taken into account and applied by organs of state. No pre-qualification criteria were included by the Minister in the Tourism Code.

The Court therefore concluded that ACSA had acted unlawfully by including pre-qualification criteria in the RFB when the Tourism Code did not. The pre-qualification criteria are an

integral part of the RFB and rendered the decision to publish the RFB (including such criteria) and the RFB itself unlawful and liable to be reviewed and set aside in terms of the principle of legality, alternatively on the basis of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

The takeaway

The Minister is empowered by the B-BBEE Act to issue B-BBEE Codes that may include, *inter alia*, pre-qualification criteria for procurement and other economic activities and any other matter necessary to achieve the objectives of the B-BBEE Act. If a B-BBEE Code is promulgated without including pre-qualification criteria, organs of state may not impose pre-qualification criteria on tenders subject to that B-BBEE Code.

Organs of state, in the exercise of public power, must have a lawful basis to exercise such power. If pre-qualification criteria are to be imposed by organs of state in relation to tenders, this must be pursuant to and in accordance with an express power or authorisation under the applicable law to do so.

It must be noted that the decision of the Court in the ACSA case may yet be taken on appeal.

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